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143	Ajudhia Puri v. Brij Bhukhan	...	1 U P L R H. C.) 64; 17 A L J 922.
144	Kali Prasonno Maity v. Secretary of State for India		23 C W N 383.
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153	Sheoraj Singh v. Naik Sahai	...	17 A L J 391; 41 A 423.
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155	Polita Pavana Panda v. Narasinga Panda	...	36 M L J 538; 42 M 632.
158	Chiranji Lal v. Naraini	...	17 A L J 394; 41 A 395.
160	Krista Das Law v. Kumar Khirada Kanta Roy	...	*Calcutta High Court.
161	Ghulam Jilani v. Emperor	...	17 A L J 432; 20 Cr L J 401.
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163	Parmeshwari Das v. Jagan Nath	...	20 Cr L J 403; 17 A L J 867; 1 U P L R (H. C.) 98.
164	Palani Goundan, *In re*	...	20 Cr L J 404, 37 M L J 17, (1919) M W N 340 42 M 547; 10 L W 45; 26 M L T 68.
170	Brahma Nath v. Sundar Nath	...	17 A L J 434; 20 Cr L J 410.
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176	Rathinam Pillai, *In re*	...	20 Cr L J 416.
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184	Parbhu Dayal v. Anandi Din	...	17 A L J 832; 1 U P L R (H. C.) 99.
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195	Emperor v Munshi Ram	...	9 P R 1919 Cr; 20 Cr L J 419.
197	Mohammad Husain v. Emperor	...	20 Cr L J 421; 17 A L J 820.
198	Asan Alliar v. Masilamani Nadar	...	36 M L J 252; 20 Cr L J 422; 42 M 446; (1919) M W N 452; 25 M L T 274.
201	Har Narain v. Emperor	...	17 A L J 686; 20 Cr L J 425.
202	Narayan Shaligram v. Emperor	...	20 Cr L J 426.
205	Ram Lal v. Emperor	...	17 A L J 386; 20 Cr L J 429; 41 A 390.
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209	Shirinbai v. Ratanbai and Navajbai	...	21 Bom L R 384.
215	Chandi Charan v. Haribola Das	...	29 C L J 366; 23 C W N 645.
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223	Sabduralli v. Sadashiv Supde	...	21 Bom L R 369; 43 B 575.
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233	Enday Ali v. Benodini Dutt	...	29 C L J 362.
235	Lehna Mal v. Hakim Bibi	...	25 P R 1919 **F. B.**
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250	Panna Lal-Lachhman Das v. Hargopal-Khubi Ram	...	29 P R 1919.
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253	Alagappa Chettiar v. Lakshmanan Chettiar	...	24 M L T 267.
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262	Godhra Municipality v. Harilal Lallubhai	...	21 Bom L R 255; 20 Cr L J 438.
263	Amrit Sonar v. Emperor	...	(1919) Pat 220; 20 Cr L J 439; 4 P L J 525.
268	Thakur Singh v. Emperor	...	20 Cr L J 444.
269	Shankar v. Bhayaji	...	20 Cr L J 415.
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273	Kartar Singh v. Indar Singh	...	31 P R 1919.
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279	Pohlo Ram v. Hukam Singh	...	32 P R 1919.
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285	Kripa Sindhu Mukherjee v. Surendra Nath Banerjee	...	30 C L J 4.
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293	Morarji Gokuldas & Co. v. Asian Commercial Assurance Co., Ltd.	...	21 Bom L R 397.
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298	Khuda Yar v. Ahmad	...	33 P R 1919.
300	Arunachalam Chettiar v. Narayanan Chettiar	...	36 M L J 301; (1919) M W N 188; 9 L W 438; 42 M 470.
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309	Narsinggirji Manufacturing Co. v. Great Indian Peninsular Railway	...	21 Bom L R 406.
316	Ramendra Nath v. Hikait Kuer	...	*Patna High Court.
318	Gopisetti Narayanaswami v. Chodavarapu Kamanna	...	*Madras High Court.
320	Mukhi Singh v. Kishun Singh	...	*Patna High Court.
322	Pearey Lal v. Muir Mills Company Ltd., Cawnpore	...	17 A L J 783; 1 U P L R (H. C.) 75.
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326	Govindan Nair v. Kunjan Nayar	...	36 M L J 565; (1919) M W N 302; 26 M L T 189.
328	Sundari Choudhurain v. Behari Lal	...	(1919) Pat 279.
331	Bhargava & Co. v. Firm Jagan Nath-Bhagwan Dass	...	17 A L J 718; 1 U P L R (H. C.) 120.
333	Parameshwar Daw v. Ananth Bandhu Daw	...	*Calcutta High Court.
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337	Sakhawat Ali v. Emperor	...	17 A L J 321; 20 Cr L J 449; 41 A 302.
340	Ram Charitar v. Emperor	...	20 Cr L J 452.
341	Mahammed Sarwar v. Secretary Camp Municipality, Amraoti	...	20 Cr L J 453; 15 N L R 105.
343	Varadarajulu Naidu v. Emperor	...	20 Cr L J 455; 37 M L J 80.
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352	Trilochan Das v Jogeshwar Das ...	20 Cr L J 464.
353	Khimji Bhimsi v. Chunilal Ambaidas ...	21 Bom L R 419.
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356	Gober Sheikh v. Alipuddin Sheikh ...	30 C L J 13.
359	Brij Kishore Lal v. Pratap Narain ...	4 P L J 360; (1919) Pat 303.
360	Jagendra Lall Chowdhury v. Mi Asha ...	9 L B R 268.
363	Vaman Gururao Deshpande v. Krishnaji Timmaji Kulkarni	21 Bom L R 427.
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372	Gopal Chandra Sen v. Benkim Bihari Ray ...	29 C L J 421.
374	Karniram-Nathuram v. Hardeo Jagannath ...	*Nagpur Judicial Commissioner's Court.
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378	Sultan Ali v. Amir ...	35 P R 1919.
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380	Bhuneshwar v. Lal Bahadur Singh ...	*Nagpur Judicial Commissioner's Court.
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388	Dwarika Prashad v. Mahadei ...	6 O L J 166.
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391	Kishen Chand v. Municipal Committee of Amritsar	39 P R 1919.
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394	Shib Ram v. Maqsum Ali Khan ...	40 P R 1919.
394	Kanailal Jalan v. Manoo Bibi ...	29 C L J 424; 23 C W N 952.
396	Nand Singh v. Chhajju ...	41 P R 1919.
397	Bashiram Nath v. Dina Nath Dey ...	*Calcutta High Court.
399	Sundar Lal v. Sita Ram ...	*Oudh Judicial Commissioner's Court.
399	Salih Mohammad v. Mehar Singh ...	1 P R 1919 Rev.
402	Gopal v. Jhau Lal ...	6 O L J 176; 22 O C 52.
403	Alimuddi Bepari v. Chintaharan Mukhopadhyay ...	23 C W N 437.
405	Fort Gloster Jute Manufacturing Co. v. Chandra Kumar Das	29 C L J 438.
408	Bhagwana v Balik Ram ...	37 P R 1919.
409	Sriram Chandra Naik v. Hridoy Nath Gupta ...	29 C L J 461.
410	Bhana v. Bela Singh ...	38 P R 1919.
411	Somu Pathar v. Rengasawmi Reddiar ...	35 M L J 252.
412	Devi Dayal v. Baini Ram ...	42 P R 1919.
415	Shamsoonessa Bibi v. Satya Sebak Ghosal ...	29 C L J 394; 23 C W N 641.
417	Partap Singh v. Jai Kaur	43 P R 1919.
419	Sheo Bahadur Singh v. Beni Bahadur Singh ...	6 O L J 178.
434	Varcados v. McLeod ...	45 P R 1919.
435	Narain Prosad v. Rameswar Adya	*Calcutta High Court.
437	Ram Diyal v Mohammad Raju Shah	46 P R 1919.
439	Kalianarama Aiyar v. Sivarama Chettiar	*Madras High Court.
441	Dasa v. Hiran ...	47 P R 1919.
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443	Parman v. Lhassu ...	49 P R 1919.
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447	Bashi Ram v. Hassan Muhammad ...	*Punjab Chief Court.
449	Sushil Chandra v. Emperor ...	6 O L J 210; 20 Cr L J 465.
465	Mangu Koeri v. Emperor ...	20 Cr L J 481.
468	Ganapathy Chetty, *In re* ...	20 Cr L J 484; 37 M L J 60; 26 M L T 64; 10 L W 263.
470	Raj Kumar Das v. Emperor ...	17 A L J 335; 20 Cr L J 486.
471	Mahabir Singh v. Emperor ...	20 Cr L J 487.
472	Hari Chand v. Emperor ...	16 P R 1919 Cr; 20 Cr L J 488.
473	Shanker Lal v. Emperor ...	20 Cr L J 489; 17 A L J 850.
474	Basheshar Nath v. Emperor ...	18 P R 1919 Cr; 20 Cr L J 490.
476	Girish Chandra Das v. Bhusan Das ...	29 C L J 387; 20 Cr L J 492; 23 C W N 959.
476	Ghasita v. Emperor ...	13 P R 1919 Cr; 20 Cr L J 492.
477	Municipal Board, Rae Bareli v. Muhammad Muqim	6 O L J 174; 20 Cr L J 493.
478	Emperor v. Nawab Ali ...	12 Bur L T 56; 20 Cr L J 494.
479	Shankar Sahai v. Emperor ...	15 P R 1919 Cr; 20 Cr L J 495.
480	Ganga Chetty v. Emperor ..	12 Bur L T 55; 20 Cr L J 498.
481	Kaikhushru Bezonji Nanabhoy Capadia v. Shirinibai Bezonji Capadia ...	21 Bom L R 130; 23 C W N 419; 43 B 88; 9 L W 485 **P. C.**

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489	Munnavaru Begam v. Mir Mahapalli	...	41 M 1033.
494	Abdul Hakim Mia v. Pana Mia Miaji	...	*Calcutta High Court.
496	Kamla Prasad v. Ram Chandra Prasad Narain Singh	...	(1919) Pat 365.
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507	Kandasami Pillai v. Ramasami Mannadi	...	36 M L J 313; (1919) M W N 194; 42 M 203.
512	Venkatarama Chetty, *In re*	...	7 L W 610.
513	Mahomed Haji Abu v. Khatubai	...	21 Bom L R 85.
529	Nataraja Pillai v. Subbaraya Pillai	...	(1918) M W N 440.
530	Hormasji v. Po Hmyin	...	12 Bur L T 9.
534	Priya Sundari v. Golapdi	...	*Calcutta High Court.
536	Pilla Kakkadu v. Vedula Chendrayya	...	(1918) M W N 562; 24 M L T 254.
537	Green v. Ba Lon	...	12 Bur L T 16.
539	Durga Prasad v. Shambhu	...	17 A L J 842; 1 U P L R (H. C.) 101.
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545	Sankata Prasad v. Kali Prasad	...	22 O C 48.
548	Mathra Prasad v. Gokal Chand	...	17 A L J 835; 1 U P L R (H. C) 100.
549	Gaya Prasad v. Gur Dayal	...	22 O C 32; 6 O L J 270.
552	Muralidhar v. Radha Mohan	...	*Calcutta High Court.
553	Niadar Singh v. Sabit Khan	...	*Allahabad High Court.
554	Amullya Charan Dawn v. Askari Kazi	...	*Calcutta High Court.
554	Badal Singh v. Mahabir Singh	...	22 O C 54.
556	Kailash Chandra v. Latifannessa Khatun	...	*Calcutta High Court.
561	Gulab v. Laltu Singh	...	22 O C 58.
561	Hemlata Debi v. Radharaman Banerjee	...	*Calcutta High Court.
563	Ma Nyun v. Texeira	...	12 Bur L T 31; 10 L B R 36 **F. B.**
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568	Zainab Bibi v. M. A. L. Chetty Firm	...	10 L B R 1; 12 Bur L T 109.
570	Ladhumal-Purtomal, Firm of v. Secretary of State for India	...	13 S L R 1.
574	Po Dwe v. K. M. T. T S. Chetty	...	12 Bur L T 41.
575	Gulab Devi v. Monji Ram	...	38 P L R 1919.
576	Rukmina Kuar v. Sheo Dat Rai	...	17 A L J 841; 1 U P L R (H. C.) 118.
577	Perianan Chetty v. Kudupoody Mallaya	...	10 L B R 4; 12 Bur L T 65.
579	Wadero Rasoolbux v. Allahbux	...	13 S L R 72.
579	Neki Ram v. Khushi Ram	..	39 P L R 1919; 14 P W R 1919.
580	Po So v. Ba Zan	...	12 Bur L T 43.
581	Gobindu Das Nath v. Nitya Kali Dasi	...	*Calcutta High Court.
582	Gor Lum Hpaw v. Camillo Camilatos	...	10 L B R 15; 12 Bur L T 68.
583	Erfanuddin Molla v. Badan Sheikh	...	*Calcutta High Court.
588	Ma Lay v. Tun Shwe	...	10 L B R 10; 12 Bur L T 75.
590	Ram Sahu v. Imdad Husain	...	22 O C 39; 6 O L J 294.
591	Official Assignee v. M. C. Bham	...	10 L B R 8; 12 Bur L T 85.
593	Prafullananda v. Brojendra Nandan	...	*Calcutta High Court.
595	Bhagwan Das v. Allah Bakhsh	...	52 P R 1919.
596	Po Kin v. Ma Sein Tin	...	10 L B R 22; 12 Bur L T 87.
597	Krishnadhan Banerji v. Sanyasi Charan	...	29 C L J 280; 23 C W N 500.
607	Gauran v. Brij Raj Saran	...	53 P R 1919.
608	Gyan Shi v. Kin Twe	...	10 L B R 23; 12 Bur L T 69.
609	Iswar Das Marwari v. Raghunandan	...	*Patna High Court.
611	Nizam-ul-Haq v. Muhammad Ishak	...	*Lahore High Court.
612	Hanmant Kashinath v. Ganesh Annaji	...	21 Bom L R 435; 43 B 612.
620	Raj Mal-Bishambhar Nath v. Diwan Chand	...	*Lahore High Court.
621	Durga Prasad v. Debi Prasad	...	*Oudh Judicial Commissioner's Court.
622	Asmatullah v. Majid Khan	...	*Lahore High Court.
623	Alijan Bibi v. Safia Bibi	...	*Calcutta High Court.
624	Shabban Bibi v. Khaliq Shah	...	16 A L J 754.
636	Sri Ram v. Sorabji	...	*Lahore High Court.
638	Fazal Ahmad v. Rahim Bibi	...	16 A L J 158; 40 A 238.
645	Bhan Singh v. Jagat Singh	...	55 P R 1919.
646	Fatima Bibi v. Ram Narain Sahu	...	16 A L J 587; 40 A 536.

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652	Jadav Chandra Moulik v. Manik Sarkar	...	29 C L J 313.
653	Darbari Mal v. Kanshi	...	60 P R 1919.
654	Soresh Chunder Gooyee, *Re*	...	23 C W N 431.
656	Rajah of Pittapuram v. Revenue Divisional Officer, Cocanada	...	36 M L J 455; 42 M 644.
657	Emperor v. Sabitkhan Bahadurkhan	...	21 Bom L R 448; 20 Cr L J 497.
666	Tun Ya v. Emperor	...	10 L B R 16; 20 Cr L J 506.
668	Amrit Majhi v. Emperor	...	29 C L J 322; 23 C W N 623; 20 Cr L J 508.
670	Sadhu v. Emperor	...	19 P R 1919 Cr; 20 Cr L J 510.
673	Pyo Gyi v. Emperor	...	12 Bur L T 58; 20 Cr L J 513; 10 L B R 31.
674	Sessions Judge of Tanjore, *In re*	...	35 M L J 259; 20 Cr L J 514
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677	Kure v. Emperor	...	16 A L J 615; 20 Cr L J 517.
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685	Arshed Molla v. Emperor	...	29 C L J 325; 20 Cr L J 525.
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689	Ram Kaur v. Partab Singh	...	58 P R 1919.
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695	Jugal Kishore v. Ishar Das	...	63 P R 1919.
697	Mahabir Prasad v. Darbhangi Thakur	...	(1919) Pat 289; 4 P L J 486.
704	Lachhman Das v. Kharak Singh	...	57 P R 1919.
706	Gurumahadeva Asram Prasad v. Ram Sekhar Prasad Singh	...	*Patna High Court.
708	Basanta Mal v. Municipal Committee, Hoshiarpur		62 P R 1919.
709	Venkatachariar v. Rangaswami Ayyangar	...	9 L W 282; 25 M L T 223; 36 M L J 532; (1919) M W N 336.
712	Har Kishen Singh v. Lahore Bank, Ltd.	...	64 P R 1919.
714	Kottarathil Puthiyapurayil Pokker v. Balathil Parkum Chandrankandi	...	25 M L T 47; (1919) M W N 39; 9 L W 138; 42 M 143; 36 M L J 231.
720	Devi Dial v. Sundar Das	...	65 P R 1919.
721	Mulchand v. Bisnu	...	15 N L R 109.
723	Ralla Ram v. Amritsar Mutual Relief Fund, Ltd.	...	13 P L R 1919.
724	Ramadh Bibi Ammal v. Kandasami Pillai	...	(1919) M W N 82; 25 M L T 154; 9 L W 479
728	Jawand Singh v. Muhammad Din	...	*Lahore High Court.
731	Shamrao Amrut v. Imam	...	15 N L R 130.
733	Anantaram Bohidar v. Ganeshram Bohidar	...	4 P L J 304.
734	Secretary of State for India v. Srirangachariar	...	*Madras High Court.
736	Kamini Kumar Roy v. Hira Lal Pal	...	23 C W N 769.
738	Benudhar Panda v. Kangoi Krishna Chandra Das		4 P L J 306.
740	Vatavatta Raman Nair v. Kenath Puthen Vittal Kuppassan Menon	...	36 M L J 630.
746	Kedar Nath Sen v. Idu Khan	...	*Calcutta High Court.
747	Baldeo Rai v. Ram Ekbal Singh	...	4 P L J 301.
748	Alla Pichai v. Pappathiammal	...	36 M L J 184.
750	Ovanna Perumal v. Maung Myin	...	U B R (1919) III, 139.
751	Maula Dad v. Begam	...	*Lahore High Court.
753	Dhakeshwar Prasad v. Manna Lal	...	*Patna High Court.
755	Shadi v. Abdur Rahman	...	*Lahore High Court.
756	Radhika Raman v. Janki Kuer	...	(1919) Pat. 276; 4 P L J 472 **F. B.**
757	Shankar Lal v. Arjmand Khan	...	*Lahore High Court.
758	Siva Narayan Ram v. Hari Narayan	...	*Patna High Court.
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763	Suraj Prosad v. Karu Singh	...	4 P L J 325; (1919) Pat 400.
766	Pindi Dayal v. Kishun Kunwar	...	*Lahore High Court.
767	Lachman Sahu v. Abdul Karim	...	4 P L J 299.
769	Ah Kway v. Emperor	...	12 Bur L T 54; 20 Cr L J 529.
769	Mathura Prasad Singh v Emperor	...	20 Cr L J 529; (1919) Pat 225; 4 P L J 475.
773	Mi Chit v. Mi Nyun	...	U B R (1919) III, 135; 20 Cr L J 533.
774	Mohammad Kabir Uddin v. Emperor	...	20 Cr L J 534.
780	Nga Han v. Emperor	...	U B R (1919) III, 137; 20 Cr L J 540.
781	Kalwa Gope v. Antonini	...	(1919) Pat 266; 20 Cr L J 541.
783	Syed Yacoob v. Emperor	...	21 Bom L R 270; 20 Cr L J 543; 43 B 554.

785	Narendra Nath Sanyal v. Emaman	...	*Calcutta High Court.
786	Premsukh Das v. Shah Gopi Saran	...	4 P L J 323.
787	Chail Behari Lal v. Kidar Nath	...	*Lahore High Court.
791	Satya Charan Chandra v. Satpir Mahanty	...	4 P L J 309.
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INDIAN CASES.

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VOLUME LI.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

February 25, 1919.

Present:—Viscount Haldane, Viscount Cave, Sir John Edge and Mr. Ameer Ali.

NALLURI KRISTNAMMA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KAMEPALLI VENKATASUBBAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Custom—Adoption—Illatom *adoption, validity of, where son or brother is alive.*

The custom of taking an *illatom* son-in-law is the same in the Kamma caste and in the Reddi caste. [p. 5, col. 2.]

There is no analogy between adoption proper, the object of which is primarily religious, and *illatom* affiliation, the object of which is secular only, and the rules of Hindu Law do not apply to the latter, which is regulated solely by custom. [p. 5, col. 2.]

Illatom affiliation is valid even though the affiliator has a son or an undivided brother living. [p. 6, col. 2.]

Appeal from a decree of the Madras High Court (Sankaran Nair and Spencer JJ.), dated the 11th September 1914, reported as 26 Ind. Cas. 54, affirming a decree of the Subordinate Judge of Guntur, dated the 19th December 1910.

FACTS.—The sole question in this appeal was whether the *illatom* affiliation of Ramakristnamma, the ancestor of the respondents, by his father-in-law Lingappa Naidu, the ancestor of the appellants, was valid in law. The facts are sufficiently stated in their Lordships' judgment, which also sets out the material portions of the judgments of the lower Courts.

The question whether a person who already has a natural born son can introduce an *illatom* son-in-law into the family had already been before the Madras High Court in *Sakhamuru* v. *Pedapoody*, Second Appeal No. 45 of 1905, unreported. The judgment then under appeal was as follows:—

"The main question argued before me in this appeal is whether a person can introduce an *illatom* son-in-law into the family when he has already a natural born son. So far as I am aware, there is as yet no case law exactly on the point. No doubt such a restriction prevails in the case of adoption, but there is a difference between these two kinds of affiliations. 'Illatom consists in the affiliation of a son-in-law in consideration of assistance in the management of the family property.' On the other hand the object of adoption is to meet the want of a male offspring for religious purposes and for the perpetuation of the line of ancestors. Manu states that 'a son of any description must be anxiously adopted by one who has none, for the sake of the funeral cake, water and solemn rites, and for the celebrity of his name.' There is, therefore, no analogy between an adoption and an *illatom*, and an *illatom* son is not a co-parcener of the natural born son or adopted son, though they can live together like an undivided family. Special custom obtaining in each caste or family can alone sanction the status of an *illatom* son and it must be affirmatively proved as any other disputed fact [*Hanumantamma* v. *Rami Reddi* (1)].

"In the case before us, there is evidently a large mass of evidence which abundantly proves the existence of the custom in the Kamma families to which these parties belong and no less than fifteen instances were cited in support of it, in the majority

(1) 4 M. 272; 1 Ind. Dec. (N. s.) 1025.

of which *illatom* took place when there were sons existing. Defendants were not able to adduce evidence worth the name to disprove the custom or to rebut the evidence adduced by the plaintiff, although further opportunity was specially afforded to them for that purpose. As the motives for adoption and *illatomship* are quite different, it cannot be contended with any show of reason that because an adoption cannot be made when a natural born son exists an *illatom* son also should not be introduced into the family where there is a son living. *Illatom* sons are introduced more for the management of the family estate than for anything else. In the present case, Bhushayya had a lame and sickly daughter who lost her mother at a very tender age. The 1st defendant is her younger brother, and not her step-brother as the District Munsif thinks. The 1st plaintiff was originally a field servant under Bhushayya, who ultimately gave his lame daughter to him in marriage accepting him as his *illatom* son-in-law and promising to give him a share in the family estate. That this marriage union was brought about upon some special agreement, is not disputed. The 1st defendant states that the agreement was that the 1st plaintiff and his wife should be kept in the family and should be fed at the family expense. This sort of agreement is neither probable nor has been satisfactorily proved by any tangible evidence. The District Munsif's finding that Bhushayya promised a share in the family to the 1st plaintiff taking him as an *illatom* son, is borne out by the evidence on record and I fully concur with him. The 1st defendant was only 11 days old when his mother died and was a little boy at the time of the *illatom*. Bhushayya was an old man and wanted help in the cultivation of his lands and the management of his affairs. He had also to find a suitable husband for his lame daughter and consequently introduced the 1st plaintiff as his *illatom* son-in-law.

"Bhushayya died only 6 or 7 years before suit. His daughter (1st plaintiff's wife) also died some years back. It seems that with the object of defrauding the 1st plaintiff, the 1st defendant alone renewed the bonds executed by Bhushayya and got the family lands transferred to his name alone. These must have been fraudulently done behind the back of the 1st plaintiff and cannot have the effect of demolishing altogether or damaging to any extent the 1st plaintiff's existing rights founded upon the solemn agreement of *illatomship*.

"One other contention put forward by the appellant is that the *illatom* son-in-law must be a sister's son or some close relation, but no authority has been cited for this proposition and it cannot be accepted. There can be no better relationship than the *illatom* son-in-law becoming his own daughter's husband.

"Appeal fails and must be dismissed with all costs.

(Signed). I. L. NARAYANA ROW,
Sub-Judge."

The High Court (Boddam and Miller, JJ.), in affirming the Subordinate Judge, delivered the following judgment :—

"It is found that there is a custom among the caste to which the parties belong which supports the plaintiffs' case. Though there was no specific issue raising the question of custom, an opportunity was given to the defendants to call evidence to contradict the evidence of custom set up by the plaintiffs' witnesses and there is, therefore, no necessity to send the case back for the specific issue to be raised and tried now, as each party has had ample opportunity of calling evidence in respect of it. We are not able to say that there is no evidence sufficient to support the finding and we must, therefore, dismiss the second appeal with costs."

In the present case the lower Courts, mainly on the authority of *Sakhamuru* v. *Pedapoody*, dismissed the plaintiffs' suit. Hence this appeal.

Messrs. *De Gruyther*, *K. C.*, and *Parikh*, for the Appellants.—The parties are Sudras of the Kamma caste, and are governed by the Mitakshara. *Illatom* affiliation is the creation of custom. In the present case no family custom has been established permitting *illatom* adoption at all. There is no proof that the custom, supposing it exists, extends to persons who have a natural son living, or that it is binding on the joint family. There is no proof what the rights of the adoptee are. Reliance is

placed on an agreement, but there is no proof of any agreement which would bind the joint family.

The onus to prove not merely the existence but the extent of the custom is on the defendants. The general law prevails except so far as ousted by custom: *Ram Nundun Singh* v. *Janki Koer* (2). There is no presumption in favour of custom: *Abdul Hussein Khan* v. *Bibi Sona Dero* (3).

The respondents' ancestor Ramakristnamma only had a right to succeed to any self-acquired property of Lingappa Naidu. The *illatom* does not become a co-parcener. Lingappa was joint up to the day of his death, so nothing could pass to Ramakristnamma: the other members of the joint family had inchoate rights which *illatom* could not take away. It is not proved here that the *illatom* becomes a co-parcener.

The decided cases are mostly cases in which the adoptor had no son living, and in which there was an executed agreement for sharing of the property: *Tayumana Reddi* v. *Perumal Reddi* (4), *Hanumantamma* v. *Rami Reddi* (1), *Sivada Balarami Reddi* v. *Sivada Pera Reddi* (5), *Chenchamma* v. *Subbaya* (6), *Ramakristna* v. *Subbakka* (7), *Malla Reddi* v. *Padmamma* (8), *Narasimha Razu* v. *Veerabhadra* (9) and *Chinna Obayya* v. *Sura Reddi* (10).

There is no decision which covers the present case. The decision in *Sakhamuru* v. *Pedapoody* depended on the special facts of that case: the District Munsif found there was an express agreement which was binding. The Sub-Judge found the same. The case only came to the High Court on second appeal, and the finding of fact was accepted. In any case, one judgment is not sufficient to establish a custom so much at variance with Hindu Law.

It is not enough to find, as the lower Courts have done, that the *illatom* adoption is valid: they should have found further what rights the *illatom* acquired under the custom, and in particular whether he becomes a co-parcener and can demand partition. The father in a Hindu joint family cannot, except by law or special usage, introduce a new member into the co-parcenary. Under the Mitakshara an agreement made by a father is not ordinarily binding on the sons: *Sahu Ram Chandra* v. *Bhup Singh* (11). Reference was also made to Mayne's Hindu Law, paragraph 207 (8th Edition, page 271).

The respondent did not appear.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal by the plaintiffs from a decree, dated the 11th September 1914, of the High Court at Madras, which affirmed a decree, dated the 19th December 1910, of the Subordinate Judge of Guntur, which dismissed the suit. The suit in which this appeal has arisen was instituted on the 27th April 1906 in the Court of the District Judge of Guntur, and was subsequently transferred to the Court of the Subordinate Judge in which it was entered as Original Suit No. 1 of 1910. The plaintiffs in this suit (No. 1 of 1910) were Nalluri Krishnamma and his brother, Nalluri Adinarayudu. The original defendants in this suit were Kamepalli Ramalingam, who is now dead, and his sons, Kamepalli Venkatasubbayya and Kamepalli Seshu. Nalluri Lingayya, who is a natural brother of these plaintiffs, was added as a defendant to the suit on the 17th September 1908, and is a nominal respondent to this appeal. He has not appeared, and it has been stated by Counsel for the appellants that Nalluri Lingayya has been adopted, according to Hindu Law, into another family, and is not interested in the suit or in this appeal.

In 1907 Kamepalli Ramalingam and his sons, Kamepalli Venkatasubbayya and Kamepalli Seshu, instituted a suit in the

(2) 29 I. A. 178 at p. 194; 29 C. 828 (P. C.); 7 C. W. N. 57; 178 P. R. 1902; 4 Bom. L. R. 664; 8 Sar. P. C. J. 351.

(3) 43 Ind. Cas. 306; 45 I. A. 10; 16 A. L. J. 17; 4 P. L. W. 27; 34 M. L. J. 48; 22 C. W. N. 353; 23 M. L. T. 117; 27 C. L. J. 240; 1 P. L. R. 1918; 20 Bom. L. R. 528; 45 C. 450; 12 S. L. R. 104; 45 I. A. 10 (P. C.).

(4) 1 M. H. C. R. 51.

(5) 6 M. 267; 2 Ind. Dec. (N. S.) 465.

(6) 9 M. 114; 3 Ind. Dec. (N. S.) 476.

(7) 12 M. 442; 4 Ind. Dec. (N. S.). 658.

(8) 17 M. 48; 6 Ind. Dec. (N. S.) 33.

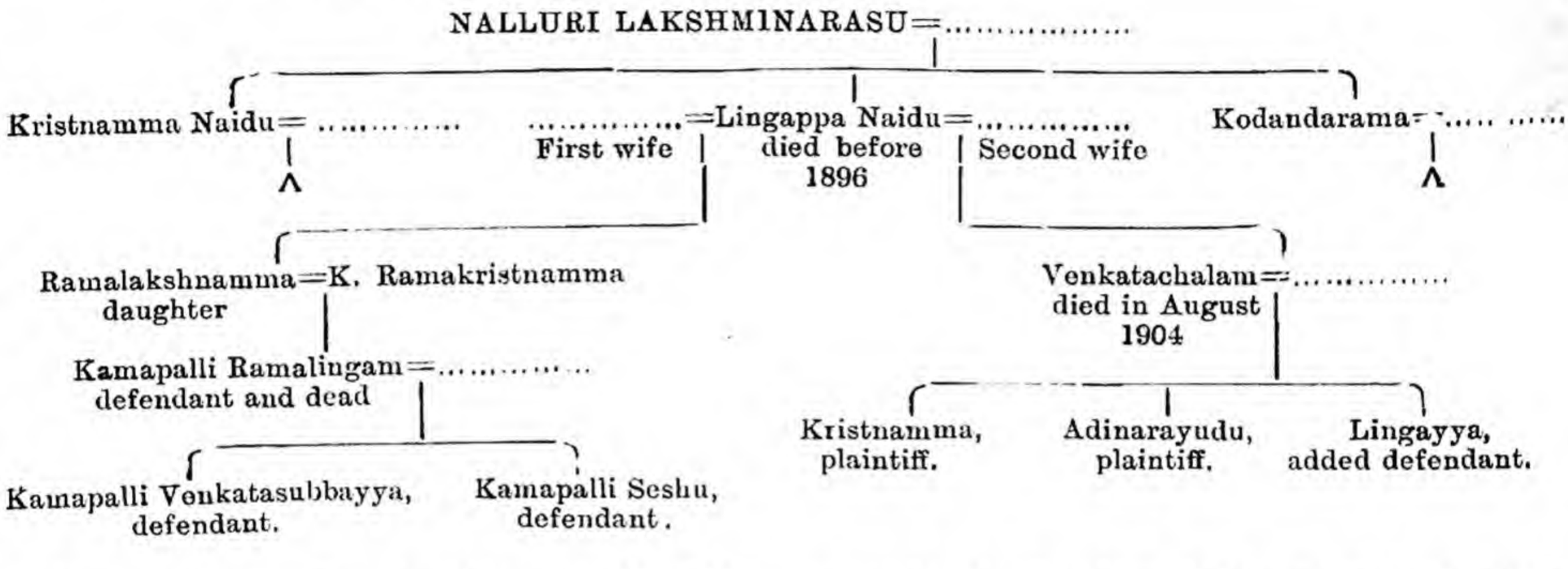
(9) 17 M. 287; 6 Ind. Dec. (N. S.) 199.

(10) 21 M. 226; 7 Ind. Dec. (N. S.) 515.

(11) 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437 (P. C.).

Court of the District Judge of Guntur against Nalluri Kristnamma, Nalluri Adinarayudu and others, which was subsequently transferred to the Court of the Subordinate Judge, in which it was entered as Original Suit No. 2 of 1910. The two suits (Nos. 1 and 2 of 1910) were tried together by the Subordinate Judge, and the evidence in each suit was used in the other. The Subordinate Judge made a separate decree in each suit. Those decrees were appealed to the High Court at Madras, which dismissed the appeal from the decree in Suit No. 2 of 1910, and from that decree of the High Court there has been no appeal.

The relationship of the parties to the suit will be seen from the following pedigree:—



The main question in this appeal relates to an alleged *illatom* adoption of Ramakristnamma as his *illatom* son-in-law by Lingappa Naidu. If that *illatom* adoption is established as valid in law the suit of the plaintiffs fails and must be dismissed. The *factum* of that adoption cannot now be disputed and is not disputed in this appeal, but it is contended on behalf of the appellants that Lingappa Naidu could not legally take Ramakristnamma as his *illatom* son-in-law because at the time of the adoption he had a natural son, Venkatachalam, living, and also because at that time Lingappa Naidu was joint with his brothers, Kristnamma Naidu and Kodandarama, and no custom authorising an *illatom* adoption under such circumstances has been proved. The parties are Hindus of the Sudra caste and sub-caste Kamma, and are governed by the Law of the Mitakshara except in so far as that law has been altered by custom. The Law of the Mitakshara would not allow a Hindu to adopt a son when he had a natural born son living. But if a custom was proved allowing a Kamma to take an *illatom* son-in-law when he had a natural born son living, both grounds of objection to the *illatom* adoption in this case would fail.

The three sons of Nalluri Lakshminarasu with their families lived together as a joint Hindu family in the village of Mangamoor, and as a joint family possessed a large ancestral estate and some moveable property. Mangamoor is a village of Guntur in Nellore. Lingappa Naidu was twice married. He had by his first wife a daughter, Ramalakshnamma, who over 60 years ago married Kamepalli Ramakristnamma and bore to him a son, Kamepalli Ramalingam, who was the father of the defendants-respondents, Kamepalli Venkatasubbayya and Kamepalli Seshu. By his second wife Lingappa Naidu had a son, Venakatachalam, who was the father of the plaintiffs and of the added defendant. Kamepalli Ramakristnamma was a near relation of Lingappa Naidu, and lived in his house as one of his family, and assisted in the management of the property. Lingappa Naidu took Kamepalli Ramakristnamma as his *illatom* son-in-law after Venkatachalam was born, and when Venkatachalam was three or four years of age promising to give him a share of his property. Lingappa

Naidu died before 1896. In 1896 his two surviving brothers, Kristnamma Naidu and Kodandarama, and their nephew, Venkatachalam, separated and partly partitioned the family estate. Venkatachalam died on the 23rd August 1904. The Subordinate Judge found as a fact that Ramakristnamma lived in the family with his wife and children, and that after his death Kamepalli Ramalingam, Kamepalli Venkatasubbayya, and Kamepalli Seshu continued to live in the family, and lived with Venkatachalam after the division of 1893 until about six months before Venkatachalam's death; that finding was not dissented from by the High Court. The Subordinate Judge considered that those facts corroborated the evidence, which he believed, that there had been an *illatom* adoption.

In 1904 it was arranged between Kamepalli Ramalingam, as representing himself and his sons, and Venkatachalam, as representing himself and his sons, in the presence of mediators that their joint family properties should be divided into three shares, and that Kamepalli Ramalingam and his sons should take one share, and should leave the remaining two shares to Venkatachalam and his sons.

On the 5th September 1905, the plaintiff, Nalluri Kristnamma, signed and presented to the Tahsildar the following statement:—

"The deceased Nalluri Venkatachalam, who was Pattadar of Nos. 2312, 2313, in Mangamoor, is my father. In the said *pattas*, which stand in my father's name, the following 13 names should be included:—

" 1. Myself, Nalluri Kristnamma.
" 2. Nalluri Andinarayadu.
" 3. Nalluri Lingayya.
" 4 Kamepalli Ramalingam.
" .....
" All these are sharers in the family."

The evidence shows that a joint *patta* was accordingly issued.

In this suit the Subordinate Judge framed the following issues amongst others:—

"(*ii*) Whether Ramakristnamma, father of the 1st defendant, was taken as *illatom* son in-law by Lingappa Naidu, and, if so, whether such taking is valid in law?

(*iii*) Whether there was an agreement or arrangement that a one-third share of the family properties should be given to the 1st defendant as alleged in his written statement, and, if so, this agreement or arrangement is valid or binding on plaintiffs?

(*iv*) Whether, as alleged by the defendants, there was a partition in November 1904, and, if so, what properties were divided and allotted to what shares and what properties were reserved for future division or joint enjoyment?

(*v*) Whether defendants have joint right with the plaintiffs to the suit properties, items Nos. 8, 15 to 55, and 59 in the plaint-Schedule A; if so, is the suit for declaration in respect of these items maintainable?"

For the reasons recorded in his judgment in Original Suit No. 2 of 1910 the Subordinate Judge found the issues (*ii*) to (*v*) against the plaintiffs.

On the question whether Lingappa Naidu having at the time of the *illatom* adoption a natural born son and two undivided brothers living could lawfully have taken Ramakristnamma as an *illatom* son-in-law, the Subordinate Judge stated:—

"The parties in the present case belong to the Kamma caste, and in this respect (the right to make *illatom* adoptions) there is no difference between them and the Reddis. The practice of *illatom* affiliation is very common in both castes."

There is evidence in this record that the custom of taking an *illatom* son-in-law is the same in the Kamma caste and in the Reddi caste. The Subordinate Judge then referred in general terms to the witnesses who had given evidence on behalf of Kamepalli Ramalingam and his sons as to the custom of *illatom* adoptions, and particularly observed that one of their witnesses, a Kamma, had given two instances in which where brothers were living jointly one of them had taken an *illatom* son-in-law. The Subordinate Judge then stated:—

"Defendants' witnesses (that is, witnesses on behalf of the defendants in Suit No. 2 of 1910, who are the plaintiffs in this suit) Nos. 5, 6, 8, 9 and 11 say that a Kamma takes an *illatom* son-in-law only when he has no son or undivided brother. This is a matter of opinion. The evidence in this case is insufficient to establish a special custom. But I think that as the custom of *illatom* affiliation has been judicially recognised, it is for the defendants (the plaintiffs in this Suit No. 1 of 1910) to show that

a father living with a son and an undivided brother cannot exercise that right. In the present case the 1st plaintiff's (Kamepalli Ramalingam's) father was, I think, treated by all members of the family as an *illatom* son-in law, and after his death the plaintiffs (original defendants in Suit No. 1 of 1910) continued to live as members of a joint family till six months before Venkatachalam's death. I, therefore, find the first issue in the affirmative."

The first issue which the Subordinate Judge so found in the affirmative was "Whether the plaintiffs' brother (Ramakristnamma) was taken as *illatom* son-in-law by Lingappa Naidu, and, if so, whether such taking is valid in law."

In the judgment on the appeal the learned Judges, Sankaran Nair and Spencer, JJ., say :—

"The adoption took place more than 50 years ago, when Lingayya was living with his two brothers as members of an undivided family. Ever since the adoption or marriage, Ramakristnamma was living with the other members of the family. An *illatom* son is adopted when assistance is needed by the adoptor in the cultivation of the family estate or for its management ; and, in this case, there is no doubt that Ramakristnamma participated in the management of the estate. When a partition was effected between Lingayya and his brothers, Ramakristnamma was treated as a member of Lingayya's (Lingappa's) branch and remained with them. Shortly before Venkatachalam's death in August 1904, there was an agreement for partition between him and Ramakristnamma.

"This, no doubt, is denied by the appellants. But Ramakristnamma's descendants are admittedly in exclusive possession of certain properties which were in the possession of Venkatachalam, and the appellants' plea that such possession was obtained by trespass is not proved. Their complaint was dismissed by the Magistrate ; and the Judge rightly points out that possession by trespass is inconsistent with the fact that the respondents are in possession of portions of properties. After Venkatachalam's death, his son, one of the appellants before us, called Ramakristnamma's son a co sharer (Exhibit B2). This conduct of the family for about 50 years and the agreement for partition in particular is very strong evidence against the appellants.

"It is contended before us that an *illatom* adoption made when there is a son living is invalid. It is true that an adoption is invalid under Hindu Law when the adoptive father has a son. But, *illatom* adoption itself is opposed to Hindu Law, and no presumption of invalidity, therefore, arises on the ground suggested.

"The evidence of appellants' witness is not that the existence of a son alone precludes an adoption, but no adoption can be legally made when there is a son or brother alive. This finds no support in Hindu Law, and is in favour of the view that we should not look to the principle of the Hindu Law to determine the incidents of the custom. The respondents have proved only two instances of adoption where there was a son, and the Judge rightly observes that the evidence is insufficient to prove a custom. But we find that it has been judicially recognised. In the suit out of which Second Appeal No. 45 of 1905 arose, many instances of *illatom* adoption by persons who had sons were proved, and this Court held that the evidence was sufficient to prove the custom.

"We are, therefore, of opinion that Ramakristnamma's adoption is valid and dismiss this appeal with costs."

Their Lordships have had the opportunity of reading the judgments of the Subordinate Judge and of the learned Judges of the High Court at Madras in appeal in the case, which in the High Court was Second Appeal No. 45 of 1905; that case has not been reported. In that case, which depended upon the existence of a custom in the Kamma families to which the parties belonged, "fifteen instances were cited in support of it (the custom), in the majority of which *illatom* took place when there were sons existing." Before the decision in Second Appeal No. 45 of 1905, it seems never to have been expressly decided that a Kamma or a Reddi could not or could lawfully take a son-in-law in *illatom* adoption when he had a son living, but having regard to the decision in that case and to the fact that the two Courts in the present suit agree that the adoption was valid in law, and as the family for very many years treated the *illatom* adoption as valid, their Lord-

ships think that this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The respondents, who did not appear at the hearing, will have such costs as they may be entitled to.

Appeal dismissed.

Solicitor for the Appellants: Mr. *E. Daigado.*

Solicitors for the Respondents: Messrs. *Chapman, Walker* and *Shephard.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 82 OF 1917.

September 25, 1918.

Present:—Mr. Justice Heaton and Mr. Justice Hayward.

BHIVA BHIKA CHOKEKAR—DEFENDANT No. 6—APPELLANT

versus

BABU BALSHET BOBHATE—PLAINTIFF—OPPONENT.

Khoti Settlement Act (I Bom. of 1880*), s.* 21—*Survey Records, entry in, as to occupation, whether conclusive.*

Section 21 of the Khoti Settlement Act makes conclusive certain decisions of the officer defined as the Recording Officer. What those decisions are is to be gathered from the preceding sections of the Act, and a perusal of those sections makes it clear that the mere entry of the name of some particular person as occupant of a plot is not included among those decisions of the Recording Officer. What are contemplated as conclusive are decisions as to the class of tenure and as to the complicated rights of the *khots.*

Appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 535 of 1915, varying the decree passed by the Joint Subordinate Judge, Rajapur, in Civil Suit No. 247 of 1914.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *S. S. Patkar*, for the Opponent.

JUDGMENT.

HAYWARD, J.—The plaintiff sued the six defendants for partition of his half share in certain lands in his possession on the strength of a sale-deed of 1879. The six defendants joined in one written statement denying his possession as purchaser. The trial Court, however, found the purchase proved and gave a decree for partition with the exception of a plot of land entered in the name of defendant No. 6 in the Survey Records. The first Appellate Court modified the decision by including in the partition the plot standing in the name of the sixth defendant. In second appeal it has been urged that this plot ought to be excluded, on the ground that the entry of the name of defendant No. 6 in the Survey Records was conclusive as to her title, under section 21 of the Khoti Settlement Act.

It is unfortunate that we have not in evidence the particular entry of the sixth defendant's name in the Survey Records. All we have is the document Exhibit 26, in which the validity of the sale-deed was expressly admitted by defendant No. 6 before the Survey Settlement Officer. There can, in my opinion, be no doubt that on that evidence the particular plot entered in the name of defendant No. 6 ought not to be excluded from the partition, and effect would have to be given to that conclusion unless clear legal objection should appear under the provisions of section 21 of the Khoti Settlement Act.

Now that section makes conclusive certain decisions of the officer defined as the Recording Officer. What those decisions are is to be gathered from the preceding sections, and a perusal of those preceding sections seems to me to make it clear that the mere entry of the name of some particular person as occupant was not intended to be included among these decisions of the Recording Officer.

What were contemplated as conclusive were decisions as to the class of tenure and as to the complicated rights of the *khots.* The appellant could not, therefore, in this appeal, have recourse to the provisions of section 21 of the Khoti Settlement Act.

The appeal ought, therefore, in my opinion, to be dismissed with costs. A similar view was taken by another Bench of this Court in the case of *Mahomed Ibrahim* v. *Ali Mahomad Ali Pangarkar*, Second Appeal No. 850 of 1914.

HEATON, J.—I agree.

Appeal dismissed.

SAKHARAM *v.* SONA BAPU.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 671 OF 1915.

October 20, 1916.

Present:—Mr. Stanyon, A. J. C.

SAKHARAM—DEFENDANT—APPELLANT

versus

SONA BAPU—PLAINTIFF—RESPONDENT.

Wajib-ul-arz, *provision in, for payment of customary dues to Zemindar—Alienation by Zemindar—Express contract not to claim dues, effect of.*

Where a *wajib-ul-arz* is prepared in respect of a Zemindari which includes a recognition of certain customary dues payable to the Zemindar, and the Zamindar alienates a portion of the Zemindari expressly contracting to claim nothing but the assessed revenue and cesses and to make no demand for anything payable to him as superior proprietor, he must be deemed to have given up his rights to receive dues *qua* Zemindar and cannot use the *wajib-ul-arz* to override his express contract. [p. 9, col. 2.]

Appeal against the decree of the District Judge, Bhandara, in Civil Appeal No. 79 of 1915, decided on 7th August 1915, arising out of Civil Suit No. 265 of 1914, decided by the Munsif, Gondia, on the 31st March 1915.

Mr. *Atmaram Bhagwant*, for the Appellant.

Mr. *Ramchandra Balkrishna Dewharay*, for the Respondent.

JUDGMENT.—The decision of this case turns upon the interpretation of a registered document Exhibit D-1. The Courts below have come to different conclusions thereon. The plaintiff is the proprietor of a certain number of villages comprising a Zemindari in the Bhandara District. He has alienated some of these villages in different forms, and in certain cases the alienees have had conferred upon them the status of inferior proprietors holding under the plaintiff as the superior proprietor. In his youth the plaintiff devastated his estate, with the result that some 25 or 30 years ago management of the Zemindari was taken over by the Bhandara Court of Wards. The estate was rendered solvent and restored to the plaintiff, according to the statement of his Pleader, some ten years ago. Since then the plaintiff has fallen into litigation with some of the inferior proprietors. At the Settlement of 1897-98 now current, a *wajib-ul-arz* for the whole Zemindari was drawn up by the Settlement Officer, which included a recognition of certain customary dues payable to the Zemindar. Exhibit P-1 is a copy of that *wajib-ul-arz*, and it shows the following annually recurring customary dues:—

From the inferior proprietor—one goat and Re. 1 worth of *ghee*.

From the tenants—5 *moras*, 25 *zadmas* and 10 *kudos joli*.

From the *mahajan*—one rope.

From the blacksmith—one scythe and one *pali*.

From the *gyaki*—two *sinkas*.

From the *pujaria*—one *chapria*.

These customary dues are manifestly marks of respect due to the Zemindar personally, and must be of ancient origin to obtain recognition as customary dues in the *wajib-ul-arz*. They must have existed long before the Court of Wards took over the management of the Zemindari; but it is easy to understand why the demand for them should have been suspended during the impersonal management of the Court of Wards, pending which the Zamindar's personal authority remained in abeyance. Since that authority has been restored, the Zemindar has apparently sought to re-establish the outward tokens of it. Some years ago he sued one inferior proprietor for the customary dues payable on account of his village, and the suit ended in his favour on the 16th April 1908 by my decision in Second Appeal No. 557 of 1907. A copy of my judgment has been filed as Exhibit P-4 in the present case, but I am unable to understand upon what view of the laws of evidence and procedure the Courts below have allowed this to be done. It is certainly not a judgment *in rem*, and being a judgment in a case brought against another defendant in respect of another village it is clearly irrelevant. Assuming that it could be cited as an unpublished ruling, that did not entitle it to a place among the Exhibits. Past experience in such matters suggests that the time is still immeasurably distant when legal practitioners and subordinate Courts will know and correctly apply the law relating to the production and reception of documentary evidence.

In the present suit the plaintiff seeks to recover from the defendant, who is the inferior proprietor of Tilli, a village in

the plaintiff's Zemindari, the customary dues for one year or their value stated to be Rs. 36 2-0 as per details given in paragraph 8 of the plaint. The defendant claims that by the terms of the deed, Exhibit D-1, by which the village was transferred to him, he is exempt from the payment of these dues. The plaintiff's reply to this plea is that Exhibit D-1 does not exempt the defendant, and that in any case the *wajib-ul-arz* makes him liable.

This case must be decided on its own facts without reference to the facts of or analogies drawn from any other case. On the 11th January 1872 the plaintiff executed Exhibit D-1 in favour of the defendant. The material part of that document may be translated thus:—

"I have received from you Rs. 600 in cash, British currency, and sold to you for ever Tilli, a village of this Taluq, Settlement No. 103, area 2382-A. 3-R. 16-P, assessed at Rs. 250, with all proprietary rights, mango groves, tanks and forests. I shall receive from you annually the revenue of the village Rs. 250, the road-cess Rs. 5, the school cess Rs. 5 and the postal-cess Rs. 1-4-0, in all Rs. 261-4-0, according to the practice prevailing in the said village. Besides this I shall take nothing more. You must accept and pay me the revenue which may (hereafter) be assessed at a new Settlement. As regards the *malikana* of the said village I shall make absolutely no objection, dispute or demand. Neither I nor my descendants have any claim to the proprietorship of this village. I will apply and have mutation effected in your name * * * you are fully entitled to mortgage or sell the village * * * you shall enjoy the same rights over the village as I have had. I have duly received in cash the consideration of this sale-deed * * *."

It will be seen that although the rights to occupy, enjoy and transfer the village as the owner thereof were conveyed to the defendant, the plaintiff retained for himself the highest right in respect of the receipt of the revenue. He remained the person primarily responsible to the Government for the payment of revenue *qua* a proprietor holding from it. Therefore the transfer was one of an inferior proprietary right, and the position of the defendant in the Zemindari became somewhat analogous to the position of a *malik makbuza* in a village belonging to a *lambardar* through whom the holder must pay his revenue.

The village remained an integral part of the plaintiff's estate, though the plaintiff's only right therein is to have the assessed revenue and cesses paid to him.

Now when the deed was executed, the customary dues payable to the Zemindar by subordinate holders, inferior proprietors, village lessees, tenants, craftsmen and others must have been in vogue. Such dues as were recognized as customary and incorporated in the *wajib-ul-arz* in 1897-98 A. D. could not have come into existence for the first time after 1897-98. The parties recognized that as a superior proprietor the plaintiff would have a claim to *malikana*, which by its very name is an emblem of proprietorship. It is in common parlance an allowance to Zemindars ousted from their estate. It cannot be given the restricted meaning in this deed of 1872 which it may have acquired in rules made under the Land Revenue Act, 1881. It seems to me, therefore, that when the plaintiff expressly contracted to claim nothing but the assessed revenue and cesses, and to make no demand for anything payable to him as superior proprietor from the defendant as inferior proprietor, he gave up his customary rights to receive dues *qua* Zemindar and that he cannot use the *wajib-ul-arz* to override his own express contract. The words in the deed "nothing more" and "*malikana*" must be construed in their widest sense against the executant. There is no ground for interpreting "nothing more" to mean no other Government demand. There was no other Government demand to give up at the time; and the parties expressly provided that the defendant should meet any increase in that demand. The contract was that the defendant should not pay a pie above that demand, and the word *malikana*, as used in 1872, referred to the usual private demands of a superior proprietor against an inferior proprietor, and not merely one of those demands. The present claim seems to be one of those claims which the plaintiff stipulated not to make

There is not a shred of evidence to show that it was ever made before, though plaintiff managed his own Zemindari for some 12 or 15 years after the sale of 1872.

For the above reasons, I think that the claim of the plaintiff cannot be supported in this case. The appeal is allowed, the decree of the lower Appellate Court is discharged and that of the first Court is restored. The plaintiff must pay and bear the costs throughout.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1266 AND 1267 OF 1917.

October 9, 1918.

Present:—Sir John Wallis, KT., Chief Justice and Mr. Justice Spencer.

NANI KUTTI *alias* NARAYANI KUTTI AMMA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KOTTHALE PATINHARE PUTHIYA PURAYIL ACHUTHAN KUTTI NAIR, KARNAVAN AND MANAGER OF THE TARWAD, AND OTHERS—DEFENDANTS NOS. 1, 2, 4 TO 6, 8 TO 17, 19 AND 20—RESPONDENTS.

Malabar Law—Partition per stirpes *or by* tavazhies, *validity of—Minor members, right of, to impeach partition on attaining majority.*

Under Malabar Law a partition can only be effected by and with the consent of all the adult members of the *tarwad* [p. 10, col. 2.]

It is competent to the adult members of a Malabar *tarwad* to make a partition *per stirpes* or by *tavazhies* and their act in effecting such a partition cannot be questioned by the minor members on their attaining majority. [p. 10, col. 2; p. 11, col. 1.]

Second appeals against the decree of the Court of the Temporary Subordinate Judge, Palghat at Calicut, dated the 19th February 1917, in Appeal Suits Nos. 784 and 814 of 1914 respectively, preferred against the decree of the Court of the District Munsif, Alatur, in Original Suit No. 45 of 1913.

Mr. *C Madhavan Nair*, for the Appellants.

Messrs. *K. P. M. Menon, C. V. Ananthakrishna Aiyar, A. Sivarama Menon, K. B. Venkatachela Aiyar* and *T. Eroman Unni*, for the Respondents.

JUDGMENT.—In view of the findings of the lower Appellate Court in these cases, Mr. C. Madhavan Nair, who appears for the appellants, has only questioned the decision as regards the partition deed, Exhibit C. This raises a question of Malabar Law of some importance on which we have derived much assistance from his argument and those of Mr. K. P. M. Menon and Mr. C. V. Ananthakrishna Aiyar for various respondents. The division under Exhibit C is a division of the Tarwad properties *per stirpes*, that is to say, allotting an equal share to each stirpe or Tavazhi. It is, of course, well settled in Malabar that there can be no partition at all, except by the consent of all the adult members. As regards the minor members of the Tarwad, it was observed by Sankaran Nair, J., in *Parakutti* v. *Kelapan Nair* (1), "such a partition would ordinarily be binding on the minors, but if on attaining majority, they are able to show that they have been prejudiced, that partition could be re opened so far as they are concerned, and they would be awarded the share which should have been set apart for them; but subject to this, the partition is final as between those who were parties to it" This appears to be an application of the similar principle which has been applied with regard to partitions on the East Coast. As to such partitions Mr. Ananthakrishna Aiyar has referred us to the decision of Srinivasa Iyengar, J., in *Yeechuri Ramamurthy* v. *Yeechuri Ramamma* (2), where it was pointed out that partitions effected by the adult members of the family are binding on the minor members, in the absence of negligence or fraud. The only question then is whether this partition which is by consent can be upset at the instance of certain members of the Tarwad who were minors, on the ground that the division was *per stirpes* and not *per capita*. Now the authorities to which Mr. Ananthakrishna Aiyar has called our attention show con-

(1) 34 Ind. Cas. 818; 31 M. L. J. 879; (19 7) M. W. N. 106.

(2) 33 Ind Cas. 961; 30 M. L. J. 308; 3 L. W. 322.

clusively that partition *per stirpes*, or what comes to the same thing partition by Tavazhies, has to say the least a greater body of authority in its favour than partition *per capita*. He has referred us to Strange's Manual of Hindu Law, section 389, where it is said that where such divisions are made, they would naturally be by Tavazhies. Mr. Ormsby who was Chief Justice of Travancore, in his book on Marumakathayam Law, says at page 2, paragraph 4: "Where division takes place it will usually be according to the Taivaries, or number of daughters of the original ancestress. Each Taivari may similarly be sub divided, should the members consent thereto, and so on until individual proprietorship is arrived at. I am not aware that this rule has ever been questioned." The fullest discussion of the question is to be found in Dr. Pandalai's Marumakathayam Law, 1914, page 146 (which was not referred to before us) where the same result is arrived at, and several decisions of the Travancore High Court are referred to. In a recent case which came before the Privy Council, *Sulaiman* v. *Biyaththumma* (3), their Lordships alluded to this method of division by Tavazhies as the proper mode of division. They say that this division "was merely an application of the rule that division for the purpose of partition is stirpital, though as between the members of any class it is capital." Mr. Madhavan Nair explained this by saying that it only meant that divisions should be by Tavazhies, but did not lay down that each Tavazhi should have an equal share. But a division *per stirpes* which gave each stirpe an unequal share depending on the number of members in it, would be very like a division *per capita*, and was not, we think, what their Lordships intended. This division by Exhibit C has been made in what appears upon authority to be the more approved form, and, therefore, we think that the plaintiffs can have no right to question a partition effected in this manner.

Further we have to bear in mind that a partition in Malabar depends upon the consent of all parties, and if we were to uphold the plaintiffs' contention, the one result would be to set this partition aside and to restore the original state of unity, because division *per capita* would in this case be without the consent of all the adult members. It appears that with regard to some of the property of this family, it was divided *per capita* by Exhibit B. That division is not attacked in the present case and we have not to consider it. What is contended is that the partition under Exhibit C should also have been *per capita*, and should be upset because it is *per stirpes*. We are clearly of opinion that there is no ground for this contention.

Therefore the appeal fails and must be dismissed with costs. Second Appeal No. 1267 of 1917 is also dismissed with costs.

IN MEMORANDUM OF OBJECTIONS IN SECOND APPEAL NO. 1267 OF 1917.

We must allow the memorandum and increase the fee in the lower Appellate Court from Rs. 20 to Rs. 95. There will be no order as to costs of this memorandum of objections.

M. C. P.

Appeals dismissed;
Memorandum of objections allowed.

(3) 39 Ind. Cas. 243; 21 M. L. T. 210; 32 M. L. J. 137; (1917) M. W. N. 213; 1 P. L. W. 210; 25 C. L. J. 273; 21 C. W. N. 553; 19 Bom. L. R. 394 (P. C.).

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1393 AND 1394 OF 1917.

April 24, 1919.

Present:—Mr. Justice Das.

RANGU MANDAL—DEFENDANT—APPELLANT

versus

CHATTERNATH CHOWDHURY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Appellate Court—Judgment, contents of—Failure to weigh evidence—Procedure, error of.

The failure by an Appellate Court to weigh all the evidence and to come to a satisfactory conclusion on the evidence before it, amounts to an error of procedure which vitiates the judgment given by that Court. [p. 12, col. 2.]

Appeals from a decision of the District Judge, Purneah.

Mr. *Ram Lal Dutt*, for the Appellant.

Mr. *Sakti Kanta Bhattacharjee*, for the Respondents.

JUDGMENT.—These two appeals arise out of suits brought by the respondents against the appellant for recovery of rent due by the appellant to the respondents for the years 1319 to 1322.

The plaintiffs' case is that the defendant is in possession of two holdings for one of which he pays Rs. 17-3-3 as rent and for the other of which he pays Rs. 19-9-6. The defendant says that before the survey operations he was in possession of three holdings for which he paid Rs. 8, Rs. 9-3-3 and 15 annas 6 pies as annual rent respectively, but that at the time of the survey the first and the second Jamas of Rs. 8 and Rs. 9 3-3 were amalgamated into one Jama of Rs. 17-3-3 and the third Jama of 15 annas 6 pies was allowed to remain separate. It will be noticed that the defendant admits that he is now in possession of a holding for which Rs. 17-3-3 is payable as rent but that he denies that he is in possession of any holding for which Rs. 19-9 6 is payable as rent. The substantial question which I have to determine is, is the defendant in possession of a holding for which Rs. 19-9-6 is payable as rent?

It is clear to me that the case has not been disposed of in a satisfactory manner by either of the Courts below. Indeed the judgment of the lower Appellate Court, which is the judgment of the final Court of facts, shows that it never understood the case made by the defendant. It says: "The defence was that there was only one single Jama of Rs. 19-9 6 and that the Jama of Rs. 17-3-3 is included in the Jama of Rs. 19-9-6." That was not the defence at all. The defence was that there were two Jamas one of Rs. 17-3-3 and the other of 15 annas 6 pies, as paragraph 2 of the written statement filed in Rent Suit No. 1500 of 1915 clearly shows. The defendant never made the case that he was in possession of a single Jama and I am of opinion that his inability to appreciate the defendant's case has in this instance led to a failure of justice.

It appears on a reference to the Record of Rights Exhibit B that the two Jamas of Rs. 9-3-3 and Rs. 8 were first of all amalgamated into one Jama of Rs. 17 3-3 and then the three jamas of Rs. 9-3-3, Rs. 8 and 15 annas 6 pies were again amalgamated into a Jama of Rs. 18 2 9, which again is shown in the Record of Rights itself as enhanced to Rs. 19-9-6 as per order of Court in Suit No. 11 of 1890-91. The defendant says that there is an obvious mistake in the preparation of the Record of Rights because he was only in possession of three Jamas and they could not be amalgamated twice. It seems to me that the defendant's contention must prevail unless it can be shown that the defendant was in *possession* of two Jamas of Rs. 8, two Jamas of Rs. 9-3-3 and one Jama of 15 annas 6 pies. The onus is undoubtedly on the defendant to show that he was in possession of three Jamas and not of five Jamas, but he claims to have proved conclusively that he was in fact in possession of three Jamas and not of five Jamas.

Now the defendant's case may be true or false, but at any rate he was entitled to ask the Court to consider his case. It seems to me that the lower Appellate Court never applied its mind to the evidence on the record. It does indeed say that there are no sufficient materials to rebut the presumption of the correctness of the Record of Rights, but as Mullick and Atkinson, JJ., said in the case of *Mubarak Hussain* v. *Syed Shah Hamid Hussain* (1): —"A mere general statement that on a perusal of all the evidence in the case the Court is satisfied as to a certain state of facts, is not a sufficient judgment within the meaning of the law, and we are bound to interfere if we feel that there may have been a miscarriage of justice by the Court's failure to weigh all the evidence before it." A bare perusal of the Record of Rights throws grave suspicion on the case made by the plaintiff and in my opinion the lower Appellate Court should have dealt with the matter. I may appropriate the words of Jenkins, C. J., in the case of *Pertap Narain Singh* v. *Maigh Lall Singha* (2) and cited by Mr. Justice Mullick in the case to which I have just referred and say that the matter was deserving of a far fuller discussion than the learned District Judge has bestowed upon it. In my opinion there has been an error of procedure by the failure of the lower Appellate Court to weigh all the evidence and to come to a satisfactory conclusion on the evidence before it. I would, therefore, remand the cases to

(1) 38 Ind. Cas, 509; 2 P. L. J. 8; 1 P. L. W. 188; (1917) Pat. 308.

(2) 2 Ind. Cas. 656; 13 C. W. N. 949 at p. 961; 36 C. 927.

the lower Appellate Court in order that there may be a proper trial of the issues raised.

It is necessary to mention another matter which has been brought to my notice by Mr. Ram Lal Dutt. It appears that the appellant asked the lower Appellate Court to take in evidence certain papers which according to the appellant were in fact produced by the plaintiffs-respondents before the Court of first instance. The learned District Judge does not seem to have dealt with that application. In dealing with this case on remand, I direct that the lower Appellate Court do dispose of that application according to law. It must be distinctly understood that the discretion of the lower Appellate Court in the disposal of that application remains wholly unfettered. All that I say and direct is that it should exercise his discretion in the matter.

In the result I allow the appeals and set aside the decrees of the lower Appellate Court and remand both the cases to the lower Appellate Court for disposal according to law. Costs will abide the result.

Appeals allowed;
Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3258 OF 1910.

April 24, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Raja BAIKUNTH NATH DE AND OTHERS—DEFENDANTS—APPELLANTS

versus

BENODE BEHARI DE—PLAINTIFF—RESPONDENT.

Specific performance—Tender of greater amount asking for execution of contract different from original agreement, validity of.

The plaintiff entered into a contract with the defendant under which the defendant undertook to convey to the plaintiff one-sixteenth share of a Zemindari on the tender by the plaintiff of one-sixteenth of a certain sum. The plaintiff tendered one-eighth part of that sum and wanted a conveyance of one-eighth part of the Zemindari:

Held, that although a tender of a greater amount includes a smaller amount, yet as the plaintiff who made the tender called upon the defendant to perform a contract different from the real agreement between them, the defendant was not bound to accept the tender. [p. 14, col. 2.]

Appeal against the decision of the Subordinate Judge, Cuttack, dated the 15th August 1910, affirming that of the Munsif Cuttack, dated the 21st September 1908.

Babu *Provas Chandra Mitter*, for the Appellants.

Babus *Mahendra Nath Ray* and *Manmatha Nath Roy*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants in a suit for specific performance of a contract of sale of immoveable property. On the 19th January 1891, the respondents transferred to the appellants one-half share in a Zemindari for a consideration of Rs. 9,000. On the 21st January 1891, the purchasers entered into an agreement with the vendors under which they undertook to re-convey the property on these terms:

"Whenever you or your heirs shall, within a period of 31 years from the date hereof, pay in any year one anna price out of the price stipulated above, we and our heirs and representatives shall, at the end of every such year, convey to you and your heirs, by a registered deed of sale, at your cost, the share in the said Zemindari proportionate to the price paid out of the aforesaid Kismat Zemindari purchased by us from you; and in this manner, we shall convey to you by means of deeds of sale one anna shares of the Zemindari on payment of the price of such one-anna shares of the Zemindari. Except at the close of a year, in no other times, we shall accept money or execute the deed of sale. If you or your heirs pay the price after entering into a contract for sale to any other person or for transferring the same by any other means, we and our heirs and representatives shall not convey to you and your heirs."

The case for the plaintiffs is that, on their behalf, a tender was made of one-eighth of the sum of Rs. 9,000, together with costs, to the defendants, but that the latter unlawfully refused to accept the money and to execute a conveyance in respect of one-eighth share of the Zemindari. The plaintiffs accordingly prayed for specific performance of the contract stated. The Courts below have made a decree in favour of the plaintiffs. That

decree has been assailed before us, on this ground amongst others, namely, that as the tender was not valid in law, the plaintiffs have not an enforceable right to claim specific performance of the contract. It has been contended that upon a true construction of the agreement, the plaintiffs were entitled to tender, at the end of any year, only one-sixteenth of Rs. 9,000, neither more nor less, and to claim a reconveyance of one-sixteenth of the Zemindari originally transferred by them to the defendants. It has been argued on behalf of the plaintiffs-respondents, on the other hand, that they were entitled to tender one-eighth of Rs. 9,000 and claim re-conveyance of one-eighth share of the Zemindari transferred to the defendants. In our opinion the construction put by the plaintiffs is erroneous and is not borne out by the language of the instrument.

It cannot be disputed indeed, it has not been disputed, that the opening sentence of the paragraph already set out provides for payment in any year of one anna share of the price stipulated, that is, one-sixteenth of Rs. 9,000. The clause then lays down that upon tender of this sum, the purchasers would re-transfer the share in the Zemindari proportionate to the amount so paid. This obviously signifies that upon payment of one sixteenth of Rs. 9,000, one sixteenth of the share which had been transferred, namely, one-sixteenth of the half share of the Zemindari, would be re transferred to the original owners. It has been contended that this view is contradicted by the next sentence, and that what was intended was that one-sixteenth of the entire Zemindari, that is one-eighth of the half share, should be re-conveyed upon tender of the proportionate price. This argument is obviously fallacious. In the first place, the purchasers had acquired an interest in one half share of the Zemindari. It was that share alone which they were competent to re-transfer and there is no reason why reference should be made to the other half share of the Zemindari of which they were not the owners and with which they were not competent to deal. In the second place, there is no reason why the second sentence should be so construed as to contradict what precedes. The governing part of the clause provides that the plaintiffs are at liberty in any one year to pay one-sixteenth of Rs. 9,000, neither more nor less; upon payment so made, all that they can reasonably demand is a re conveyance of the proportionate share of the Zemindari. In this view it is clear that they tendered more than they were entitled to offer and they claimed re-conveyance of a share in excess of what they were entitled to claim. The refusal of the defendants to accept their offer was consequently fully justified. It need not be disputed that, as observed by Ashurst, J., in *Douglas* v. *Patrick* (1), "there is no doubt that a tender of the greater includes the smaller": *Dean* v. *James* (2). But the real difficulty of the plaintiffs is that they called upon the defendants to perform a contract different from the real agreement between them, they have adhered to it in this suit up to the very last stage, and, they cannot consequently now turn round, accept the defendants' version of the contract and claim performance thereof.

We may add that a question was raised before us as to the application of the rule against perpetuities to the agreement for re-conveyance. In the view we take of the rights of the parties as they stand in the present litigation, it is not necessary for us to express any opinion upon this interesting question.

The result is that this appeal is allowed and the suit dismissed with costs in all the Courts.

Appeal allowed; Suit dismissed.

(1) (1790) 3 T. R. 683; 1 R. R. 793; 100 E. R. 802.
(2) (1833) 4 B. & Ad. 546; 1 N. & M. 303; 2 L. J. K. B. 94; 110 E. R. 561.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 82 OF 1917.

May 13, 1919.

Present:—Sir George Knox, KT., Acting Chief Justice, and Justice Sir P. C. Banerji, KT.

HOTI LAL—DEFENDANT—APPELLANT

versus

CHUTTAN LAL—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901*), ss.* 33, 34, *applicability of—Tenant agreeing to pay rent at certain rate, position of.*

Section 34 of the Agra Tenancy Act applies only where a person is in possession as a tenant without the consent of the landlord.

Where a tenant agrees to pay rent at a certain rate, he is not in possession of his holding without the landlord's consent, and section 34 of the Agra Tenancy Act has, therefore, no application to his case. He is liable to pay the rent agreed upon by him under section 33 of the Act.

Appeal, under section 10 of the Letters Patent, from a judgment of Mr. Justice Walsh, dated the 18th June 1917.

Dr. *S. N. Sen*, for the Appellant.

Messrs. *S. C. Chaudhri* and *P. L. Banerjee*' for the Respondent.

JUDGMENT.—An elaborate argument has been addressed to us in support of the appellant. We think the case may be decided upon a short and simple ground. The suit was not one either in form or in substance for determination of the rate of rent. The plaintiff clearly claimed arrears of rent at the rate mentioned in the plaint and he did so under section 33 of the Agra Tenancy Act. The original holding of 55 *bighas* had been determined by proceedings for ejectment of the defendant from that holding. The plaintiff actually dispossessed the defendant from a large portion of the holding but as the land now in question was covered by rose plants the defendant was allowed to remain in possession first for the purpose of determining the compensation to be paid to him and subsequently as a tenant of that part of the holding. The defendant, who owned a share in the village, brought a suit against the present plaintiff for his share of profits. In that suit a question was raised whether the land in respect of which rent is now claimed was held by the defendant as *khudkasht* or as a tenant. The matter was referred to arbitration and the

arbitrator held that he held the land as a tenant, the rent being Rs. 105 a year. Both parties accepted the award. So that it may be taken that they agreed that the land now in question should be held by the defendant as a tenant, he agreeing to pay a rent of Rs. 105 a year. This was the finding of the Court of first instance and that Court rightly decreed the plaintiff's claim. The lower Appellate Court no doubt went into the question of the application of section 34 of the Tenancy Act to the present case. That section had nothing to do with the case, inasmuch as the defendant was not in possession as tenant without the consent of the plaintiff. We think that it must be taken, as the first Court found, that the parties agreed that the defendant should hold this land at a rent of Rs. 105 a year. Therefore under section 33 of the Tenancy Act he was liable to pay rent at that rate and the decree passed against him was, in our opinion, right and equitable. Section 35 on which the learned Advocate for the appellant relied, has no application to the present case. The original tenancy of 55 *bighas* came to an end and a new tenancy was created. We accordingly dismiss the appeal with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1269 TO 1280 OF 1917.

April 14, 1919.

Present:—Mr. Justice Das.

KALI CHARAN ROY AND OTHERS —DEFENDANTS—APPELLANTS

versus

Maharaja Bahadur KESHO PRASAD SINGH—PLAINTIFF—RESPONDENT.

Court Fees Act (VII of 1870*), s.* 7 (ii), (iv) (c)—*"Other sums payable periodically", meaning of—Suit for assessment of rent and for recovery of specific sums of money as damages for use and occupation, nature of—Court-fees payable—Interpretation of Statutes—Fiscal Statutes.*

KALI CHARAN ROY *v.* KESHO PRASAD SINGH.

In construing a Statute the general rule is that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. Consequently, in construing section 7, clause (*ii*), of the Court Fees Act the expression "other sums payable periodically" must be limited by the specific words that precede it. [p. 18, col. 1.]

A fiscal enactment should, as far as possible, be construed in favour of the subject, and the construction most beneficial to the subject should be adopted. [p. 18, col. 2.]

A suit for assessment of rent and for recovery of a specific sum of money as damages for use and occupation is in the nature of a suit to obtain a declaratory decree where consequential relief is claimed, and the amount of Court-fees payable on such a suit should be computed according to clause (*iv*) (*c*) of section 7 of the Court Fees Act. [p. 18, col. 2.]

Appeals from a decision of the District Judge, Shahabad.

FACTS.—The plaintiff is the landlord and the defendants are his tenants. The lands in dispute were recorded in the Survey Khatian as '*kabil lagan*.' The plaintiff brought the present suits for assessment of rent at the rate of Rs. 14 per *bigha*, or at such fair and equitable rate which the Court might think proper. He further prayed for recovery of a specific amount as damages for use and occupation in previous years. The defendants pleaded, amongst other grounds, that the lands in dispute were portions of their fixed rate holdings and as such no rent was payable. The Court of first instance overruled the pleadings of the defendants, assessed the lands at the rate of Rs. 10-2 0 per *bigha* and decreed the plaintiff's claim for rent of the previous years at that rate. The defendants appealed to the District Judge. They paid Court fees on the amount of rent decreed against them. The learned District Judge, being of opinion that the defendants should have paid Court-fees on ten times the annual rental decreed against them under section 7 (*ii*) of the Court Fees Act, rejected the memorandum of appeal as being insufficiently stamped. Against this order the defendants preferred second appeal to the High Court. In the High Court also they paid the same amount of Court-fees as they had paid in the Court of Appeal below. The Stamp Reporter, being of opinion that the defendants should have paid Court-fees in accordance with the provision of section 7 (*ii*) of the Court Fees Act, reported that the memorandum of appeal to the High Court was insufficiently stamped. The matter was in due course referred to the Hon'ble Mr. Justice Roe, Taxing Judge, who on 14th of August 1917 made the following order:—

"The Court-fee to be paid in this case seems to me to be leviable only on the amount actually claimed. The decision as to what is payable for the years in suit is *res judicata* only so far as the years in suit are concerned. The fact that there is a presumption under the Bengal Tenancy Act that the rent payable for any one year is the amount payable for the next year in the case and, therefore, payable for all time, unless a change is proved, would not affect the Court-fee to be paid on the suit as brought. The suit as brought is for the recovery of a sum of money. Incidentally there will be a decision as to what sum is annually due, and incidentally there will be a declaration of what is a fair rent. But these are incidents of the case, and not the real cause of action.

"Section 7, clause (*ii*), certainly does not apply. That clause is intended to cover cases in which the decision will make the defendant liable for all times without any further adjudication. Decrees obtained in such cases are capable of execution from year to year. The decree to be obtained in in this case will be capable of execution only for the amount decreed."

The memorandum of appeal being thus held to be sufficiently stamped, the appeal was registered, and was placed for final disposal before the Hon'ble Mr. Justice Das.

Mr. *Parmeshwar Dayal*, for the Appellants, contended that the memorandum of appeal in the Court below was sufficiently stamped. The suit was for recovery of a fixed amount of rent by way of damages. The declaration as to what was a fair and equitable rent was merely an incidental fact to be determined for the disposal of the case. The declaration as to the annual rate of rent was a mere incident and not the real cause of action. Thus the amount of Court-fees payable was *ad valorem* on the amount claimed under section 7 (*i*) of the Court Fees Act. Section 7 (*ii*) of the Court Fees Act did not at all apply to the facts of

the case. This clause was intended to cover a case where the plaintiff wanted to establish his claim to a certain sum of money payable periodically in the nature of maintenance or annuities. In such a case when a decree is made in favour of the plaintiff, he is entitled to recover the sum so decreed periodically from the defendant without further adjudication, by executing the decree. In the present case the plaintiff decree-holder could execute his decree only to the extent of the specific sum decreed in his favour.

There is one other clause of the Court Fees Act which may possibly apply to the present case. Section 7 (*iv*) (*c*) provides for a case where the plaintiff seeks to obtain a declaratory decree with a consequential relief. In the present case the defendants sought for a declaration that the lands in question were portions of their fixed-rate holdings and were not liable to be assessed with any rent and as a consequence they submitted that they were not liable to the amount decreed against them by the Court of first instance. In this view they were bound to pay Court-fees on the consequential relief only.

Thus whether the case fell under clause (*i*) or clause (*iv*) (*c*) of section 7, the Court-fee paid by the defendant on their memorandum of appeal in the Court below was sufficient.

Mr. *Krishna Sahai* (with him Mr. *Nirsu Narayan Sinha*), for the Respondent, submitted that the case fell under section 7 (*ii*) of the Court Fees Act. The assessment of annual rent was one of the substantial reliefs claimed by the plaintiff in his plaint and as such it was a suit for adjudication of the plaintiff's right to a "sum of money payable periodically" within the meaning of clause (*ii*) of the section. Clause (*i*) or (*iv*) (*c*) had no application to the case.

JUDGMENT.—These analogous appeals come before me from an order of the District Judge of Shahabad rejecting the appellants' appeals to that Court on the ground that proper Court-fees were not paid by the appellants, and the only question which I have to determine is, did the appellants pay proper Court fees on their appeals to that Court?

The appellants were the defendants in the actions which were for assessment of rent and for recovery of specific sums of money as damages for use and occupation of the land. The learned Munsif who heard the suits held that Rs. 10 2 0, besides cess, per *bigha* would be a fair and equitable rent for the holdings in suit. In the result, the learned Munsif made a declaration to that effect and gave the plaintiff a decree for damages calculated at Rs. 10-2 0 per *bigha* for six years from 1317 to 1322.

The tenants defendants preferred appeals to the Court of the District Judge at Shahabad. They paid Court-fees on the amount decreed against them under section 7, clause (*iv*) (*c*), of the Court Fees Act. The learned District Judge, however, was of opinion that section 7, clause (*ii*), of the Court Fees Act applied and called upon the appellants to pay the proper Court fees on the principle enunciated in that clause. The appellants took time to pay, but ultimately they were unable to comply with the order. The District Judge thereupon rejected their appeals.

It seems to me that the plaintiff's suits were suits "to obtain declaratory decrees or orders where consequential reliefs are prayed" and that *prima facie* section 7, clause (*iv*) (*c*), would apply, but it is argued that the suits were suits for a sum payable periodically, and that, therefore, section 7, clause (*ii*), would apply.

Section 7, clause (*ii*), runs as follows:—"In suits for maintenance and annuities or other sums payable periodically, according to the value of the subject-matter of the suit, and such value shall be deemed to be ten times the amount claimed to be payable for one year." It is urged on behalf of the appellants that the suits were substantially suits for assessment of rent which would be payable periodically and that, therefore, the learned District Judge was right in asking the appellants to pay according to the principle laid down in section 7, clause (*ii*). The critical question for my determination, therefore, is, what effect must be given to the words "or other sums payable periodically" which immediately follow the words "In suits for maintenance and annuities."

It will be noticed that I have to construe certain general words which follow particular

and specific words. Clearly, the suits were suits neither for maintenance nor for annuities. Were they suits for other sums payable periodically ?

"I accede to the principle", said Lord Campbell in *R.* v. *Edmundson* (1), "laid down in all the cases which have been cited, that, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified." In *Ashbury Railway Carriage and Iron Company* v. *Riche* (2) a question arose as to the meaning of the words "general contractors." "Upon all ordinary principles of construction", said Lord Cairns, "these words must be referred to the part of the sentence which immediately precedes them.....therefore.....the term 'general contractors' would be referred to that which goes immediately before, and would indicate the making generally of contracts connected with the business of Mechanical Engineers." In the same case Lord Chelmsford said: "It seems to me that the generality of the expression is limited by its association with the previous words 'Mechanical Engineers' and it ought to be confined to contracts connected with that business."

It seems to me that we must apply this rule of *ejusdem generis* for the purpose of construing section 7, clause (*ii*) of the Indian Court Fees Act, for it is difficult to conceive why the Legislature should have taken the trouble to specify in this section certain classes of suits, which undoubtedly are suits for sums payable periodically, except to limit the generality of the expression that follows and to indicate that the general words must be confined to things of the same kind as those specified.

In my opinion, the generality of the expression "other sums payable periodically" must be limited by the specific words that precede, and, when so limited, section 7, clause (*ii*) would read as follows :—"In suits for maintenance and annuities or other sums of the same kind payable periodically.....".

Now, can it be said that a sum of money payable as rent is of the same kind as a sum of money payable as maintenance or annuity ? I think not, and, therefore, I must hold that the Court fees paid by the appellants under section 7, clause (*iv*) (*e*), of the Act were sufficient.

In this connection it is necessary to remember that a series of cases of the highest authority have repeatedly laid down that fiscal enactments should, as far as possible, be construed in favour of the subject, and that, in cases of a doubt, the construction most beneficial to the subject is to be adopted.

I allow these appeals and remand the cases to the lower Appellate Court to be disposed of according to law.

The respondent must pay the costs of these appeals. The costs incurred in the Courts below will abide the result and will be disposed of by the lower Appellate Court.

The appellant is entitled to a certificate authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal to this Court

Appeals allowed; *Cases remanded.*

(1) (1859) 28 L. J. M. C. 213; 2 El. & El. 77; 5 Jur. (N. S.) 1351; 7 W. R. 565; 8 Cox C. C. 212; 33 L. T. (O. S. 237, 119 R. R. 631; 121 E. R. 30.

(2) (1875) 7 H. L. 653; 44 L. J. Ex. 185; 33 L. T. 451; 24 W. R. 794.

BOMBAY HIGH COURT.

CROSS-APPEALS NOS. 43 AND 113 OF 1917.

August 8, 1918.

Present:—Mr. Justice Heaton and Mr. Justice Hayward.

MIRKHA IMAMKHA—DEFENDANT No. 2—APPELLANT

versus

BHAGIRATHI MAHADEV ABHYANKAR AND OTHERS—RESPONDENTS.

AND

BHAGIRATHI MAHADEV ABHYANKAR—PLAINTIFF—APPELLANT

versus

ROSHANBI MAHOMED HANIF AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Decree against some of several heirs of deceased—Sale in execution of decree—Heirs not made parties to suit, whether bound by sale—Representation—Administration suit—Suit by creditor to recover debt, nature of.

A money decree was obtained against the estate of a deceased Muhammadan in a suit by a creditor in which the widow and the step-mother of the deceased were impleaded as defendants. The daughter of the deceased who was his principal heir was not made a party to the suit. In execution of the decree the right, title and interest of the deceased in a house belonging to him was sold;

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar

MIRKHA IMAMKHA v. BHAGIRATHI MAHADEV ABHYANKAR.

Held, that the daughter of the deceased not having been made a party to the suit, her interest in the house was not affected by the decree and did not pass under the sale. [p. 21, col. 1; p. 22, cols. 1 & 2.]

A suit by a creditor to establish a single debt against the estate of a deceased person cannot be treated as an administration suit. [p. 20, col. 1; p. 24, col. 1.]

Per *Heaton, J.*—There cannot be a valid sale under a decree unless the property sold can properly be sold under the decree. [p. 19, col. 2.]

Appeals from the decision of the Additional first Class Subordinate Judge, Poona, in Suit No. 344 of 1911.

Mr. *G. S. Rao*, for the Appellant.

Mr. *J. R. Gharpure*, for Respondent No. 4.

JUDGMENT.

HEATON, J.—The facts which we have had to master in the consideration of these appeals are complicated, but for the purpose of Appeal No. 113 of 1917 they may be simply stated: A Mahomedan named Mainaba died possessed of five houses, leaving as his heirs a son, two widows and three daughters. The son Mahomed Hanif died afterwards leaving as his heirs a daughter Aminabi, his widow Roshanbi and a son who was afterwards held to be illegitimate and not to be an heir. A money decree was obtained against the estate of Mahomed Hanif in a suit by a creditor in which the defendants were that deceased person's widow Roshanbi, and his step-mother Sakinabi and the son Abdul. His daughter Aminabi, who was really his principal heir, was not made a party to the suit. Thereafter one of the five houses known as No. 371 was sold in execution of the decree and bought by defendant No. 4. What was sold was the right, title and interest of Mahomed Hanif deceased. The plaintiff has become, by processes which it is immaterial at present to set out, the owner of whatever interest Aminabi had in this house. She sued *inter alia* to recover by partition Aminabi's share and her claim in this particular was rejected. She now appeals to us.

She claims that Aminabi's interest in the house was not bound by the decree obtained by the creditor, because Aminabi was not made a defendant in the creditor's suit and that consequently her interest in the house did not pass to the auction-purchaser, defendant No. 4. The latter contends, firstly, that Aminabi's share in the house could be sold under the decree, for the decree was against the estate of her deceased father from whom she inherited her interest in the house; and, secondly, in any event, that Aminabi's interest in the house passed at the sale; for what was sold and what was paid for was the father's interest. If the decree was such that Aminabi's interest could be sold under it, then undoubtedly that interest was sold, for it was included in the father's interest the whole of which was sold.

If her interest in the house was not bound by the decree, nevertheless as it was in fact sold, it is contended that it would pass to the purchaser, defendant No. 4. This contention, however, we think, has nothing substantial to support it. There cannot be a valid sale under a decree unless the property sold can properly be sold under the decree.

Let us consider the real question: whether the creditor's decree would bind the interest of Aminabi who was not made a defendant. If we consider this question in a purely general way ignoring all questions of Hindu or of Muhammadan Law, the answer must, I think, be that the decree would not bind Aminabi's interest. She was just as much concerned in the matter as the other defendants, in fact more so, for her share in the property was larger. She could not be bound by the decree unless she was in some way properly represented and as a fact she was not represented. She was indeed definitely and explicitly excluded. For the creditor had brought an earlier suit to which Aminabi was a defendant, but the claim as against her was dropped, though against the others and as to them only it was withdrawn with leave to bring another suit.

But even if this had not happened, the decree would not be operative against Aminabi's interest. It could not be if she was not represented; and she would not be represented in such a suit to which she was not a party, apart from the peculiarities of Hindu or Muhammadan Law; except on the somewhat curious theory that a creditor's suit, such as this, is in effect an administration suit by a creditor. I do not think it is, although there are Calcutta decisions favouring this

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view: *Muttyjan* v. *Ahmed Ally* (1), followed in *Amir Dulhin* v. *Baij Nath Singh* (2). It seems to me to be a mistake in terms to call a suit by a creditor to establish a single debt against the estate of a deceased person a creditor's administration suit. Neither the proceedings nor the decree were appropriate to an administration suit. There was a difference in substance as well as in form. Chandavarkar, J., saw a great difference between such suits as will appear from the observations at the end of his judgment in *Bai Meherbai* v. *Maganchand* (3).

It may at first sight appear that the law is unreasonable, if it will not allow a creditor to establish a debt against the estate of a deceased debtor without making all the heirs defendants, for some or most of the heirs may be in distant countries and it may be impossible to obtain a decree within a reasonable time if all are to be made parties. But this view of the law is, I am glad to think, fallacious. The creditor can compel one of the heirs on the spot to take out Letters of Administration or failing that can take out such Letters himself, a proceeding which can be accomplished within a reasonable time although many of the heirs may be living in distant parts of the world. But if a creditor ignores the Probate and Administration Act and elects to bring an ordinary suit, he must be content with the law applicable to ordinary suits. That is both just and reasonable in my opinion.

Does the fact that the deceased debtor was a Mahomedan make any difference? There cannot, of course, be any appeal to Hindu Law in this case, for we are concerned only with the ordinary law or with the Muhammadan Law. The point is fully and clearly dealt with in paragraph 161 of Sir Roland Wilson's Digest of Anglo, Muhammadan Law, 3rd Edition, and in paragraphs 566 and 567 of F. B. Tyabji's Principles of Muhammadan Law.

I shall unhesitatingly accept Sir Roland Wilson's conclusions and follow the Allahabad decisions if it be open to us to do so. But is it open to us? Are we not bound by the Bombay decisions referred to in Sir Roland Wilson's discussion of the law?

The two Bombay cases referred to by Sir Roland Wilson are *Khurshetbibi* v. *Keso Vinayek* (4) and *Davalava* v. *Bhimaji Dhondo* (5). The former judgment in its reasoning deals exclusively with the sale, not with the decree, it does not pronounce whether the decree would bind an heir who was not made a defendant; it finds that the auction-purchaser bought a certain interest in property and was, therefore, entitled to that interest. In the second case the decision was to the same effect: there had been a sale under a decree and the matter decided was rather what the auction-purchaser had bought than what was the effect of the decree. But in any event the later case is no authority; not only because the point decided is the effect of the sale, not of the decree, but also because the reasons given by the two Judges are different. Jardine, J., seems to have had doubts as to applying to Mahomedans a rule evolved from Hindu Law and he contented himself with relying on and following the case of *Khurshetbibi* v. *Keso Vinayek* (4). We are, therefore, thrown back on that case as the one which stands in the way of giving effect to what we believe to be the law.

Broadly speaking, only the parties to a suit are bound by a decree and consequently only their property can be sold under the decree. But to this general rule there is an apparent exception in the case of Hindus. It has become by now well established that the whole of a Hindu family property is in certain circumstances liable to be sold in execution of a decree to which all the sharers are not parties. This is an exception to the general law and appears to be based on some principle of representation which is evolved from a consideration of the law applicable to joint Hindu families. This exception is neither stated nor explained in the case of *Khurshetbibi* v. *Keso Vinayek* (4), it is simply assumed; so we have to look elsewhere for the explanation. We need

(1) 8 C. 379; 10 C. L. R 346; 4 Ind. Dec. (N. s.) 237.
(2) 21 C. 311; 10 Ind. Dec. (N. s.) 839.
(3) 29 B. 90; 6 Bom. L. R. 853.
(4) 12 B. 101; 6 Ind. Dec. (N. s.) 553.
(5) 20 B. 338; 10 Ind. Dec. (N. s.) 787.

not go very far. In the case of *Akoba Dada* v. *Sakharam* (6), Sir Charles Sargent, the same learned Judge who gave judgment in *Khurshetbibi's case* (4), said as follows:—

"These cases doubtless establish that when the minor son is substantially before the Court, and the proceedings show a clear intention on the part of the Court making the decree to bind the entire estate which is subject to the debt, no mere technical or formal objection will be allowed to prevail against giving full effect to the decree."

Again in the case of *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (7) the Judges of the Privy Council observed:

"Their Lordships have, therefore, come to the conclusion that although there may have been some irregularity in drawing up these decrees, they are substantially decrees in respect of a joint debt of the family and against the representative of the family."

Then in the case of *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (8), the earliest of all the cases, the liability of a Hindu under a decree to which he was not a party is illustrated by the analogy of a suit against an executor. Underlying all these cases is the idea of substantial representation and the idea arises out of the peculiarities of the Hindu joint family where the property is family property, not individual property; and where the representation is to be of the family, not of individuals. It is clearly essential, therefore, in these cases to ascertain first of all whether the person, whose property is sold under a decree but who was not a party to the decree, was substantially represented in the suit. In this case we know that Aminabi was not substantially represented; she was specifically excluded. That consideration alone would, in this case, demand that the appeal be allowed and that it be held that Aminabi's share in the house could not and did not pass by the sale. But many hours of our time have been spent on the question whether the exception to the general law, which we are considering, applies to Mahomedans as well as to Hindus. Why should it? No reason whatever is given in *Khurshetbibi's case* (4) and none that appeals to us in Mr. Justice Ranade's judgment in *Davalava's case* (5). Indeed there is apparently no Bombay case in which the matter is discussed, except in *Davalava's case* (5) and in that case Jardine, J., does not say a word on the point and Ranade, J., gives reasons which, as I have said, do not appeal to us.

The truth seems to be that a rule derived from Hindu Law was applied to Mahomedans without the reasons being stated. Quite recently a Full Bench of this Court sat to consider a very remarkable instance of this practice of applying Hindu Law to Mahomedans. My learned brother and myself have considered the matter most carefully and have come to the conclusion that it would not be incumbent on us to follow the case of *Khurshetbibi* v. *Keso Vinayek* (4), if that case be held to affirm that the theory of substantial representation derived from the Hindu Law applies to Mahomedans. For, to follow that case if it so decides, would be to accept, without any stated reason for doing so, the application to Mahomedans of a rule evolved out of Hindu Law; and to do this would, we think, be to set aside the principle underlying the decision of the Full Bench of this Court in *Isap Ahmad Mograria* v. *Abhramji Ahmadji Mograria* (9).

The plaintiff sued for mesne profits from the date of suit and should have such profits, which must be determined in execution.

We have heard the cross-objections of defendant No. 1 and find there is no substance in them. We dismiss them with costs.

We allow the Appeal No. 113 of 1917 with costs against defendant No. 4. The decree will have to be modified so as to allow plaintiff to obtain on partition Aminabi's share in house No. 371 and to award plaintiff mesne profits from date of suit in respect of that share from defendant No. 4.

In Appeal No. 43 of 1917 the defendant No. 2 is the appellant. He has a mortgage from Sakinabi, one of the widows of Mainaba and the step-mother of Mahomed

(6) 9 B. 429 at p. 431; 10 Ind. Jur. 67; 5 Ind. Dec. (N. S.) 284.
(7) 6 I. A. 233 at p. 237; 5 C. L. R. 477 (P. C.).
(8) Marsh. 614.

(9) 41 Ind. Cas 761; 19 Bom. L. R. 579; 41 B. 588 (F. B.)

Hanif. This mortgage-deed has not been put in evidence, but it appears that defendant No. 2 is in possession of the ground floor of house No. 529 and he desires that directions should be given that in making the partition the ground floor of house No. 529 should, if possible, be allowed to Sakinabi's share. The desire is natural, but the request is one to be presented and considered when the partition comes to be made. Only the person who makes the partition, knowing the value of the total estate and the value of each house separately and also knowing something of the convenience and wishes of the sharers, can make an equitable and fair partition. The matter is not one for us to pronounce on in appeal, for it has not yet been dealt with by the appropriate authority. But we think defendant No. 2 should not be made liable for plaintiff's costs: that would be most unfair. The decree of the lower Court must be modified by providing that defendant No. 2 is to pay only his own costs. We make no order as to costs in this appeal.

HAYWARD, J.—The plaintiff sued as purchaser to recover possession by partition of Aminabi's share in house No. 371 in Poona City, being part of the estate of Aminabi's deceased father, Mahomed Hanif. The defendant No. 4 resisted the suit as the purchaser of the whole house at a Court-sale of the estate of the deceased Mahomed Hanif.

It was not disputed that Aminabi was not personally represented in the litigation leading to the Court sale but it was contended that her share was bound, as it was in the possession of Roshanbi and was sufficiently represented in the litigation by Roshanbi, the widow of the deceased Mahomed Hanif. This contention was upheld on the strength of the decision in the case of *Davalava* v. *Bhimaji* (5) by the trial Court. The substantial questions for determination on this first appeal are whether that decision ought to be regarded as binding and, if not, whether it was right. It seems to me that it ought not to be regarded as binding, as the two learned Judges did not agree on the *ratio decidendi*, which is alone binding according to the authorities underlying paragraph 535 of Volume XVIII of Halsbury's Laws of England; and, with all deference, that it was wrong in that it applied without justification a rule founded on the peculiar nature of the joint family of Hindus to the heirs of a deceased Mahomedan.

It was held by Sir Barnes Peacock in the case of *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (8) that a Court-sale was binding on the minor son of a Hindu, based upon a decree obtained against the widow as representing the estate of the deceased Hindu. This was approved by the Privy Council in the case of *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (7) and it was said that it was necessary to look to the substance of the proceedings in Court-sales relating to the estates of deceased Hindus. This principle of representation was subsequently applied by their Lordships in the case of *Daulat Ram* v. *Mehr Chand* (10) to the transactions of the managing members of joint families of Hindus and it has been regarded ever since as a settled rule governing the joint families of Hindus, as would appear from paragraphs 320 and 333 at pages 425 and 443 of the 8th Edition of Mayne's Hindu Law. It was acted upon by Sir Charles Sargent in the case of *Jairam Bajabashet* v. *Joma Kondia* (11), where the minor sons of a deceased Hindu were not allowed to dispute the sale of the family property under a decree against the elder son for a debt of the deceased Hindu, and it was extended by the same learned Judge in the case of *Khurshetbibi* v. *Keso Vinayek* (4) to the heir of a deceased Mahomedan. There the daughter was held bound by a sale under a decree against the son of the deceased Mahomedan. This could not be regarded as a binding authority, as no reasons were given for extending the rule of the joint family of Hindus to the heirs of deceased Mahomedans. No reference was made to the rules of Muhammadan Law nor to the provisions of Regulation IV of 1827 requiring Muhammadan Law to be applied to Mahomedans in default of Acts of the Legislature. It was, moreover, not applied by the same learned Judge several

(10) 14 I. A. 187; 1 P. R. 1888 (P. C.); 15 C. 70; 5 Sar. P. C. J. 84; 11 Ind. Jur. 435; 7 Ind. Dec. (N. S.) 632.

(11) 11 B. 361; 11 Ind. Jur. 427; 6 Ind. Dec. (N. S.) 236.

years later to the case of *Ambashankar Harprasad* v. *Sayad Ali Rasul* (12). It was, however, relied on again, without reasons being stated, by Jardine, J., in the case under immediate consideration, namely, *Davaluva* v. *Bhimaji Dhondo* (5). Ranade, J., on the other hand dealt in detail with the matter but his reasons, though entitled to respect, could not be regarded as binding in default of the approval of the second Judge. He discussed at length the rule governing the joint families of Hindus and then proceeded (page 345) to state that there was no foundation for the contention that the rule was based on the peculiar constitution of a Hindu joint family and that the analogy did not hold good in the case of Mahomedans. His authority for this somewhat startling statement was an *obiter dictum* in the case of *Hukeem Bibee* v. *Khaiah Gowhur Ali* (13), cited in *Assumathen Nessa Bibee* v. *Roy Lutchmeeput Singh* (14), and the extension of the rule without express reasons in the case already mentioned of *Khurshetbibi* v. *Keso Vinayek* (4). He stated further that the creditor could seek his relief against one of several heirs in a case where all the effects might be in the hands of that heir, as the succession was of the kind known as universal and any one of the heirs of a deceased person stood as litigant on behalf of all the others. He relied for this statement on the dissentient judgment of Markby, J., in the Full Bench case of *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh* (14). Markby, J., there held that the heirs in possession merely *represented* the estate, which devolved upon them with all its rights and liabilities by universal succession, and that the estate did not *vest* in all the heirs immediately as owners (pages 157 to 159), relying on the rules of procedure contained in the Hedaya for the disposal of the estate of a deceased Mahomedan. But this view was not adopted by the majority of the Judges of the Full Bench and it was expressly dissented from by Mahmood, J., as being based upon mere rules of procedure superseded by the Civil Procedure Code, in his exhaustive judgment in the later case of *Jafri Begam* v. *Amir Muhammad Khan* (15) before the Full Bench of the Allahabad High Court; and the results of the investigation of Mahmood, J., were accepted in the case of *Amir Dulhin* v. *Baij Nath Singh* (2) by a subsequent Bench of the Calcutta High Court. There would appear, therefore, to have been but slender foundations in the authorities to support the proposition put forward by Ranade, J., in the case under immediate consideration, namely, *Davalava* v. *Bhimaji Dhondo* (5), that the particular rule governing the transactions of managing members of joint families of Hindus ought to be extended by analogy to the case of Mahomedans. It was again expressly denied that such extension was permissible in the later case of *Pathummabi* v. *Vittil Ammachabi* (16) before the Madras High Court; it was said (page 738) on the authority of *Davalava* v. *Bhimaji* (5) that the creditors could seek relief against the heirs in possession of the whole estate under the Muhammadan Law. But this later *dictum* also was shown to be untenable in the judgment of Abdur Rahim, J., in the subsequent case of *Abdul Majeeth* v. *Krishnamachariar* (17) before the Full Bench of the Madras High Court. It seems to me, therefore, with all deference, that the proposition propounded by Ranade, J., extending the rule of representation governing the joint families of Hindus to the heirs of deceased Mahomedans ought, upon the authorities, to be rejected, as directly contrary to the spirit of the provisions of Regulation IV of 1827; and that the rules of the Hedaya providing for the representation by the heirs in possession of the estate of a deceased Mahomedan ought to be disregarded, as mere rules of procedure superseded by the Civil Procedure Code, as pointed out by Mahmood, J., in *Jafri Begam* v. *Amir Muhammad Khan* (15) before the Full Bench of the Allahabad High Court and approved in the case of *Amir Dulhin* v. *Baij Nath Singh* (2) by the Calcutta High Court and in the judgment of Abdur Rahim, J., in the case of *Abdul Majeeth* v. *Krishnamachariar*

(12) 19 B. 273; 10 Ind. Dec. (N. S.) 185.
(13) 5 Wym. 27.
(14) 4 C. 142 at p. 164; 2 C. L. R. 223 (F. B.); 1 Shome L. R. 219; 2 Ind. Dec. (N. S.) 92.
(15) 7 A. 822; A. W. N. (1885) 248; 4 Ind. Dec. (N. S.) 636.
(16) 28 M. 734 at p. 787.
(17) 40 Ind. Cas. 210; 40 M. 243 at pp. 255, 257 (F. B.); 32 M. L. J. 195; (1917) M. W. N. 346; 5 L. W. 767.

(17) before the Full Bench of the Madras High Court.

It remains only to notice an alternative theory adopted in the case of *Muttyjan* v. *Ahmed Ally* (1) by the Calcutta High Court, that creditors' suits against the heirs in possession should be regarded as administration suits binding on all the heirs of a deceased Mahomedan. It was considered and rejected by Mahmood, J., in the case of *Jafri Begam* v. *Amir Muhammad Khan* (15) before the Allahabad High Court, but was re-asserted in the case of *Amir Dulhin* v. *Baij Nath Singh* (2) by a subsequent Bench of the Calcutta High Court. It seems to me, with all deference, that mere creditors' suits would be altogether different, as pointed out by Mahmood, J. They would be solely on behalf of those particular creditors and not on behalf of all creditors as contemplated by the form of plaint No. 41 in Appendix A, and by the form of preliminary decree requiring public notice to all interested, No. 17 (13) in Appendix D, of Schedule 1, of the Civil Procedure Code. Nor would they result in the satisfaction of all persons interested and the final distribution of the estate as provided in the form of final decree No. 18 in Appendix D and in Order XX, rule 13, of the 1st Schedule of the Civil Procedure Code. It seems to me, moreover, that there would be no necessity for regarding them as anything but what they really would be or for adopting the admittedly inexact analogy of administration suits; for there would be nothing to prevent their being brought, if desired, in the proper form and ample remedy for any practical inconvenience has already been provided in sections 23 and 69 of the Probate and Administration Act, 1881, by the Legislature. The defendant No. 4 ought not, therefore, in my opinion, to be permitted to succeed either on this ground. He would not be entitled to succeed on the special rule as to representation by managers of joint families of Hindus as already shown and, as it seems to me, further indicated by the remarks of their Lordships in the case of *Khiaraimal* v. *Daim* (18) before the Privy Council. Nor would he be entitled, as already shown, to appeal to any similar rule of representation under the Muhammadan Law in order to escape the general rule there applied (page 312) that the property of parties not properly represented on the record could not validly be sold by the Court. The discussion by their Lordships of the supposed powers of *de facto* guardians in the most recent case of *Imambandi* v. *Mutsaddi* (19) supports, it seems to me, the view that no such rule of representation could be pleaded under Muhammadan Law in aid of an invalid sale by the Court. This case would appear not yet to have been reported. It was only decided on the 28th February 1918 by the Privy Council.

This appeal ought, therefore, in my opinion, to be allowed. The cross-objections of respondent No. 1 ought to be dismissed with costs. The appeal of respondent No. 2 ought to be dismissed with costs. Possession by partition of the particular house in dispute with mesne profits and costs ought to be allowed against respondent No. 4.

Appeal No. 113, *allowed*;
Appeal No. 43, *dismissed*.

(18) 32 C. 296; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C. W. N. 201 (P. C.); 2 A. L. J. 71.

(19) 47 Ind. Cas. 513; 45 I. A. 73; 20 Bom. L. R. 1022; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 45 C. 878; (1918) M. W. N. 91.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS PETITION No. 15 OF 1916.

February 28, 1917.

Present:—Mr. Mittra, A. J. C.

Musammat MANGLA GOURI—APPLICANT

versus

SAMSON SHALOM AND OTHERS—NON-APPL'CANTS.

Vendor and purchaser—Sale effected with object of conferring power to contest suit—Consideration, payment of, conditional on success—Transaction, nature of—Endorsement, unregistered, on sale-deed purporting to re convey property, effect of—Probate and Administration Act (V of 1881), s. 50—Revocation of Probate—Notice, absence of, whether "just cause".

Where a sale-deed is executed with the object of conferring upon the vendee the power of contesting a suit and the payment of consideration is made conditional on the success of the suit, the transaction cannot be called a nominal transaction. [p. 26, col. 1.]

MANGLA GOURI *v.* SAMSON SHALOM.

Where a real sale has taken place, an unregistered endorsement on the back of the sale-deed does not operate to re-convey the title to the vendor. [p. 26, col. 1.]

Where in an application for revocation of Probate on the ground of absence of notice, it appeared that the applicant, though not cited, had parted with her interest by sale and was represented in the Probate proceedings by her vendee :

Held, that, apart from the fact that by reason of the sale the applicant had parted with her interest in the estate, the mere absence of notice was not "just cause" within the meaning of section 50 of the Probate and Administration Act for holding that the Probate proceedings were defective in substance and liable to be set aside. [p. 26, col. 2.]

Dr. *H. S. Gour* and Mr. *W. H. Dhabe*, for the Applicant.

The Hon'ble Mr. *M. R. Dixit*, for the Non-Applicants.

JUDGMENT.—This an application for revocation of the grant of Probate of the Will of *Musammat* Parbati Bai, dated 20th October 1912. The applicant is a co-widow of *Musammat* Parbati Bai. It is no longer disputed that the applicant is so related to the deceased and that she would be entitled to the estate of Parbati Bai in case of intestacy. One of the executors under the Will applied for a Probate to this Court on the 3rd October 1914. An order for Probate was passed on the 4th January 1916 and Probate was actually granted on the 21st January 1916. The present application was filed on the 29th March 1916. It is an admitted fact that the applicant, although she should have received special citation, did not receive it. The Probate proceedings were strongly contested by one Ramrao, who has been examined as applicant's witness No. 2. On the 20th May 1915 there was a registered sale-deed purporting to convey the applicant's interest in the estate of Parbati to the said Ramrao for an ostensible consideration of Rs. 10,000. This document recites that some litigation is going on in regard to the estate of *Musammat* Parbati. The applicant's case is that she was not aware of the Probate proceedings and that the sale deed was a nominal transaction not intended to be acted upon, and was a bogus deed.

Although I have framed several issues in the case, most of them can be disposed of in a few words. On the first issue I find that the applicant is the widow of Balwantrao and as such an heir of Parbati. On the third issue I find that she was entitled to a notice of the Probate proceedings. On the fifth issue I find that the consideration for the sale deed in favour of Ramrao was not paid. I shall now proceed to discuss the evidence relating to the remaining issues.

The learned Counsel for the applicant in his argument urges that the document was an escrow and that there was a condition precedent that the sale deed was to operate only upon payment of consideration. In the written statement drafted by himself the case set out was that it was a bogus transaction. The necessity for a nominal sale has not been explained to me. There is very little doubt that the sale was a real sale, and that the consideration was to be paid if the proceedings which were then pending terminated successfully in favour of the vendee. Ramrao clearly says that he was advised by his Barrister Mr. Abhyanker that he should get a document from the applicant, as if she turned up and set up a claim his own case would be hopelese. In cross examination he admits: "If I succeeded in that litigation, then I would have paid the money. If I failed the document was to be returned." Later on he says: "Ramrao, *i.e.*, the brother of the applicant, agreed to the terms which I proposed, namely, that I would pay the money if I was successful but not otherwise." The applicant has no explanation to give as to why she entered into this transaction. Rewashanker, witness No. 3, in examination in-chief says that the document was a bogus transaction. He again adds that Mangla Gowri's brother Ramrao wrote to him that he should get back the document or take the money, that is, Rs. 10,000. He further says that he advised her to admit receipt of consideration before the Sub-Registrar because she might get Rs. 10,000. Later on the witness says that he believed that the money would be paid in a few months,otherwise the deed would be bogus. Ramrao, brother of the applicant, makes a significant statement that the amount put down for consideration was Rs. 10,000 because Ramrao, the vendee, refused to write more.

A similar document was taken from Mahipatrai, who was examined on commission. He says that he was paid Rs. 500 and

the balance of Rs. 10,000 would be paid to him in case of success.

There is not the least doubt in my mind that the sale was a real sale meant to be operative, but the consideration of Rs. 10,000 was to be paid contingent upon success in the litigation for which Ramrao took the document. The object of the transaction was, to use the words of the learned Counsel for the applicant, to confer on Ramrao the power of contesting the suit. Such a document cannot be called a nominal transaction. The applicant would have been undoubtedly entitled to the money if the proceedings had terminated in favour of Ramrao.

There is an unregistered endorsement on the back of the sale-deed purporting to bear the date 29th July 1915. The evidence in support of it is that of Ramrao and Rewashanker. Ramrao no doubt denies what was suggested by the non-applicants, namely, that this endorsement was made after the decision of this Court in the Probate proceedings. I accept the non-applicants' theory that this endorsement was made after the Probate proceedings terminated in order to enable the applicant to move this Court. If the object of Ramrao was to have a *locus standi* in the contest when advised by his Counsel to take the sale-deed, it appears highly improbable that he parted with the sale-deed without consulting his Counsel as he now says, when only a few witnesses had been examined in the Probate proceedings and it was absolutely impossible to say on the 29th July 1915 how that case would have terminated. Such an endorsement can be easily made at any time and I do not believe in the two witnesses who swear to it. Moreover on my finding that there was a real sale, an unregistered endorsement on the back of the sale-deed cannot re-convey the title to the applicant. She is, therefore, not entitled to move the Court.

In this case there is no just cause within the meaning of section 50 of the Probate and Administration Act for holding that the proceedings to obtain the grant were defective in substance. Although the applicant was not cited, she was represented in that litigation by Ramrao, her vendee, and she had no interest left after the sale-deed. A re-conveyance subsequently made after the Probate proceedings even if by a registered instrument, would not give her *locus standi* to move the Court, no more than a sale-deed by Ramrao in favour of a third party. These findings are sufficient to put the applicant out of Court. I think, however, that she was fully aware of the proceedings. Great reliance is placed on her behalf on the recitals in the sale-deed, which speak of some litigation where there is a dispute as to the right of inheritance and ownership of the estate of *Musammat* Parbati. It is indeed very difficult for a petition writer or for men of the status of Ramrao and Rewashanker to describe in vernacular the Probate proceedings. I have no doubt that the recitals refer to to the Probate proceedings, for Ramrao says that he was advised by his Counsel who was appearing for him only in the Probate proceedings to obtain the sale-deed. It was argued before me that his Counsel might have advised him before his engagement in the Probate proceedings and before the Probate proceedings were started. If that had been so, it was clearly the duty of the applicant's Pleader to have cleared that up in re-examination, but this was not done. The applicant herself pretends not to know anything about the transaction, nor does she know what litigation is referred to. Her brother Ramrao says that Gokle and Ramrao had verbally told him that they carried on litigation about the *badas* of Benares and two villages of Nagpur. I do not believe this story. The vendee Ramrao has a similar story to tell us. None of the litigation suggested was of any importance, being only mutation proceedings. The certified copies of these proceedings have not been filed and I am strongly inclined to think that the litigation referred to in the document is the Probate proceedings then going on. I hold, therefore, the applicant had notice of the Probate proceedings and that she had parted with her interest in the property by a conveyance in favour of Ramrao. She can, therefore, no longer show any just cause for setting aside the proceedings which were fought out by Ramrao. The mere absence of notice is not necessarily a just cause within the meaning of section 50 as would appear from a consideration of the following cases: *Pitambar*

v. *Girdhar* (1), *Nistarany* v. *Brahmomoyi* (2) and *Dwijendra* v. *Golok Nath* (3).

The application is, therefore, dismissed with costs. I fix Rs. 200 as Pleader's fees.

Application dismissed.

(1) 5 B. 538; 3 Ind. Dec. (N. s.) 420.
(2) 18 C. 45; 9 Ind. Dec. (N. s.) 31.
(3) 28 Ind. Cas. 574; 19 C. W. N. 747; 21 C. L. J. 287.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1299 TO 1303 OF 1917.

April 4, 1919.

Present:—Mr. Justice Das.

JUGAL KISHORE SAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHAMBHU NATH PANDE—PLAINTIFF AND RAM PARTAP MISSER—*Pro forma* DEFENDANT—RESPONDENTS.

Chota Nagpur Tenancy Act (VI of 1908), ss. 26, 27—Occupancy tenant—Contract as to enhancement of rent, validity of.

The language of section 27 of the Chota Nagpur Tenancy Act is very peremptory and leaves no scope whatever for any agreement between the parties. [p. 28, col. 2.]

A *kabuliyat* executed by an occupancy tenant to pay enhanced rent is illegal and is not binding upon the tenant under section 27 of the Chota Nagpur Tenancy Act. [p. 28, col. 2.]

Appeals from a decision of the Judicial Commissioner, Manbhum.

Mr. *Mirtunjay Lal*, for the Appellants.

Mr. *Sushil Kumar Mitter*, for the Respondents.

JUDGMENT.—These analogous appeals come before me from the judgment of the Judicial Commissioner of Manbhum and arise out of suits brought by the respondent against the appellants for recovery of rent on the basis of Kabuliyats executed by the tenants in favour of the landlord. It appears that the entire Mouza in which these tenants hold land as occupancy tenants, was sold in execution of a rent decree obtained by the Zemindar against the Mokarraridar and was purchased by Mr. G. P. Cooke. Subsequently Mr. Cooke sold his interest to the plaintiff. The plaintiff's case is that the result of the auction sale was to put an end to all the tenancies as encumbrances affecting the land and that he became entitled to evict the tenants, including the appellants before me, from the land but that he offered to enter into settlements with them on new terms and conditions, which offer was accepted by the tenants. He now brings his suit for recovery of rent on the basis of the Kabuliyats alleged to have been voluntarily executed by the tenants in favour of the plaintiff. The tenants contest this suit on two grounds. Firstly, they say that these Kabuliyats were procured from them by coercion and undue influence exercised on them by the plaintiff; secondly, they say that having regard to the provisions of sections 26 and 27 of the Chota Nagpur Tenancy Act the plaintiff is not entitled to receive rent at the rate stipulated in the Kabuliyats. The lower Appellate Court has come to a conclusion favourable to the plaintiff on both these points.

The tenants appeal and on their behalf it has been argued before me that these Kabuliyats were in fact procured by coercion and undue influence and, therefore, they are not binding on the tenants. I do not propose to come to a definite finding on this point, because in my opinion the appellants are entitled to succeed on the next point urged on their behalf, namely, having regard to the provisions of sections 26 and 27 of the Chota Nagpur Tenancy Act the plaintiff is not entitled to recover rent at the stipulated rate. The provisions of sections 26 and 27 of the Chota Nagpur Tenancy Act are very definite and clear, but it has been argued before me by the learned Vakil appearing on behalf of the respondent that at the time when these Kabuliyats were executed by the tenants, the law was not perfectly clear, or at any rate doubtful on the question whether the purchaser of a tenure sold for non-payment of rent due to the superior landlord was not by virtue of section 16 of the Rent Recovery Act entitled to annul the occupancy tenancies on the land as encumbrances affecting the land. His point is that at any rate the position was not free from doubt and difficulty. He had a fair chance of establishing in a Court of law that he was entitled to evict the tenants; the tenants appreciated their own difficulty in the matter and voluntarily executed the Kabuliyats. He says that the arrangement amounted to a fresh settlement of land with his tenants. The argument is a subtle one, but in my opinion it does not deserve success. The

question was debated in the case of *Bama Charan Gosain* v. *Ram Kanai Dubey* (1) and it was there pointed out that from the days of 11 Weekly Reporter it has been consistently held that the occupancy tenants are by the express provision of section 16 protected from eviction. The only one case that has struck a different note is that of *Jogeshwar Mazumdar* v. *Abed Mohamad Sirkar* (2), but that was a case decided under Regulation VIII of 1890 and not under Act of 1865. Having considered section 16 of Act VIII of 1865 myself, I agree with the learned Judges who decided the case of *Bama Charan Gosain* v. *Ram Kanai Dubey* (1) that the occupancy tenants are so protected and that it has been so held certainly from 1-69. That being so, at the date of the Kabuliyats these tenants were undoubtedly occupancy Ryots and there was undoubtedly a subsisting relationship of landlord and tenant between the plaintiff and them. In my opinion the enhancement of rent could only be under the provisions of sections 26 and 27 of the Chota Nagpur Tenancy Act. The learned Judicial Commissioner relies upon the case of *Bata Mandal* v. *Maharaja Manindra Chandra Nandi Bahadur* (3) for his conclusion that sections 26 and 27 of the Chota Nagpur Tenancy Act only apply where there is a real contract for enhancement, and not where there is a *bona fide* dispute between the parties. The case reported as *Bata Mandal* v. *Mahara a Manindra Chandra Nandi Bahadur* (3) was decided with reference not to sections 26 and 27 of the Chota Nagpur Tenancy Act, but to section 29 of the Bengal Tenancy Act and it is to be noted that the learned Judges who decided that case did so very reluctantly and only because they thought they were compelled to do so having regard to the course of the decisions on the subject. So far as sections 26 and 27 of the Chota Nagpur Tenancy Act are concerned, we are not embarrassed by a course of decisions, and are at liberty to decide according to the plain meaning of the section. But apart from this consideration, there is in my opinion a difference in principle between section 29 of the Bengal Tenancy Act and sections 26 and 27 of the Chota Nagpur Tenancy Act. It is to be noted that the language of section 27 is very peremptory and, in my opinion, leaves no scope whatever for any agreement between the parties. It is expressed both in the positive and negative form. It says that the rent of an occupancy Ryot whose rent is liable to enhancement may be enhanced only by order of the Deputy Commissioner passed under section 29 and then in order, as I understand, to emphasise the position, it declares in the negative form that no enhancement of such rent made after the commencement of this Act in any manner other than that referred to in clause (*a*) or clause (*b*), as the case may be, whether by private contract or otherwise, shall for any reason be recognized or given effect to in any suit or proceeding in any Court.

In my opinion the judgment of the learned Judicial Commissioner is erroneous and I would, therefore, allow all these appeals with costs here and in the Courts below.

Appeals allowed.

(1) 28 Ind. Cas. 374; 19 C. W. N. 858.
(2) 3 C. W. N 13.
(3) 25 Ind. Cas. 829; 19 C. W. N. 321; 21 C. L. J. 325.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 33 OF 1918.

January 13, 1919.

Present:—Mr. Mittra, A. J. C., and Mr. Prideaux, A. J. C.

RATANCHAND PARWAR—
PLAINTIFF—APPELLANT

versus

SHEOCHARAN AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Mortgage of ancestral property by father—Antecedent debt—Mortgagee, rights of, during father's lifetime.

In the case of a mortgage by a Hindu father of ancestral property to satisfy antecedent debts, the mortgagee is entitled, during the father's lifetime, to proceed against the entire family property including the son's shares. In this connection, there is no difference between a sale and a mortgage, both are binding on the sons, if effected for satisfying an antecedent debt. [p. 30, col. 2.]

Appeal against the decree of the District Judge, Chhindwara, in Civil Suit No. 7 of 1917, decided on the 5th January 1918,

JUDGMENT.—This appeal arises out of a suit on a mortgage executed on the 24th August 1910 for Rs. 4,000 (four thousand). The lower Court has passed a decree against the adult executants and has dismissed the suit as against the three defendants, who were minors at the date of the mortgage by their father. The property is admittedly ancestral property in which the minor sons had an interest by birth. The lower Court has found that there was no family necessity for the mortgage and has, following the recent Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* (1), released the share of the three minor sons. In this appeal the mortgagee seeks to enforce the mortgage against their interest. The finding of the lower Court that there was no legal necessity for the mortgage is not disputed before us, except in respect of an item of Rs. 800 (eight hundred). It is, however, contended that out of the consideration, Rs. 3,200 (three thousand two hundred) formed antecedent debts of the father within the meaning of the Privy Council decision.

On behalf of the respondents it is urged that although some of the items making up Rs. 3,200(three thousand two hundred)might be regarded as antecedent debts of the father, the mortgagee is not entitled to enforce the mortgage during the father's lifetime against the interest of the minor sons. The argument is that the sons' obligation to pay an antecedent debt of their father arises out of a pious duty which, it is contended, cannot be enforced in the lifetime of the father. The following passage in *Sahu Ram Chandra* v. *Bhup Singh* (1) is relied upon:—

"While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail."

Reliance is also placed upon the following passages from the judgment of Sir John Stanley, C. J., in the case of *Chandradeo Singh* v. *Mata Prasad* (2) cited with approval by their Lordships of the Privy Council at page 446:*—

"The first of these propositions, it will be observed, deals with cases where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family, and with no other cases, and the words antecedent debt seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons."

The respondents also argue that the word "alienation" means a sale in the following *dictum* of Lord Hobhouse in *Nanomi Babuasin* v. *Modhun Mohun* (3) cited in *Sahu Ram Chandra* v. *Bhup Singh* (1) at page 447†

"Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have, for some time, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

It is contended that as the liability of the family estate for the antecedent debt of the father is an exception to the general rule of Hindu Law, this liability should be restricted to the case where the father sells the property or where a sale upon a mortgage has actually taken place and the property has passed out of the family.

We think the position contended for by the respondents is untenable. In the Allahabad Full Bench case Stanley, C. J., at page 190† says:—

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 139; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(2) 1 Ind. Cas. 479 (F. B.); 31 A. 176; 6 A. L. J. 263.

(3) 13 C. 21 (P. C.); 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar P. C. J. 682; 6 Ind. Dec. (N. S.) 510.

*Page of 39 A.—*Ed.*

†Page of 31 A.—*Ed.*

"It is obvious that no distinction can be drawn between alienation by out and out sale and alienation by mortgage. A mortgage is a sale *sub modo*. The word 'alienation' frequently met with in the text books and judgments embraces both sale and mortgage."

What was held in that case was that a mortgage, in the absence of family necessity, is only binding where it is executed to satisfy an antecedent debt of the father, and this has been the view taken in this Court in *Hira Ram* v. *Udhe Ram* (4): see also *Dilli Singh* v. *Bina* (5).

The observations of their Lordships in *Sahu Ram Chandra* v. *Bhup Singh* (1) at page 444* relied upon relate to the question how far payment of the father's debt can be enforced against the sons and grandsons in his lifetime. This question is not before us. We have to decide whether the mortgage binds the sons' interest. Their Lordships laid down:—

"Responsibility to meet the father's debts is one thing and the validity of a mortgage over the joint estate is quite another thing".

There are sufficient indications in this judgment, which was meant to be a guide to the settlement of the conflict of authority in India on the subject of antecedent debt. The following passage at page 447* clearly negatives the contention put forward on behalf of the respondents: —

"In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property."

We think no distinction can be made as suggested between a sale and a mortgage. Both are binding on the son, if effected for satisfying an antecedent debt. In the case of the mortgage the Court sells what the father was at liberty himself to do, that is, the entire family estate. The following passage at page 447* from the same judgment also makes it clear that no such distinction can be properly made:—

"In short, it may be said that the rule of this part of the Mitakshara Law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes *for it* nor can he obtain money for his own purposes *upon it*."

We have, therefore, come to the conclusion that if family necessity is proved in respect of Rs. 800 (eight hundred), then the mortgage to that extent would be binding. Similarly, if any portion of the remaining Rs. 3,200 (three thousand two hundred) can properly be called an antecedent debt within the meaning of the recent ruling, then the mortgage would be binding on the entire estate to that extent, and can be enforced in the lifetime of the father.

It is contended that the bond for Rs. 400 (four hundred) dated the 6th August was not properly speaking an antecedent debt. In support of this reference is made to the evidence of the plaintiff's agent P. W. No. 1, who says that when Sheocharan, that is, the father, borrowed Rs. 400 (four hundred) on a bond he said that he required Rs. 4,000 (four thousand). This amount of Rs. 400 (four hundred) was paid off on the 24th August 1910 when the mortgage was executed. It seems to us that the sum of Rs. 400 (four hundred) was advanced upon an understanding that it was part of the larger sum of Rs. 4,000 (four thousand) to be advanced upon a mortgage and was accordingly paid in anticipation of the mortgage a few days before its execution. Such a debt is not an antecedent debt as defined by the Privy Council. The respondents' contention succeeds as regards the bond of Rs. 400 (four hundred).

Sheocharan's brother Lachman had filed a suit for partition and obtained a decree for his half share. So far as that decree directed the payment of costs and money,

(4) 19 Ind. Cas. 861; 9 N. L. R. 74.
(5) 44 Ind. Cas. 506; 14 N. L. R. 41.

*Pages of 39 A.—*Ed.*

no objection has been taken on behalf of the respondents. The partition decree, however, directed the delivery of some cattle and grain, or their value Rs. 1,195 (one thousand one hundred and ninety-five). The respondents object to this item of Rs. 1,195 (one thousand one hundred and ninety five) and contend that this was not an antecedent debt of the father. The partition decree proceeded upon the footing that the grain and cattle were existing assets of the family. The creditor has given no evidence why it became necessary to borrow money rather than deliver the moveable property mentioned in the decree. Sheocharan as a witness does not give any explanation either, nor does he say whether he actually paid the money or delivered the moveable property In the absence of any such explanation there is no prcof that there was an antecedent debt, though there was an antecedent obligation to deliver moveable property. The obligation became a debt if Sheocharan, after borrowing money from the plaintiff, decided not to deliver specific property but to pay its value: in other words, it became a debt subsequent to the payment of the money by the creditor. The objection, therefore, also succeeds with regard to the value of moveable property, Rs. 1,195 (one thousand one hundred and ninety-five).

The sum of Rs. 800 (eight hundred) was kept in deposit in the plaintiff's shop. All that the plaintiff knows is that Sheocharan paid about Rs. 400 (four hundred) to Abdul Razak, P. W. No. 6, and a similar amount to Richpal, P. W. No. 7. This was said to be for the purposes of subsequent purchase of cattle and grain. These men are entirely uncorroborated and their evidence conflicts with the recitals in the mortgage deed, which are to the effect that the entire consideration was required to meet existing liabilities. There is nothing to show that it was necessary to buy cattle and grain in the month of September. The partition decree tends to show that the family had ample supply of both cattle and grain. We agree, therefore, with the lower Court that family necessity for Rs. 800 (eight hundred) has not been proved.

The result is that the appeal partially succeeds. The decree of the lower Court will be modified by showing that the entire family estate is liable for Rs. 1,605 (one thousand six hundred and five) together with interest thereon, total Rs. 4,950 (four thousand nine hundred and fifty). This amount as well as the amount decreed by the lower Court against the other defendants will carry interest at six per cent. per annum from the date fixed for redemption by the lower Court till realisation. Costs in proportion.

Appeal partly allowed.

PATNA HIGH COURT.
SECOND CIVIL APPEALS NOS. 1086 TO 1090 OF 1917.
April 14, 1919.
Present:—Mr. Justice Das.
Babu SAT NARAYAN SINGH AND OTHERS —PLAINTIFFS—APPELLANTS
versus
ANANT PROSAD AND OTHERS—DEFENDANTS --RESPONDENTS.

Co-sharer—Tenant inducted into land by one co-sharer—Right of other co-sharers to sue for compensation for use and occupation.

A co-sharer landlord is not entitled to recover compensation for use and occupation from a tenant inducted into the land by another co-sharer landlord.

Appeal from a decision of the Subordinate Judge, Monghyr, dated the 12th September 1917, reversing that of the Munsif, Begusarai, dated the 21st December 1916.

Mr. *Siva Narain Bose*, for the Appellants.

Messrs. *Abani Bhusan Mukherjee*, *Siva Nandan Roy* and *Mahomed Hasan Jan*, for the Respondents.

JUDGMENT.—The point which I have to determine in this appeal is whether a co-sharer landlord is entitled to recover compensation for use and occupation from a tenant inducted into the land by another co sharer landlord. The appellant is the two annas proprietor of a certain *mahal*, of which the Indigo Concern at Manjhowl is also a proprietor to the extent of 3 pies share therein. The lower Appellate Court says that the Factory let out the lands to the defendants at a time when the plaintiff had acquired no right. This is

wrong, as the sale certificate produced by the plaintiff shows. We may take it, therefore, that the Factory settled the land with the defendants without the consent of the plaintiff, although the Factory had only a 3 pies share in the *mahal*. The problem that I have to consider is, what is the plaintiff's remedy.

Now the plaintiff's suit is not a suit against his co-owner, the Factory, for compensation for the exclusive use of the joint land according to the plaintiff's share in such land. It is not a suit for the ejectment of the defendants or for joint possession with the defendants on the ground that so far as the plaintiff's share is concerned, the Factory was not entitled to induct tenants against the will of the plaintiff. As I read the plaint, the suit is a suit against the tenants for compensation for the use and occupation of his share of the land.

In England it is well established that it is not trespass for one co-owner to use the common property in the natural and necessary course of use or enjoyment. See *Job* v. *Potton* (1). In the case of *Jacobs* v. *Sewards* (2) the point was investigated with great care and precision by Lord Hatherly who, in the course of his speech, said: "The cases in which trover would lie against a tenant in common are reducible to this. They are cases in which something has been done which has destroyed the common property, or where there has been a direct and positive exclusion of the co tenant in common from the common property, he seeking to exercise his rights therein, and being denied the exercise of such rights .....As long as the tenant-in-common is confining the use of that property to its legitimate purpose trover will not lie against him. But the moment he steps from the legitimate use to that which is illegitimate,...trover will lie."

This principle of English Law is founded on the doctrine that the act of one tenant in common is considered in law as the act of all the tenants in common, and this because the occupation (as is said in Co. Litt. 189a) is undivided. So strict was the rule at common law that before the Statute of Anne, the other tenants in common could not charge the tenant in common who had received the profits as bailiff, though in equity a co-owner who had received the profits was always bound to account at the suit of the others. See *Strelly* v. *Winson* (3).

We may, therefore, take it as settled law in England that, if the land is agricultural land, one co-owner would be entitled to enter upon the land and to use the common property in the natural and necessary course of use or occupation without subjecting himself to an action in trespass by the other co-owners, the only restrictions upon him being that he may not appropriate to himself more than his share. But would he be entitled to induct tenants upon the land who would, no doubt, use the common property for agricultural purpose? The case of *Wilkinson* v. *Haygarth* (4), which no doubt was decided on a question of special pleading, certainly suggests that he would be so entitled. Coleridge, J., said in that case: "It must be admitted on the part of the plaintiff that the tenant" (meaning thereby a tenant in common) "might license the doing of whatever he might do himself." The point was expressly decided in the case of *Job* v. *Potton* (1), and I think it was decided by implication in the case of *Jacobs* v. *Sewards* (2). I cannot see on what ground it may be said that though a co owner may himself enter the land and use it in the natural and necessary course of use or occupation, he cannot induct a tenant on the land for the purpose of using the land in the natural and necessary course of use or occupation. The test in either case is, to what use has the common property been put? If it is used in good husbandry for the proper cultivation of the land, not in denial of the title of the other co-tenants but with the object of making a profit out of the land, the other co-owners would appear to have no right to maintain an action in trespass either against the co-owners or against a third party who by leave and license of the co-owner is carrying on agricultural operation on the land.

(1) (1875) 20 Eq. 84; 44 L. J. Ch. 262; 32 L. T. 110.
(2) (1872) 5 H. L. 484; 27 L. T. 185; 41 L. J. C. P. 221.
(3) 1 Vern. 297; 23 E. R. 480.
(4) (1847) 12 Q. B. 837; 116 E. R. 1085; 16 L. J. Q. B. 103; 11 Jur. 104.

The question as to the right of the co-owners as between themselves was debated in the leading case of *Watson & Co.* v. *Ramchund Dutt* (5). The Judicial Committee in that case for the first time laid down the law as follows:—"It seems to their Lordships that if there be two or more tenants in common, and one *A* be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common *B* attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which *A* is engaged and the profitable use by him of the said part, and *A* resists and prevents such entry, not in denial of *B*'s title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of *A* would not entitle *B* to a decree for joint possession." In the result, their Lordships granted *B* a decree for compensation for the exclusive use of the joint land by *A* according to *B*'s share in the joint land. The principle of the decision was again affirmed by the Judicial Committee in the case of *Lachmeswar Singh* v. *Manowar Hossein* (6). From the principle enunciated in these cases to the principle that when one co-sharer landlord in possession of common land leases it out to a tenant who improves it without any objection on the part of the other co sharer landlords, it is not open to the latter to obtain *khas* possession of the land so improved jointly with the tenant, was but a step and that step was taken in the case of *Madan Mohun Shaha* v. *Rajab Ali* (7). But it was held in the case of *Radha Proshad Wasti* v. *Esuf* (8) that "No man has a right to intrude upon *ijmali* property against the will of the co sharers or of any of them. If he does so, he may be ejected without notice, either altogether, if all the co-sharers join in the suit, or partially, if only some of the co-sharers wish to eject him, and the legal means by which such a partial ejectment is effected, is by giving the plaintiffs possession of their shares jointly with the intruder."

At first sight it would seem as if this case is in conflict with the principle which I have deduced from the English cases and upon which, in my opinion, the case of *Watson & Co.* v. *Ramchund Dutt* (5) was decided. But there is in fact no conflict when the cases are closely examined. A co-owner of agricultural land has the right to enter the land or authorise somebody else to enter the land, not in denial of the rights of other co-owners, but in exercise of his own right to cultivate the land. He is entitled to protect himself in the profitable use of the land but, apart from that, he is not entitled to exclude the other co owners from entering the land for the purpose of cultivation. The other co-owners or their tenants are entitled to a decree for joint possession, unless such joint possession interferes with the profitable use of the land by the co-owners first in the field or unless the co-owner of his tenant has improved the land without any objection on the part of the other co-owners. The principles which I deduce from the cases are the following:—

(*a*) It is not trespass for one co-owner *A* either by himself or by his tenants to use the common property in the natural and necessary course of use or enjoyment. The remedy of the other co owner *B* is to sue *A*, but not his tenants, for compensation according to his share, for the exclusive use of the common property by *A*.

(*b*) *A* is entitled to protect himself in the profitable use of the land as to which he is accountable to *B*, but he is not entitled to exclude *B* or his tenants from entering the land and carrying on agricultural operations in a way consistent with the continuance of the joint ownership and possession.

(*c*) As a necessary corollary, *B* or his tenants is or are entitled to maintain a suit for joint possession either with *A* or his tenants, unless such joint possession interferes with the profitable use of the

(5) 18 C. 10 (P. C.); 17 I. A. 110; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. S.) 7.
(6) 19 C. 253 (P. C.); 19 I. A. 48; 6 Sar. P. C. J. 133; 9 Ind. Dec. (N. S.) 614.
(7) 28 C. 223.
(8) 7 C. 414; 9 C. L. R. 76; 3 Ind. Dec. (N. S.) 816.

land by *A* or unless *A* or his tenants has or have improved the land to the knowledge of and without any objection by *B*.

In the case before me, the plaintiff does not ask for a decree for joint possession, nor does he seek to recover compensation according to his share from the Factory for the exclusive use of the land by the Factory. In my opinion these were the only remedies open to the plaintiff, unless indeed he chose to recognise the defendant as his tenant, in which case he could maintain an action for rent against the defendant. In my opinion, an action for compensation does not lie against the defendant. An action for compensation is an action in tort and in every action in tort the plaintiff must allege a right in himself which, according to him, has been infringed, and a corresponding duty on the defendant, which duty has been broken. There is, in my opinion, no duty cast on the defendant to pay compensation to the plaintiff, but there is undoubtedly a duty cast on the Factory to account to the plaintiff for the profits made by it by settling tenants on the land. It seems to me, therefore, that the plaintiff entirely misconceived his remedy. In my opinion this appeal fails and must be dismissed with costs.

This judgment will govern all the analogous appeals and also Second Appeal No. 1089 of 1917 and the appeal analogous thereto.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2560 AND 2837 OF 1909.

July 16, 1912.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

SUKRAJ ROY—PLAINTIFF—APPELLANT

versus

LAL BAHADUR GOPE—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 30, 52, 105—Rent, enhancement of—Price of staple food crops, rise in—Procedure—Settlement Officer, power of, to decide question—Increase of rent for additional area—Measurement, inaccuracy in, proof of, whether necessary.

A landlord, who claims enhancement of rent on the ground of rise in the average local price of staple food crops during the currency of the existing rent, should have his case decided by the Settlement Officer in a proceeding under section 105 of the Bengal Tenancy Act and should not be driven to a separate suit. [p. 35, col. 1.]

A landlord may be entitled to additional rent under section 52 of the Bengal Tenancy Act, even though he is unable to establish that the previous measurement was accurate and reliable, where it appears that the inaccuracy in the previous measurement was in favour of the landlord and the tenant is found to be in possession of more land than was found in the previous measurement. [p. 35, cols. 1 & 2.]

Appeal against the decision of the District Judge, Bhagalpur, dated the 10th July, 1909, reversing that of the Settlement Officer, Bhagalpur, dated the 15th September 1908.

Babus *Umakali Mukherjee* and *Khetra Mohan Sen*, for the Appellant.

JUDGMENT.—This is an appeal on behalf of the landlord in a proceeding under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rent in respect of the land held by the tenants respondents. The claim was allowed in part by the Settlement Officer. But upon appeal that decision has been reversed by the Special Judge. The landlord assails the decree of the Special Judge substantially on two grounds: namely, *first*, that in so far as he claims enhancement of rent on the ground mentioned in section 30, clause (*b*), of the Bengal Tenancy Act, namely, rise in the average local price of staple food crops during the currency of the existing rent, he should not have been driven to a separate suit; and *secondly*, that additional rent for excess lands should have been allowed under section 52 of the Bengal Tenancy Act, notwithstanding the finding that the previous measurement made by the landlord in 1900 was not trustworthy. In our opinion, both these contentions must prevail.

In respect of the first contention, it is difficult to see upon what ground the landlord has been referred to a fresh litigation. Section 105 entitles the landlord to apply for assessment of a fair

and equitable rent in respect of the lands held by the tenants. Sub section 4 provides that in settling rents under the section the Revenue Officer shall presume, until the contrary is proved, that the existing rent is fair and equitable and shall have regard to the rules laid down in the Act for the guidance of the Civil Court in increasing or reducing rents, as the case may be. One of the rules laid down in the Bengal Tenancy Act for enhancement of rent is to be found in section 31B read with section 30, clause (*b*). Consequently this matter must be determined by the Special Judge.

In so far as the second ground is concerned, no doubt under section 52, it is not disputed that the landlord has to establish that there is excess land in respect of which he is entitled to claim additional rent. The landlord must prove that the tenant is, at the time of the claim, in occupation of more land than that for which he has hitherto paid rent. He has, therefore, to establish the quantity of land in the occupation of the tenant at the time of the claim and the quantity in his possession previously. This presumes, no doubt, that the present as well as the previous measurement is accurate and reliable. It is conceivable, however, as is illustrated by the present case, that the landlord may be entitled to additional rent, even though he is unable to establish that the previous measurement is accurate and reliable. In the case before us, the measurement of 1900 was made by what is called the Kamarband system. The Settlement Officer has explained what is meant by the system of measurement. A *russi* is used for measurement and is 20 *cottahs* in length. Each *cottah* is equal to $5\frac{1}{2}$ cubits but one *cottah* at each end of the *russi* is twisted round a man's waist and measurement is made only by 18 *cottahs*, which actually makes 1 *bigha* equal to 16 *cottahs* 4 *dhurs*. This obviously is beneficial to the landlord. He measures with a *russi* which is ostensibly 20 cubits in length; but the one actually employed is only 18 *cottahs* in length. Under this system it would not be difficult to convert the area as determined into the area according to the standard method of measurement. But the Special Judge has pointed out that an inaccuracy is introduced by reason of the practice followed in carrying out the measurement, which is thus described by him: "In writing down the measurements the number of the *lugga* reached is written; that is what is 2 *luggas* on the ground is written 3, what is 3 is written 4 and so on. Lengths and breadths measured on this system are multiplied together in calculating areas and the result obtained reduced to *bighas* and *cottas* by the ordinary calculation, namely, 20 *dhurs* is taken as equivalent to 1 *cottah* and 20 *cottahs* as equivalent to 1 *bigha*." It is obvious that this practice introduces an indeterminate error. The extent of the error depends not upon the area of the plot mentioned but upon the lengths of its sides. Let us take a concrete instance. If a field really measured 3 *by* 4, according to this system, it is taken to be 4 *by* 5; that is, what is 12 becomes, according to this system, 20. On the other hand, a field which is 19 *by* 20, becomes 20 *by* 21; while another field 38 *by* 10, that is, of equal area, becomes 39 *by* 11; in other words 380 becomes 420, in the one case, but 429 in the other. It is thus obvious that the extent of the error is not proportionate to the size of the field, and that even in the case of several fields of equal area, the extent of the error may widely differ; for instance, the error in the case of a field 60 *by* 7 is very different from the error in the case of a field 21 by 20, although the areas of the two fields are identical. Consequently if merely the area of the field as determined according to this inaccurate method is known, we have not sufficient data to determine the correct area. The error, it will be observed, is for the benefit of the landlord. *Prima facie*, therefore, the landlord is not entitled to rely upon this measurement to show that the tenant is in occupation of more lands than that for which he has been paying rent. But the learned Vakil for the landlord appellant has pointed out that he is entitled to excess rent in respect of the difference between the area as indicated in the measurement of 1900 and the area as accurately determined on the present measurement. This is obviously sound. The error in 1900, as we have already explained, has been for the bene-

fit of the landlord. Consequently, if we take the difference between the two figures just mentioned, the advantage will be on the side of the tenant, as he will be assessed with additional rent, on the principle mentioned in sub-section 5 of section 52, only in respect of the excess quantity so determined. Let us take a concrete illustration again: the tenant who really held 12 *bighas* (4 *by* 3) in 1900, was shown in the measurement papers as in possession of 20 *bighas* (5 *by* 4); if he is now in occupation of 25 *bighas*, he will be liable for additional rent in respect of 5 *bighas*; he cannot very well altogether escape payment of additional rent, merely because the measurement of 1900 was inaccurate in favour of the landlord. Consequently the claim under section 52 of the Bengal Tenancy Act ought not to have been entirely negatived.

The result is that this appeal is allowed, the decree of the Special Judge set aside and the case remanded to him in order that these two points may be reconsidered. There will be no order as to the costs of this appeal.

It is conceded that this judgment will govern the other appeal, Second Appeal No. 2837 of 1909, in which a similar order will be drawn up.

Appeals allowed; Cases remanded.

PATNA HIGH COURT.
CIVIL REVISION No. 79 OF 1919.
April 7, 1919.
Present:—Mr. Justice Mullick and
Mr. Justice Jwala Prasad.
Maharaja KESHO PRASAD SINGH—DEFENDANT—PETITIONER
versus
Babu SHIVA SARAN LAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 10, scope of—Matter directly and substantially in issue in two suits—Stay of subsequent suit—Reliefs claimed, difference in, effect of.

In order to attract the operation of section 10 of the Code of Civil Procedure it is necessary that every matter in dispute should be directly and substantially in issue in the two suits. [p. 37, col. 2.]

Where, however, the matters in dispute in both the suits are substantially the same, the mere fact that the relief claimed in the subsequent suit is not identical with the relief claimed in the earlier suit would not operate to enable the parties to continue the litigation. [p. 37, cols. 1 & 2.]

Civil revision from an order of the Subordinate Judge, Shahabad.

Messrs. *P. K. Sen* and *Nirsu Narain Sinha*, for the Petitioner.

Messrs. *S. Sinha*, *Sailendra N. Palit*, *G. D. Singh*, *Raghunath Singh*, *Santa Prasad* and *Sambhu Saran*, for the Opposite Party.

JUDGMENT.

MULLICK, J.—This matter arises out of a suit brought by Babu Shiva Saran Lal against the Maharaja of Dumraon for arrears of pension for the period August 1912 to August 1918. The plaintiff alleges that the pension is due upon an Ekrarnama executed in his favour by the late Maharani of Dumraon.

It appears that another suit claiming pension for an earlier period was decided in the trial Court against the plaintiff but was decreed in his favour on appeal in the High Court. In this suit the present Maharaja of Dumraon repudiated his liability to pay the pension on various grounds. But it was held in the High Court that the liability existed and could be enforced against the property of the Maharani which was in the hands of the Maharaja. Against the judgment and decree of the High Court an appeal is now pending before their Lordships of the Privy Council.

In the present suit it does not appear that any issues have been framed, but an application was made before the trial Court asking that the provisions of section 10 of the Civil Procedure Code of 1908 should be put in force and that the Court should not proceed with the trial of the suit till the judgment of their Lordships of the Privy Council is delivered in the appeal pending before them.

The Subordinate Judge dismissed the application before him on two grounds. The first ground was that the application was premature inasmuch as it could not be said that the trial could commence before any issues were framed and that the proper stage for making an application under section 10, Civil Procedure Code, was after the defendants had disclosed their

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defence and issues had been framed for trial.

The second and more important ground upon which the learned Subordinate Judge proceeded was that section 10 was not applicable, as the claim in the present case related to a period subsequent to the claim in the former case, and the learned Subordinate Judge relied upon the case of *Bepin Behary Mozumdar* v. *Jogendra Chandra Ghosh* (1). In my opinion the decision of the learned Subordinate Judge was correct.

It is conceded by the learned Counsel who appears on behalf of the petitioner that under the provisions of the Code of 1882 unless the same relief had been claimed in the present suit, the Court could not have refused to try it, but he contends that the law has been changed. In this connection it is not necessary to consider the effect of all the changes in section 10 as compared with the corresponding section in the Code of 1882; for our purpose it will be sufficient to consider only the effect of the omission of the words "for the same relief" in the present Code.

In the case of *Balkishan* v. *Kishan Lal* (2) the decision turned upon the words "for the same relief" and the Court was obliged to hold that unless the reliefs were the same, it could not refuse to try the suit even though the matter in issue might be directly and substantially the same. *Balkishan's case* (2) was one relating to Malikana for a period subsequent to that covered by a previous suit which was under appeal and it is contended before us that the present Code has expressly omitted the words "for the same relief" in order to overrule the view previously held and to enable the Court to stay the trial of a subsequent suit if the right or title to relief is under adjudication in a previously instituted suit. In my opinion, the omission of the words "for the same relief" does not necessarily indicate that this was the intention of the Legislature. What the section does intend is that if all the matters in dispute are substantially the same, then the fact that the relief claimed in the subsequent suit is not identical with the relief claimed in the previous suit shall not operate to enable the parties to continue the litigation. This was the view taken by their Lordships of the Calcutta High Court in *Bepin Behary's case* (1) above cited. That was a case for rent for a period subsequent to the period which was the subject-matter of a previous suit under appeal. Their Lordships of the Calcutta Court held that although the question of title was raised in both suits and decided in the first suit, it was not sufficient to attract the operation of section 10. In order to attract the operation of section 10 it was necessary that every matter in dispute should be directly and substantially in issue in the two suits. It is true that in the concluding portion of the judgment there is a passage relating to the decision of an issue which was left open in the suit. But that passage, in my opinion, does not affect the main ground on which the learned Judges declined to apply section 10.

The learned author Mr. Mulla in the last edition of his work on the Civil Procedure Code does give an illustration in the notes which would seem to assist the learned Counsel for the petitioner. But in my opinion it is not supported by any Judicial authority, and is inconsistent with the judgment of their Lordships of the Calcutta High Court.

In my opinion the learned Subordinate Judge was right in dismissing the application before him.

In the view we take it is not necessary to express any opinion on his first ground but if it were necessary to decide the point, my inclination would be to agree with the Subordinate Judge.

The application is dismissed with costs. Hearing fee three gold *mohurs*.

JWALA PRASAD, J.—I agree to the order proposed.

Application dismissed.

(1) 36 Ind. Cas. 641; 24 C. L. J. 514.
(2) 11 A. 148; A. W. N. (1889) 42; 13 Ind. Jur. 309; 6 Ind. Dec. (N. S.) 523.

MAGADHU PILLAI *v.* ASAN MUHAMMADHU.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 795 OF 1918.

January 22, 1919.

Present:—Mr. Justice Phillips and Mr. Justice Krishnan.

MAGADHU PILLAI ROWTHER—DEFENDANT—APPELLANT

versus

ASAN MUHAMMADHU ROWTHER—PLAINTIFF—RESPONDENT.

Jurisdiction, territorial—Contract in Ceylon for execution of othi *deed in British India—Suit for damages in British Indian Court—Certificate of conformity by Ceylon Court, whether valid defence—Parties resident in Ceylon at date of issue of certificate, effect of—Conflict of Laws—Ceylon Insolvency Ordinance (VII of* 1853*), ss.* 124, 126.

Plaintiff and defendant, who were resident in Colombo, entered into a contract whereby defendant was to go to India and execute an *othi* deed to plaintiff on a certain date for a cash consideration of Rs. 1,000 and for Rs. 1,000 already due by defendant to plaintiff. In the event of breach defendant was to pay plaintiff Rs. 250 for damages with which the lands were to be charged. Defendant never came to India and did not register the document. He applied for insolvency in Colombo and got a certificate of conformity under section 124 of the Ceylon Insolvency Ordinance. The plaintiff thereafter instituted the present suit in a British Indian Court for Rs. 1,000 due to him as aforesaid and for damages for defendant's breach of contract:

Held, (1) that the cause of action for the plaint debt arose in Ceylon and the discharge granted by the Ceylon Court was a valid discharge of the debt everywhere, including British India; [p. 39, col. 2.]

(2) that even if the performance of the contract was to be in British India, that fact did not affect the validity of the discharge under the Ceylon Insolvency Ordinance. [p. 40, col. 1.]

Second appeal against the decree of the District Court, Tinnevelly, in Appeal Suit No. 79 of 1917, preferred against the decree of the Court of the District Munsif, Srivaikuntam, in Original Suit No. 430 of 1915.

FACTS appear from the judgment.

Mr. *N. Srinivasa Charya*, for the Defendant-Appellant.—If a person is adjudicated an insolvent according to the law of the place where the contract was entered into, he is absolved from all liability under the contract. See *Narayana Chettiar* v. *Veerappa Chettiar* (1); Dicey's Conflict of Laws, rule 115, at page 440, also rule 116. See also *Deivanayagam Pillai* v. *Muthukumarasawmy Pillai* (2).

(1) 35 Ind. Cas. 918; 31 M. L. J. 386; 20 M. L. T. 318; (1916) 2 M. W. N. 271; 4 L. W. 422; 40 M. 581.
(2) 14 Ind. Cas. 560.

This is not a case of a breach of contract. The effect of the adjudication is to exonerate the defendant from liability under the contract. See the Ceylon Ordinances which follow the English Bankruptcy Laws.

By fulfilling the contract the defendant would be a gainer. But the adjudication incapacitates him from doing so.

Under the circumstances, the British Indian Courts have no jurisdiction to try a suit like the present.

Mr. *C. Padmanabha Aiyangar* for Mr. *K. R. Rangaswamy Aiyangar*, for the Respondent.—The adjudication by the Law of Ceylon operates only as a discharge of liabilities incurred in Ceylon. Here the liability has arisen in British India and the British Indian Courts alone have jurisdiction.

[KRISHNAN, J.—Both the parties have been living permanently in Colombo before and after the contract. That is the evidence. The contract was entered into at Colombo. The present liability is under the contract. The Ceylon Courts have jurisdiction.]

See *Manjappa* v. *Rajagopalachariar* (3).

See rule 146 of Dicey's Conflict of Laws, page 529. The cause of action is said to arise where the debt or liability arose. Here performance was due in British India and failing it, the breach of the contract gave rise to the liability in damages. The cause of action has arisen in British India and discharge in Ceylon does not amount to discharge in British India.

JUDGMENT.—The question for our decision in this second appeal is whether the certificate of conformity, Exhibit I, granted to the defendant, who is the appellant before us, by the District Court of Colombo under section 124 of the Ceylon Insolvency Ordinance, VII of 1853, is a valid defence to the plaintiff's suit for money.

The facts may be shortly stated as follows: Plaintiff and defendant were traders in Ceylon in 1914 and previously. They had dealings with each other and as the result of them the defendant became indebted to the plaintiff. In March 1914 they settled the amount due at Rs. 1,000 and entered into a contract, Exhibit A, which provided that defendant was to go to India by the 30th

(3) 45 Ind. Cas. 779; (1918) M. W. N. 378; 24 M. L. T. 95.

of May and execute and register a deed of *othi* of certain lands of his in India in favour of the plaintiff for Rs. 2,000 and deduct the Rs. 1,000 and interest from the amount payable to him by the plaintiff for the *othi* and receive the balance before the Sub-Registrar and deliver the deed to him. It also provided that, on default, defendant was to pay, besides the principal and interest due, a sum of Rs. 250 as compensation for the breach of contract and the plaintiff was to recover the whole amount from defendant personally and from the lands. The document was not registered and the charge did not take effect. The defendant never came to India and the contract was never performed.

In 1915 the defendant applied in insolvency in Colombo and finally obtained Exhibit I which, under section 126 of the Ceylon Ordinance, discharged him, "subject to the provisions of the Ordinance from all debts due by him when he became insolvent and from all claims and demands made provable under the insolvency." There was a question before the District Munsif whether plaintiff had been joined as a creditor in the schedule and whether he had notice; the Munsif found the points against the plaintiff and no objection was taken to his finding in appeal. It is clear from plaintiff's own admission in his evidence that he was residing in Colombo at the time of the insolvency proceedings and it may also be stated that the contract, Exhibit A, was entered into in Colombo. Plaintiff apparently did not appear in the insolvency proceedings and did not claim or receive any dividend. Towards the latter part of 1915 both the parties came to India and plaintiff brought this suit here for the Rs. 1,000 and interest on it and for the Rs. 250 damages provided for by Exhibit A. Defendant pleaded Exhibit I in defence. The District Munsif upheld the plea and dismissed the suit; but the District Judge reversed that decree and gave plaintiff a decree for his money. The defendant has appealed to us and has urged that Exhibit I constituted a valid discharge of the plaint debt.

On the facts found, there can be no doubt that there was a cause of action for the plaint debt in Colombo which could have been enforced against the defendant there at the time when he filed his insolvency petition and obtained his discharge. The contract was entered into at Colombo and the parties were resident there at the time, as already stated. The District Judge, however, finds that the parties intended to pay the debt in India and he thinks that, therefore, the law in British India should be applied to the debt and the Ceylon Court had in consequence no jurisdiction to deal with it. The finding on the question of intention itself is attacked by the appellant. It is based mainly on the fact that under Exhibit A the money was payable before the Sub-Registrar when the *othi* was registered. That provision, however, will apply after the *othi* is executed and when it has to be registered; but that was not done. There is nothing in Exhibit A to show that in case of breach of contract the parties intended that they should take the trouble of going over to India for the mere purpose of paying and receiving the money due when they could have had it paid and received with ease in Colombo where they were then resident. The finding of the District Judge as to the intention of parties does not, therefore, seem to be correct. It may fairly be assumed that the payment was to be made where the parties resided. In this view there can be no question that the discharge granted under Exhibit I was a valid discharge of the debt everywhere including this country. Professor Dicey states as rule 115 in his well known book on the Conflict of Laws that "a discharge from any debt or liability under the Bankruptcy Law of the country where the debt or liability has been contracted or has arisen (or perhaps where it is to be paid or satisfied) is a discharge therefrom in England." This has been adopted by this Court as correct in *Narayana Chettiar* v. *Veerappa Chettiar* (1). The rule is applicable to a discharge by a Court in a foreign country and, therefore, all the more applicable to a discharge in one of the British Colonies such as Ceylon. See *Gardiner* v. *Houghton* (4), per Cockburn, C. J.

But even if we assume that the parties intended that the money was to be paid in British India, will that make any

(4) (1862) 2 B. & S. 743; 121 E. R. 1247; 127 R. R. 544.

difference to the validity of the discharge under Exhibit I. We do not think so. So long as the order of discharge granted by the Ceylon Court was with jurisdiction and after notice to the parties, we are bound to give effect to it in our Courts. The principle stated by the District Judge that the validity of a contract, its nature, and effect and the rights and obligations of the contracting parties thereunder should be judged with reference to the law of the place of performance has no application to the present case, as we are not concerned here with such matters. The obligation to pay under Exhibit A, whether under the Law of British India or under the Ceylon Law, was the same. We are here concerned only with the effect to be given to an order of the Ceylon Court granting a discharge of that obligation. If that was made with jurisdiction, the fact that the performance was to be in British India does not affect its validity at all.

It was suggested that this was a case to which rule 116 in Dicey's book applied, and not 115. That is not so, as the contract was entered into in Ceylon. It was subject to the Bankruptcy Law of Ceylon and the parties being resident in Ceylon at the time of the order, they are clearly amenable to the jurisdiction of the Ceylon Court.

We must, therefore, hold that Exhibit I extinguished the defendant's debt to plaintiff and his suit is not maintainable. The decree of the District Judge is reversed and that of the Munsif restored with costs here and in the Court below.

M. C. P.

Appeal allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 472 OF 1918,

April 14, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

SARJUG SINGH AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

JAGMOHAN SINGH—PLAINTIFF AND JAGARNATH AND ANOTHER—DEFENDANTS NOS. 3 AND 4—RESPONDENTS.

Muhammadan Law—Pre-emption—Joint estate—Joint liability, when ceases—Talab-i-istishhad, *how to be made.*

Where the liability to pay Government revenue is joint, the joint liability, for purposes of pre-emption, does not cease in the case of any co-sharer until his particular share has been partitioned by the Revenue Authorities. [p. 41, col. 1.]

Under the Muhammadan Law not only is it necessary that the *talab-i-istishhad* should be made in the presence of witnesses, but that they should be asked to bear testimony that the demand has been duly made. [p. 41, col. 2.]

Appeal from a decision of the Subordinate Judge, Saran.

Messrs. *Syed Hasan Imam, Fakhur-ud-din* and *Panchanan Banerji*, for the Appellants.

Messrs. *S. Sinha, Rajendra Prasad, Ram Prasad* and *Tribhubannath Sahai*, for the Respondents.

JUDGMENT.

MULLICK, J.—The plaintiff, in exercise of his right of pre-emption, claims to purchase from defendants Nos. 3 and 4 a two-anna share in Mauza Bazidpore which these defendants have sold by *kabala* to defendants Nos. 1 and 2. It is admitted that the Mauza bears Tauzi No. 780 and that the plaintiff is the owner of a two-anna share in it. In the survey and settlement proceedings it was found that the Tauzi covered an area of 101 *bighas* 11 *roods* and that it has been divided into five shares which have been entered in 5 Khewats numbered 3/1 to 3/5. The plaintiff's interest has been recorded under Khewat No. 3/2 while that of defendants Nos. 3 and 4 has been entered in Khewat No. 3/5. An area of 4 *bighas* and odd has been retained in the joint possession of all the co-sharers of the Mauza and the question is whether, in these circumstances, the right of pre-emption exists.

The Munsif found on a careful examination of all the facts that the plaintiff had separated his share so completely from that of defendants Nos. 3 and 4 that he could not be allowed to pre empt, and he relied upon a number of authorities in the High Court of Allahabad of which the case of *Munna Lal* v. *Hajira Jan* (1) is an example.

These authorities, however, all deal with perfect and imperfect partitions under special laws in the United Provinces and are not of any assistance for the purposes of the case now before us. The general

(1) 7 Ind. Cas. 404; 33 A. 28; 7 A. L. J. 879.

principle that after a perfect partition has been made by the Revenue Authorities, the right of pre-emption no longer exists between the former co-sharers is one which does not apply to this case. Here, the liability to pay Government revenue is still joint and a portion of the estate consisting of roads, *nullas* and water courses has not yet been partitioned. The question is, whether to such a case as this the principles laid down by their Lordships of the Privy Council in *Jadu Lal Sahu* v. *Janki Koer* (2) apply.

The Subordinate Judge, disagreeing with the Munsif, considers that they do. On the other hand, the learned Vakil for the defendant-appellants before us relies upon *Byjnath Singh* v. *Dooly Mahtoon* (3). In that case the liability to pay Government revenue was still joint but the plaintiff had divided off his own share by regular metes and bounds and made himself in every respect independent of his co-parceners so far as it was in his power to do so. This case was cited in argument before their Lordships of the Privy Council and it was urged that this joint liability does not constitute the co-parcenary contemplated by the Muhammadan Law. Their Lordships did not accept this submission and held that joint liability does not cease in the case of any co-sharer until his particular share has been partitioned by the Revenue Authorities. In my opinion the learned Subordinate Judge was right in holding that the case under consideration was covered by this decision.

The next point that arises is as to the performance of the demands necessary to establish a right of pre-emption. It is admitted that the Talab-i-Moasibat was duly made. The difficulty turns upon performance of the Talab-i-Istishhad. The Munsif has found that, although this demand was made by the plaintiff in the presence of witnesses, there was no express reference to the fact that the immediate claim, or Talab-i-Moasibat, had been duly made.

It was contended before us by the learned Vakil for the appellants that it is necessary under the Muhammadan Law that not only this demand should be made in the presence of witnesses but that they should be asked to bear testimony to the declaration that the demand had been duly made. This is in conformity with the views expressed by the text book writers and has been affirmed by their Lordships of the Calcutta High Court in the Full Bench decision in *Rujjub Ali Chopedar* v. *Chundi Churn Bhadra* (4). In that case the point referred was whether it was necessary that the pre-emptor should declare that he has made the Talab-i-Moasibat and, at the same time, should invoke witnesses to attest it. The answer of their Lordships was unanimously in the affirmative. The words given in the Hedaya, Grady, page 556, are as follows: "Such a person has bought such a house of which I am the Shafi. I have already claimed my privilege of Shufa and am now again claiming. Be, therefore, the witness thereof."

The authorities upon this point have been also discussed by their Lordships of the Allahabad Court in *Muhammad Ahmad Said Khan* v. *Madho Prasad* (5). On the other hand our attention has been drawn to the case of *Chatu* v. *Husain Bokhsh* (6), where their Lordships of the Allahabad Court appear to have held that the mere presence of the witnesses was sufficient and no specific invocation was necessary.

It is to be observed, however, that this ruling has been practically dissented from in *Mubarak Husain* v. *Kaniz Bano* (7). The view taken by the learned Munsif, therefore, seems to be right. But upon the question of fact the learned Subordinate Judge has come to a finding which concludes the matter. Disagreeing with the Munsif, he has found that the plaintiff did call upon the witnesses to bear testimony to the fact that he had performed the previous ceremony.

Now, although the learned Munsif has disbelieved the plaintiff upon this point, it was open to the learned Subordinate

(2) 15 Ind. Cas. 659; 39 C. 915; 16 C. W. N. 553; 11 M. L. T. 361; (1912) M. W. N. 486; 15 C. L. J. 483; 9 A. L. J. 525; 14 Bom. L. R. 436; 23 M. L. J. 28; 39 I. A. 101 (P. C.).

(3) 11 W. R. 215.

(4) 17 C. 543 (F. B.); 8 Ind. Dec. (N. S.) 902.

(5) 35 Ind. Cas. 911; 39 A. 133; 14 A. L. J. 1141.

(6) A. W. N. (1893) 101.

(7) 27 A. 160; A. W. N. (1904), 201; 1 A. L. J. 569.

Judge to take a contrary view and his finding is conclusive in second appeal. The result, therefore, is that the decree made by the learned Subordinate Judge is correct.

With regard to the right of irrigation and the right of vicinage, the claim to pre emption does not seem to have been pressed before the Subordinate Judge on these grounds. The appeal, therefore, will be dismissed with costs.

JWALA PRASAD, J.—I agree to the order proposed.

Appeal dismissed.

MADRAS HIGH COURT.
CIVIL APPEAL No. 178 OF 1918.
February 12, 1919.
Present:—Sir John Wallis, KT, Chief Justice, and Justice Sir William Ayling, KT.
S. Haji ABDULLA SAHIB AND OTHERS—PLAINTIFFS—APPELLANTS
versus
HYDER BEG SAHIB *alias* DADA MIAN SAHIB AND OTHERS—DEFENDANTS NOS. 1 TO 8—RESPONDENTS.

Trust—Grant, construction of—Grant to specific persons, described as servants of mosque, for expenses of lamp oil and for prayers for prosperity of Government—Trust, whether created.

A grant to certain specified persons, described as servants of a mosque, recited that the revenue of the lands granted were to be enjoyed by the grantees for their own needs and for the expenses of lamp oil in the mosque, the grantees being required also to pray for the prosperity of Government:

Held, that the grant constituted a public charitable trust. [p. 43, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Vellore, in Original Suit No. 22 of 1917.

FACTS:—Certain property was granted "Abdul Kadir, etc., etc., servants in a mosque" by one of the Nawabs of Arcot more than a century ago and they were to sweep the mosque and light it. The main question was whether the property was a public charitable trust or property burdened with a trust only as in ordinary trusts among private parties.

Mr. *K. Srinivasa Aiyangar* (with him Messrs. *S. Duraswamy Aiyar* and *S. Aravamudu Aiyangar*), for the Appellants.—The property is public trust property belonging to the mosque, having been an endowment for meeting the sweeping and lighting charges. It is of the kind dealt with in *Bejoy Chand Mohatap* v. *Kali Pada Chatterjee* (1), which applies to this case. There it is held that the fact that the grant is to the incumbents for the time being by name does not alter the nature of the grant. For the land is given for a definite purpose, the grantee being in the same position as if he held a service tenure. See the description of the suit land in the Inam Settlement Register which supports my contention.

Mr. *K. V. Krishnaswamy Aiyar*, for the Respondents.—Service Inams are held not to fall within the scope of section 92 of the Code: *Sriranga Chariar* v. *Pranatharthihara Chariar* (2). They are not resumable by the temple authorities if granted by Government: *Matte Sarayya* v. *Vepparathi Vydyanatham* (3). See also *Kupparazu Venkatasubbiah* v. *Murugula Shaik Silar Sahib* (4), *Bibee Kuneez Fatima* v. *Bibee Saheba Jan* (5), *Fatmabibi* v. *The Advocate General of Bombay* (6), *Sonatun Bysack* v *Sreemutty Juggutsoondree Dossee* (7). The Settlement Register is of no value in determining the class, etc., to which an Inam belongs. See *Balu Mudali* v. *Duruvasalu Pillai* (8).

[Mr. *K. Srinivasa Aiyangar*.—If the property be not a public trust, the property should have been registered under section 15 of Regulation XXXI of 1802. See *Suryanarayana* v. *Patanna* (9). See also *Mahomed Athar* v. *Ramjan Khan* (10) where a similar public religious endowment is under consideration. See

(1) 20 Ind. Cas. 78; 41 C. 57; 17 C. W. N. 1013; 18 C. L. J. 347.
(2) 30 Ind. Cas. 74; 18 M. L. T. 122; 2 L. W. 632; (1915) M. W. N. 531.
(3) 27 Ind. Cas. 163; 27 M. L. J. 57; 1 L. W. 490.
(4) 32 Ind. Cas. 947; 19 M. L. T. 144; 3 L. W. 157.
(5) 8 W. R. 313.
(6) 6 B. 42; 6 Ind. Jur. 253; 3 Ind. Dec. (N. S) 485.
(7) 8 M. I. A. 66; 2 Suth. P.C.J. 37; 1 Sar. P. C. J. 721; 19 E. R. 455,
(8) 34 Ind. Cas. 570; 4 L. W. 74; (916) 2 M. W. N. 276.
(9) 48 Ind. Cas. 689; 41 M. 1012 at p. 1020; 25 M. L. T. 30; (1918) M. W. N. 859; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 36 M. L. J. 585; 45 I. A. 209; 1 U. P. L. R. 11 (P. C.).
(10) 34 C. 587.

also *Ramanadan Chettiar* v. *Vava Levvai Marakayar* (11).]

Mr. *K. V. Krishnaswamy Aiyar.*—The property itself is not trust property but is only burdened with a trust. The grant is not to an office but to certain persons who are described merely as holders of certain menial posts which are not dignified enough to be called 'offices'. The grant further states that the "revenues" (are) "to be enjoyed by the grantees for their own needs." Therefore, they can also alienate but that the alienee will take subject to the trust.

[WALLIS, C. J.—If the grant were intended for a public charity, does not the property become trust property?]

There is a distinction based on the description of the grantee in the grant. See *Thornber* v. *Wilson* (12), where gift to a minister of a parish as such is distinguished from one to the person by name who is described as the minister of a particular parish.

JUDGMENT.

WALLIS, C. J.—The question in this appeal is, whether the grant, Exhibit L, created a public charitable trust. The petition, of which a precis is given at the close of the document, prays that a grant by the late Nawab Sadatullah of 18 Cawnies of land for expenses of lamp oil in the Mosque and in aid of the maintenance of the petitioners who were servants of the mosque should be confirmed. This was preceded by another summary of the petition which says that the grant prayed for was of 16 Cawnies of land and the rent of 12 shops for the same purposes. The grant itself, which comes first, recites the earlier grant for subsistence of Abdul Kadir, etc., the servants of the mosque and for the expenses of lamp, oil in the mosque and makes a grant of the lands and the rents "to the aforesaid persons so that the revenues may be enjoyed by them according to their own needs and that they should engage in prayers for the prosperity and duration of the Government." In *Bibee Kuneez Fatima* v. *Bibi Saheba Jan* (5) and *Sayad Mahomed Ali* v. *Sayad Gobar Ali* (13) grants somewhat resembling this were held not to give rise to charitable trusts and the judgments of these cases show that the Court read the grants in those cases as grants to the grantees free from any trusts at all. It was not held in *Bibee Kuneez Fatima* v. *Bibi Saheba Jan* (5) that a grant of this nature for the maintenance of a monastrey would not be charitable but that no such trust was intended to be created. On the other hand, in *Bishen Chand Basawat* v. *Nadir Hossein* (14) an express trust was clearly created by the terms of the instrument, and it affords no assistance at all in the present case. Here the lands and shops are given to the grantees to be enjoyed by them for their own necessities and they are to pray for the prosperity of the State. Nothing is said in terms of this grant itself about the future maintenance of the lamps and I cannot read it as a grant in favour of the petitioners subject to the burden of maintaining the lamps. There is, however, one fact which is peculiar to this case. The grant is made to the petitioners, who are described as the servants of the mosque. It does not appear that they were all of one family and it can scarcely have been intended as a grant to them as tenants in-common. Having regard to this fact and to the fact that in the registers maintained since the establishment of the British Government the property has been treated with the assent of the heirs of the grantees as an endowment of the mosque, I think there is sufficient evidence to show that in this case the intention was to create a trust and I would accordingly reverse the decree and remand this case for disposal according to law. Costs to abide.

AYLING, J.—I agree.

M.C.P.

Appeal allowed;
Case remanded.

(11) 39 Ind. Cas. 235; 40 M. 116; 32 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C. L. J. 224; 21 M. L. T. 215; 21 C. W. N. 521; 1 P. L. W. 394; 19 Bom. L. R. 401; 44 I. A. 21 (P. C.).

(12) 62 E. R. 135; 4 Drew. 350; 28 L. J. Ch. 145; 4 Jur. (N. S.) 1268; 7 W. R. 394; 113 R. R. 394.

(13) 6 B. 88; 3 Ind. Dec. (N. S.) 516.

(14) (1858) 15 I. A. 1 (P. C.); 15 C. 329; 5 Sar. P. C. J. 113; 12 Ind. Jur. 170; 7 Ind. Dec. (N. S.) 803.

BISESWAR ROY *v.* PITAMBER NATH.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 907, AND 971 TO 973 OF 1917.

February 12, 1919.

Present:—Mr. Justice Walmsley.

BISESWAR ROY—PLAINTIFF—APPELLANT IN ALL

versus

PITAMBER NATH, ONE OF THE PRINCIPAL DEFENDANTS AND OTHERS—RESPONDENTS IN No. 971 OF 1917

HARAN MIR AND OTHERS—RESPONDENTS IN No 972 OF 1917

MEHARANNESSA BEWA AND OTHERS—DEFENDANTS—RESPONDENTS IN No. 973 OF 1917.

Transfer of Property Act (IV of 1882), s. 106—Landlord and tenant—Lease—Rent payable yearly, whether makes lease from year to year—Notice to quit, service of, mode of

The mere fact that rent is expressed in a lease as so much a year does not make the lease a lease from year to year. [p. 45, col. 1.]

Where a tenant held certain land on which a dwelling-house was built and the rent was expressed in the lease to be payable yearly:

Held, that under section 106 of the Transfer of Property Act a notice to quit served on Bhadon 6th requiring the tenant to quit the land in the following month of Aswin was adequate. [p. 45, col. 1.]

A Civil Court peon went to serve a notice under section 106 of the Transfer of Property Act upon two tenants, one of whom was a *pardanashin* lady and the other a minor boy. Being told that the lady was indoors and that the boy had gone out to look after cattle, the peon beat a drum, read the notice aloud and affixed a copy of the notice to the wall of the house. It appeared, however, that there were servants present, but that no attempt was made to tender the notice to the servants or to find the boy and tender the notice to him:

Held, that the service of notice was not good, inasmuch as the drum-beating and the affixing of the notice to a wall were of no avail unless tender or delivery was not practicable. [p. 45, col. 2.]

Appeals against the decrees of the Subordinate Judge, 4th Court, Mymensingh, dated the 9th February 1917, affirming those of the Munsif, Jamalpur, dated the 6th December 1915.

FACTS appear from the judgment.

Babu *Dwarkanath Chakraburty* (with him Babu *Ramani Mohan Chatterjee*), for the Appellant.—The appeals arise out of suits for ejectment after notice to quit. The first Court found that the lands belonged to plaintiff but refused to give *khas* possession. The Appellate Court upheld the first Court's findings on the ground that the requirements of law were not complied with in the service of notice, which was served through Court. The peon described the mode of service, which was certified by the Nazir to have been made according to law. The tenants were not at home and the notice was left at their residence after due publication to the neighbours. This is sufficient compliance with the provisions of section 106, Transfer of Property Act.

As regards the other suits, the lower Courts have misconceived the nature of a *bhogottar* property. An admission is binding only when it raises the question of estoppel. The recital in the *solenamah* is not binding on me. See *Siva Rau Nanaji* v. *Jevana Rau* (1). *Bhogottar* is usually a life tenure. As to admissions sections 17 and 18 of the Indian Evidence Act support my contention. As regards the service of notice, see *Harihar Banerji* v. *Ramsashi Roy* (2).

Dr. *Sarat Chandra Basak* (with him Babu *Prafulla Chandra Nag*), for the Respondents.—As regards the first suit, six months' notice is necessary. The rent reserved is to be paid from year to year. The contract to pay may be proved from other sources: see *Kishori Mohun Roy* v. *Nund Kumar Ghosal* (3) and *Debendra Nath Bhowmick* v. *Syama Prosanna Bhowmik* (4), As regards the service of notice, there is no provision of law in the Transfer of Property Act which permits service of notice through Court. There was no tender. The servants were not asked to take the notice.

As regards the other suits, there is an entry in the Settlement Khatian that the *bhogottar* is a permanent tenure. It is on the other side to prove that it is a life-interest. The admission is binding on the plaintiff.

Babu *Dwarkanath Chakrabarty*, for the Appellant, in reply.—It does not matter much whether the rent reserved is payable annually or monthly.

(1) 2 M. H. C. R. 31.
(2) 48 Ind. Cas. 277; 23 C. W. N. 77; 16 A. L. J. 969; 35 M. L. J. 707; 29 C. L. J. 117; 9 L. W. 148; 25 M. L. T. 159; 45 I. A. 222 (P. C.).
(3) 24 C. 720; 12 Ind. Dec. (N. S.) 1149.
(4) 11 C. W. N. 1124.

Section 106 of the Transfer of Property Act is clear on the point.

JUDGMENT.—These four appeals arise from one judgment which disposed of four appeals: those four appeals again arose from one judgment which disposed of four suits tried together.

All the suits were for ejectment after notice.

It will be convenient to deal first with Second Appeal No. 907. This arises from Appeal No. 29 and Suit No. 2102. It has been found that the plaintiff has a permanent *mokurrari mourasi* interest in the land. The defendants are a *pardanashin* lady and a minor boy, the heirs of a Mukhtear named Shahar Muhammad. The land from which the plaintiff wants to eject them is situated in the Municipality of Jamalpur, and a dwelling-house was built on it by Shahar Muhammad: he paid a rent of Rs. 3 a year, but he had no permanent interest. The plaintiff's case is that he caused a notice to be served on the defendants through the Civil Court on Bhadra 6th, 1321, calling upon the defendants to vacate the land in the following month of Aswin.

The first Court held that the notice was not sufficient and that the service was defective, while the lower Appellate Court differed as to the sufficiency of the notice but agreed that it was not properly served.

For the appellant-plaintiff it is argued that the service was in accordance with law. On the other hand the respondents support the learned Judge's view, and also urged that the notice was inadequate.

As regards the length of notice, I think the learned Subordinate Judge was right. This is nothing to take the case out of the operation of the Transfer of Property Act, and the mere fact that the rent was expressed as so much a year does not make the lease a lease from year to year. I hold, therefore, that the notice if served was adequate.

Regarding service the objection taken by the defendants is that there was no tender. The peon's report is that he found neither of the defendants at the house; he was told that the lady was indoors and that the boy had gone out to look after cattle, and then he beat a drum, read the notice aloud, and affixed a copy to a wall of the house. It appears, however, that there were servants present, but no attempt was made to tender the notice to the servants or to find the boy and tender the notice to him, and on a literal interpretation of the words of the section I must hold that the service was not good, for the drum beating and the affixing to a wall are of no avail unless tender or delivery is not practicable. The objection is very technical, but it must succeed, and the appeal must be dismissed with costs.

The other appeals raise different questions. The Courts below have held that the defendants hold their lands under one Hiramoni Devi, and that she has a '*bhogottar*' interest as it is called. The learned Subordinate Judge refers to a *solenamah*, Exhibit A, and to the Record of Rights, and the argument for the appellant is that the statement in Exhibit A is not conclusive against the plaintiff, that it is of very little evidentiary value because it does not say that Hiramoni has a permanent right, and because the statement was made for the purpose of a particular suit and for consideration, and that the Records of Rights does not show the character of Hiramoni's tenancy.

It appears to me that the statement in Exhibit A cannot be whittled away on the grounds mentioned by the appellant: it is an important piece of evidence, and when the learned Subordinate Judge says that it binds the plaintiff he means that it is evidence against the plaintiff just as much as it would be against his lessor, not that it is conclusive against the plaintiffs. Then the Khatian clearly shows that Hiramoni is in possession: the special incident mentioned is that the interest is '*Jibitashatya*;' but her interest is also described as '*Chirosthayi*' and '*Nishkar*'. I think the Court below is justified in holding that Hiramoni has a subsisting interest between the plaintiffs and the defendants, and that on that account the plaintiff cannot, at present, eject the defendants. It is not necessary to consider the position which will arise on the death of Hiramoni.

The appeals are dismissed with costs, there will be one set of costs in all the appeals.

Appeals dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1383 OF 1917.

April 4, 1919.

Present :—Mr. Justice Das.

MANGAR SINGH—DEFENDANT—APPELLANT

versus

Babu BHARAT PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 17, 19, 31—*Appeal—Pleader without instructions—Procedure—Judgment, contents of.*

Where the Pleader for an appellant intimates to the Court that he has no instructions to argue the appeal, the proper course for the Judge is to dismiss the appeal under Order XLI, rule 17, of the Civil Procedure Code, so that the appellant may have an opportunity of applying for re-admission of his appeal under Order XLI, rule 19.

A mere general statement that on a perusal of all the evidence in the case the Court is satisfied as to a certain set of facts is not a sufficient judgment within the meaning of the law.

Appeal from a decision of the Subordinate Judge, Muzaffarpur.

Mr. *L. K. Jha*, for the Appellant.

Messrs. *Ragho Prosad* and *Awadh Behari Chobey*, for the Respondents.

JUDGMENT.—This appeal comes before me from the judgment of the Subordinate Judge of Muzaffarpur and arises out of a suit brought by the respondents for recovery, of possession of the land, which is the subject matter of the suit, on the allegation that the defendants Nos. 3 to 5 had no right to transfer the said land by executing a *mukarrari patta* in favour of defendant No. 1. It appears that on the date when the appeal came on for hearing before the learned Subordinate Judge, the appellant was personally present in Court but his Vakil stated that he had no instructions to argue the appeal. I think the Subordinate Judge would have been right under those circumstances to dismiss the appeal under Order XLI, rule 17, of the Code, leaving it open to the appellant to apply for re-admission of the appeal under Order XLI, rule 19; but the Subordinate Judge did not take this course. He asked the Vakil for the respondent to deal with the main facts and features of the case and the learned Vakil having dealt with the case from his own point of view, the Subordinate Judge held that the appeal was without substance and dismissed it with costs. It has been held by this Court in the case of *Mubarak Hussain* v. *Syed Shah Hamid Hussain* (1) that a mere general statement that on a perusal of all the evidence in the case the Court is satisfied as to a certain set of facts is not a sufficient judgment within the meaning of the law.

In the present case the learned Subordinate Judge has bestowed only one line to the whole case, and I am unable to hold that this is a judgment in accordance with law. But it is argued by the learned Vakil for the respondent that in substance the dismissal is under Order XLI, rule 17, and that he need not have expressed any opinion on the merits of the case at all. I do not agree with this contention, because the form of the judgment made it impossible for the appellant to apply before the Subordinate Judge for re-admission of the appeal under Order XLI, rule 19. If he had dismissed the appeal under Order XLI, rule 17, it would have been possible for the appellant to come to the Court and ask the Court to re-admit the appeal under Order XLI, rule 19. But the course adopted by the learned Subordinate Judge did not leave any option to the appellant. He had to come to this Court in order to show that the judgment of the learned Subordinate Judge is not in accordance with law. The case must, therefore, be remanded to the lower Appellate Court for disposal according to law. I think the appellant is entitled to the costs of this appeal. Costs of the Courts below will abide the result.

Case remanded.

(1) 38 Ind. Cas. 509; 2 P. L. J. 8; 1 P.L.W. 188; (1917) Pat. 308.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2101 OF 1917.

November 21, 1918.

Present:—Mr. Justice Coutts Trotter and Mr. Jussice Kumaraswami Sastri.

AIYALAM KESAVA CHETTY—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF NORTH ARCOT—DEFENDANT—RESPONDENT.

Madras Land Encroachment Act (III Mad. of 1905)

ss. 3, 7, 14—*'Levied' in s.* 14, *meaning of—Penal assessment, imposition of—Suit for declaration that land not liable to assessment—Cause of action—Limitation, starting point of—Interpretation of Statutes—Marginal notes to sections, value of.*

The word 'levied' in section 14 of the Madras Land Encroachment Act means 'collected' and the period of limitation in section 14 of the Act runs from the date when the assessment or penalty is actually collected, and not when it is merely imposed. [p. 48, col. 1.]

Secretary of State for India v. *Illikkal Assan*, 32 Ind. Cas. 755; 39 M. 727; 30 M. L. J. 255; 3 L W. 228; 19 M. L. T. 157; (1916) 1 M. W. N. 167, explained.

Marginal notes to the sections of an Act cannot be used for the purpose of construing the Act. [p. 47, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Vellore, in Appeal Suit No. 36 of 1917 (Appeal Suit No. 220 of 1916, District Court, North Arcot), preferred against the decree of the Court of the Principal District Munsif, Vellore, in Original Suit No. 51 of 1915.

FACTS appear from the judgment.

Mr. *K. Ramanatha Shenai*, for the Appellant.—The lower Court erred in holding that the suit was barred. The cause of action did not arise on the date of the Divisional Officer's notice. If the date of imposition of the penal assessment is to be treated as the cause of action, persons who become aware of the notice long afterwards will be seriously jeopardised. The cause of action arises only when the assessee is actually damnified, *i.e.*, when he pays the assessment, just as in cases of eviction, the date of the eviction gives the starting point.

It was an error on the part of the lower Courts to have construed section 14 by reference to the marginal notes to sections 3, 5 and 7. Marginal notes afford no help in the construction of an Act. That is settled law.

Mr. *V. Ramesam*, (Government Pleader), for the Respondent.—The use of the expression 'levied' in section 14 connotes only the imposition of the penalty as distinguished from the actual collection. The invasion of plaintiff's right commences when he is served with notice of the penal assessment and limitation runs from that date.

JUDGMENT.—The plaintiff is the appellant. He sued the Secretary of State for India in Council, respondent, for a declaration that the property specified in the plaint belongs to him and is not liable to penal assessment, for an injunction restraining the defendant from interfering with the property and for refund of the penal assessment levied. The case for the plaintiff is that the property belongs to him absolutely and was never the property of the Government, that he was served with a notice from the Revenue Divisional Officer dated 15th July 1914, purporting to be issued under Madras Act III of 1905, levying a penal assessment of Rs. 10 and that the amount was wrongly collected from him on the 21st July 1914. The defence is that the property was Nattam Poramboke which the plaintiff trespassed upon, that the Government is entitled to levy the assessment claimed and that the suit is barred by limitation.

Both the District Munsif and on appeal the Subordinate Judge held that the suit was barred by limitation, as it was brought more than six months after the 15th July 1914, the date of the notice of the Divisional Officer informing the plaintiff that an assessment of Rs. 10 was levied owing to his having encroached on Government property.

The question raised in this second appeal is whether the period of six months specified in section 14 of the Madras Land Encroachment Act III of 1905 is to be computed from the date of the imposition of the assessment or the date when it is actually collected from him.

Section 14 of the Act provides that Civil Courts shall not take cognizance of any suit instituted by persons aggrieved by any proceedings under that Act, unless the suit is instituted within six months from the date of the cause of action. The explanation to the section states that the cause of action in respect of any assessment or penalty shall be deemed to arise "on the date on which such assessment or penalty was levied." As regards eviction or forfeitures, the cause of action is said to arise on the date of eviction or forfeiture.

Both the lower Courts have erred in construing section 14 with reference to the marginal notes to sections 3, 5 and 7 of the Act. It is now well settled that marginal notes to sections of an Act of the Indian Legislature cannot be referred to for the purpose of construing the Act. The view taken in *Punardeo Narain Singh* v. *Ram*

Sarup Roy (1) and *Emperor* v. *Alloomiya Husan* (2) has been affirmed by their Lordships of the Privy Council in *Thakarain Balraj Kunwar* v. *Rae Jagatpal Singh* (3), where Lord Macnaghten observed as follows: "It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake and was exploded long ago. There seems to be no reason for giving to the marginal notes of an Indian Statute any greater authority than the marginal notes in an English Act of Parliament." The marginal notes do not throw much light on the question. It is significant that while the marginal notes to sections 3 and 9 would suggest that "levy" was used in the sense of 'imposition', the marginal note to section 15 uses the word in the sense of "colection." In the body of the Act the word "levied" is only used in section 13 and obviously means "collected", as the clause provides that if any penalty has been levied from any person under section 5, no similar penalty shall be levied under any other law.

I am of opinion that the word "levied" in section 14 means "collected" and that the period of limitation in section 14 runs from the date when the assessment or penalty is actually collected, and not when it is merely imposed. The decision of the Revenue Officer under section 3 of the Act to impose assessment need not be on notice to the party, as section 7 of the Act requires notice to be given only when it is decided to impose penalty or eviction or forfeiture of crops. As the explanation to section 14 refers to both assessment and penalty, it is difficult to see how a mere decision of the Revenue Officer to levy assessment can cause time to run against the person aggrieved. If "levy" simply means "imposition" time will begin to run before the person on whom it is imposed has any notice of the demand and if the fact that assessment has been imposed comes to his knowledge six months afterwards, he would be without any remedy.

(1) 25 C. 858; 2 C. W. N. 577; 13 Ind. Dec. (N. S.) 559.

(2) 28 B. 129 at p. 142; 5 Bom. L. R. 805; 1 Cr. L. J. 227.

(3) 31 I. A. 132; 7 O. C. 248; 26 A. 393; 8 C. W. N. 699 (P. C.); 1 A. L. J. 384; 11 Bom. L. R. 516; 8 Sar. P. C. J. 639.

As regards the recovery of the sum actually paid, plaintiff's cause of action can only arise after he has paid it and there is no reason why he should go to Court before he is actually damnified by the amount being recovered from him. Nor is he bound to file a suit to declare his title to the property or for an injunction, until the Government take some steps to eject him and the mere imposition of assessment or fine, if unaccompanied by any steps taken to evict him under the powers conferred by section 6 of the Act, would not affect his possession. Under clause (*b*) of the explanation to section 14 a person's cause of action arises in respect of eviction or forfeiture from the date of the eviction or forfeiture, and not when the Collector issues the order directing his eviction, and there seems to me no reason why in the case of assessment or penalty his cause of action should be deemed to have arisen on the mere imposition of the assessment or penalty and not on payment,

Reference has been made to *Secretary of State for India* v. *Illikkal Assan* (4), where it was held that a notice under section 7 of the Act gives rise to no cause of action. It appears from the facts of that case that the assessment was actually collected six months before the suit and all that was decided was that that suit for declaration of title would be barred if the remedy to recover the assessment paid was barred under section 14, clause (*a*) of the Act. It is no authority for the view that the starting point of limitation is the imposition and not the actual collection of the assessment or penalty. On the contrary the fact that his right to ask for a declaration of title would be barred if his remedy in respect of the assessment or penalty is barred is, in my opinion, a good reason for holding that payment and not mere demand gives rise to the cause of action.

As the penal assessment was paid on the 21st July 1914, the suit is in time having been filed within six months from that date.

I would reverse the decrees of both Courts and remand the suit for disposal to the District Munsif for trial on the other issues.

(4) 32 Ind. Cas. 755; 39 M. 727; 30 M. L. J. 255; 3 L. W. 228; 19 M. L. T. 157; (1916) 1 M. W. N. 167.

Appellants will be entitled to a refund of Court-fees. Costs will abide and follow the result.

COUTTS TROTTER, J.—I agree and have nothing to add.

M.C P.

Appeal allowed;
Suit remanded.

PATNA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 360 OF 1918.
March 28, 1919.
Present:—Mr. Justice Roe and
Mr. Justice Coutts.
Babu BHEKDHARI SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
Rai Bahadur BAIJNATH GOENKA AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage decree—Sale directed in certain order—Sale-proceeds of one property sufficient to satisfy mortgage-debt—Contribution, liability for.

Where in a mortgage suit involving several mortgages by various mortgagors, the Court decides that the properties should be sold in a certain order, the decision does not mean that in the event of the decretal amount being satisfied by the sale of one property only the remaining mortgagors are released from all liability to contribute to the mortgagor whose property alone has been sold. Before it can be held that the properties have been so released, there must at least be in the previous proceedings an indication of an intention in the mind of the Court to release them from such liability. [p. 49, col. 2; p. 50, col. 1.]

Appeal from a decision of the District Judge, Monghyr.

Messrs. *Kulwant Sahay* and *Lalit Mohan Ghose*, for the Appellants.

Messrs. *Naresh Chandra Sinha*, *Bankim Chandra Mitter* and *Amir Hasan*, for the Respondents.

JUDGMENT.—It is not necessary to set down in full the facts of this case for it is, in our opinion, necessary that there should be a remand.

The grounds upon which the learned Judge has dismissed the plaintiffs' suit are that in the original suit upon a mortgage it was decided that the properties should be sold in a certain order, and he takes that as a justification for the proposition that by that decision the liability of the various mortgagors was settled, the intention being that if the sale of the property of one of the mortgagors satisfied the decree, the property of the remaining mortgagors should be released from all liability whatsoever. It is by no means clear that there was in the decision of the Courts in the suit upon the original mortgage any such intention. It may be that the Courts trying a mortgage suit may think it equitable that if one property is sufficiently valuable to satisfy the mortgage, the sale of other properties should be avoided, but a direction to this effect is not necessarily a decision that all claims to contribution as between the various mortgagors will hereafter be barred. If the Transfer of Property Act be alone considered, the only circumstance justifying the release of properties covered by a mortgage from bearing each its share of the liability under the mortgage, is that as between the parties to the mortgage there has been a contract to the contrary. We doubt very much whether a Court trying the suit on the mortgage could enter into any question of liability to contribution in the event of one of those properties being in the end called upon to bear the whole burden. The case cited by the learned Judge, *Satya Kripal Bandopadhya* v. *Gopi Kishore Mandul* (1), is based upon entirely different circumstances. The learned Judges were of opinion that in the litigation upon the mortgage itself the parties had by arrangement allowed the whole liability to rest on one property in the event of that property being able to bear the whole burden. There was certainly nothing in the nature of an agreement in the litigation upon the mortgage in the case before us. We must, therefore, remand this case for retrial. It has been dismissed on the preliminary issue, and we do not think that the reasons given for that dismissal were correct. At the same time we do not wish to fetter any Divisional Bench before whom this case may come hereafter, by any detailed expression of our views upon the law, and would say only that before it can be held that the properties have been released from all liability to

(1) 6 C. W. N. 583.

contribute, there must at least be in the previous proceedings an indication of an intention in the mind of the Court to release them from such liability. The Court of first instance will primarily be required to ascertain what was the value of each of the properties mortgaged at the time of the mortgage transaction. It will then ascertain what sum was paid by whom to satisfy the mortgage and will call upon the various properties to contribute in proportion to the values ascertained, unless it be found that there was an agreement to the contrary, or a clear decision in previous litigation to the contrary, or other equitable reasons for releasing them from liability.

The decree made by the District Court is set aside and the case remanded for retrial.

The appellants are entitled to a refund of the Court-fee paid on this appeal.

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1533 OF 1917.

February 27, 1919.

Present:—Mr. Justice Walmsley and Mr. Justice Newbould.

MURALI DHAR ADITYA—PLAINTIFF—APPELLANT

versus

THAKUR DAS MONDAL—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 121—Sale under Bengal Act XI of 1859—Auction-purchaser, suit by, to avoid under-tenure—Limitation, commencement of—Burden of proof—Civil Procedure Code (Act V of 1908), s. 99, O. XLI, r. 27—Appeal—Additional evidence, admission of—Reasons, failure to record, effect of—Record of Rights—Presumption of correctness—Both parties repudiating entry, effect of.

Where in a suit brought by the auction-purchaser of an estate at a sale under Bengal Act XI of 1859 to avoid an under-tenure, the defendant raises the plea that the suit is barred under Article 121 of the Limitation Act, the plaintiff should produce evidence to show when, as a matter of fact, the sale became final and conclusive. [p. 51, col. 2.]

Where in such a suit the plaintiff was partially successful in the Court of first instance and the defendant preferred an appeal and in the Appellate Court produced a *robakari* (a public document) to show when the sale became final and conclusive and the Appellate Court accepted the document but recorded no reasons for doing so:

Held, that the Appellate Court was right in admitting this additional evidence in the appellate stage, and that its omission to record reasons was an irregularity which was cured by section 99, Civil Procedure Code. [p. 51, col. 2.]

Where both the plaintiff and the defendant in a suit repudiate an entry in the Record of Rights, the presumption arising from the Record of Rights may be held to have been rebutted. [p. 52, col. 1.]

Appeal against the decree of the Additional District Judge, Midnapore, dated the 14th April 1917, reversing that of the Munsif, 1st Court at that place, dated the 1st of February 1915.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitter* (with him Babu *M. N. Banerjee* for Babu *Debendra Nath Mondal*), for the Appellant.—The plaintiff was a purchaser at a sale for arrears of Government revenue. This suit is for *khas* possession or assessment of rent. The most important defence raised by the defendant was that the plaintiff's suit was barred by limitation. He further said that he was not a tenant of the land in dispute. The learned Judge has wrongly admitted additional evidence. This is against the provisions of Order XLI, rule 27, Civil Procedure Code. Moreover, it has prejudiced the plaintiff. Further no reasons are given as to why the *rubakari* was ordered to be filed. The Judge says only: 'Let the document be kept with the record'. There was no occasion for accepting additional evidence. See *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1). The Judge must be satisfied that there are reasons for the reception of additional evidence. See *Bepin Behari Saha* v. *Abdul Barik* (2) as regards the question whether or not the Appellate Court ought to admit evidence. Again the Judge has not correctly applied the Article of the Limitation Act. Under Article 121 the suit has to be instituted within 12 years from when the sale becomes final and conclusive; the suit, therefore, should not have been thrown out. The defendant was regarded as a tenant under the plaintiff, so the former cannot raise the plea of limitation against his landlord. A tenant cannot claim prescription against his landlord.

(1) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435.

(2) 35 Ind. Cas. 613; 24 C. L. J. 416 at p. 447; 21 C. W. N. 30; 44 C. 950.

MURALI DHAR ADITYA *v.* THAKUR DAS MONDAL.

Babu *Bipin Behari Ghosh* (with him Babus *Peary Mohan Chatterjee* and *B. B. Mukerjee*), for the Respondent.—This suit is mainly one for ejectment on the ground that there is no relationship of landlord and tenant and that the defendant was never plaintiff's tenant. The plaintiff must establish title to the land. He did not even put in his title deed. If we concede that Article 121 was applicable, was not the plaintiff bound to show when the sale became final and conclusive? As regards the admission of the *robakari*, it is not a private document. Even here before your Lordships I could have asked you to admit it in evidence to show the date of plaintiff's purchase. As regards the omission to assign any reason, it is a mere irregularity which does not affect the merits of the case, and section 99, Civil Procedure Code, covers such a case.

Dr. *Dwarkanath Mitter* replied.

JUDGMENT.

WALMSLEY, J.—The plaintiff brought the suit from which the appeal arises to eject the defendant or, in the alternative, to have an assessment of fair rent in respect of the land held by the defendant, and the basis of his claim was a purchase made under the provisions of Act XI of 1859. The defendant raised various defences, one being that the suit was barred by limitation, another, that the defendant was not a tenant of the land under the plaintiff and that, therefore, the plaintiff was not entitled to either remedy. The first Court dismissed the suit so far as the prayer for ejectment was concerned but gave the plaintiff a decree for fair rent, holding that the suit was not barred by limitation and that the defendant was a tenant under the plaintiff. This decision was reversed by the learned District Judge on appeal and so far as the matter of limitation was concerned, the Judge proceeded upon a document which was put in by the defendant, then appellant, on the date on which the arguments were heard. He further held that the presumption arising from the Record of Rights had been rebutted. The arguments which were advanced in support of the plaintiff's appeal to this Court are as follows. *First* of all it is stated that the admission of the *robakauri* relating to the sale is opposed to the provisions of Order XLI, rule 27, and, *secondly*, that the admission has prejudiced the plaintiff because the document was admitted at a late stage of the case and he had no opportunity of adducing evidence to show that the sale became final upon some date other than the date mentioned by the learned Judge. The *third* point is that having regard to the entry in the Record of Rights dated 1911 where the defendant is shown as tenant under the plaintiff, no question of limitation can arise. Now with regard to the admission of the *ruabakari* it appears to me that the learned Judge was quite correct in allowing this additional evidence to be produced. The suit by the plaintiff as an auction-purchaser is governed by Article 121 of the Indian Limitation Act and I think that when the defendant raised a plea that the suit was not brought within 12 years from the date when the sale had become final and conclusive, the plaintiff should have produced evidence to show when as a matter of fact the sale did become final and conclusive, and it was not enough for him to produce an extract from the Collectorate Register to show the registration of his name as a proprietor of the land in suit. The Judge, however, made an error in not complying with the second part of rule 27, which requires that the reasons for admitting evidence in the Appellate Court must be given in writing. All that he said is that it was to be filed with the record. I think, however, that the provisions of section 99 of the Civil Procedure Code cover such a case. There is no substance in the plaintiff's suggestion that he was prejudiced by this admission, because obviously, as he was an auction-purchaser, he must have known if there were any proceedings before the Commissioner which would have deferred the date when the sale became final, and, therefore, the irregularity cannot be said to affect the merits of the case. That disposes of the argument with regard to the additional evidence and the question of limitation based on Article 121.

It is urged, however, that the entry in the Record of Rights made in 1911 absolves the plaintiff from the necessity of bringing his suit within 12 years from the date of the purchase, on the ground that the defendant was then regarded as a tenant

under the plaintiff and he cannot raise a plea of limitation against his landlord. The view taken by the learned Judge is that the presumption arising from the Record of Rights has been rebutted and this view appears to me to be correct. It is pointed out to us on behalf of the respondent that in the plaint the plaintiff has alleged that there was no relationship of landlord and tenant and that the defendant had taken forcible possession of the land in suit and had never paid rent. The defendant on the other hand in his written statement said that he was never in possession of the land as tenant under the plaintiff. When both sides repudiated the entry in the Record of Rights. I fail to see how it can be said that the presumption had not been rebutted.

In my opinion this argument fails also, and that being so, the appeal fails and must be dismissed with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 217 OF 1916.
April 23, 1919.
Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.
RAM KHELAWAN AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
RAM NARES SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mortgage—Interest, high rate of—Necessity—Burden of proof.

It is incumbent upon a mortgagee suing to enforce his mortgage to prove not only the existence of family necessity, but that there was necessity for borrowing at an onerous rate of interest. [p. 52, col. 2.]

Where, therefore, a mortgage deed provided for the payment of interest at 24 per cent. per annum and compound interest with half yearly rests, and the mortgagee failed to prove that there was any necessity for borrowing at such high rate of interest and the Court reduced the rate of interest to 18 per cent. simple interest, and finding that at this rate the mortgagee had been repaid an amount sufficient to cover the principal and interest, it dismissed the suit:

Held, that the suit was rightly dismissed. [p. 53, col. 1.]

First appeal from the decree of the Subordinate Judge, Gorakhpur, dated the 4th of April 1916.

Dr. *T. B. Sapru* and Mr. *Iswar Saran*, for the Appellants

Mr. *U. S. Bajpai* for Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for enforcement of a mortgage, dated the 27th of August 1900. The plaintiffs are the legal representatives of the mortgagees and some of the defendants are mortgagors and the rest are the legal representatives of the other mortgagors. The principal amount secured was Rs. 900. Interest was payable at the rate of 24 per cent. per annum and compound interest with half yearly rests. The amount claimed is Rs. 6,745-4-0, after giving credit for Rs. 2,600 admitted to have been received. Some of the defendants denied the mortgage and also asserted that there was no family necessity for incurring the loan. The Court below has found that the loan was incurred for payment of past debts secured on family property, but it was of opinion that the plaintiffs had failed to prove that there was any necessity for borrowing money at the high rate of interest provided for in the mortgage. It accordingly reduced the rate of interest to simple interest at 18 per cent. per annum and, finding that the amount paid back to the plaintiffs was sufficient to cover the principal and interest at the rate above mentioned, dismissed the suit. The plaintiffs have preferred this appeal. The only contention raised on their behalf relates to the question of necessity for borrowing the money at the high rate of interest mentioned in the mortgage deed. It has been held by their Lordships of the Privy Council, and their decision has been followed in this Court, that a mortgagee must not only prove the existence of family necessity but he must also prove that there was necessity for borrowing at an onerous rate of interest. The latest pronouncement of their Lordships of the Privy Council is contained in their judgment in *Nawab Nazir Begam* v. *Rao Raghunath* (1) in the following terms:—"It is incumbent

(1) 50 Ind. Cas. 434; 17 A. L. J. 591; 36 M. L. J. 521 (P. C.).

on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow but that it was not unreasonable to borrow at some such high rate and upon such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage that rate and those terms cannot stand."

This judgment was delivered on the 18th of February last and does not appear to have been reported. Their Lordships adhered to the view expressed by them in *Hurro Nath Rai Chowdhri* v. *Randhir Singh* (2) and approved of the decision of this Court in *Nand Ram* v. *Bhupal Singh* (3). It is true that no evidence was given on the point by either party in this case, but as their Lordships observed in the case to which we have referred, "the thing spoke for itself." There can be no doubt that the rate of interest agreed upon by the manager of the family was inordinately high. The property was amply sufficient to secure repayment of Rs. 900 with reasonable interest and the fact that the plaintiffs seek to recover more than Rs. 6,000 by sale of the mortgaged property, is sufficient to show that the security was ample. Under these circumstances we think the learned Subordinate Judge was right in reducing the rate of interest to simple interest at Rs. 18 per cent. per annum. Allowing interest at that rate, the plaintiffs have not only recovered from the defendants the principal amount but also interest at that rate. The suit was, therefore, rightly dismissed and we dismiss this appeal with costs, including in this Court fees on the higher scale.

Appeal dismissed.

(2) 18 I. A. 1; 18 C. 311 (P. C.): 5 Sar. P. C. J. 642. 15 Ind. Jur. 34; 9 Ind. Dec. (N. S.) 207.
(3) 13 Ind. Cas. 5; 34 A. 126; 8 A. L. J. 1294.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 81 OF 1918.

February 3, 1919.

Present:—Mr. Justice Kumaraswami Sastri.

RETHAMALI SERVAI AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

RAMASAMI SERVAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, para. 20—Award dissolving marriage and directing payment of money by one of the parties—Application to file award to enforce payment of money—Jurisdiction of Small Cause Court—'Subject-matter of award,' meaning of—Irregularities in procedure of arbitrators, waiver of, by parties.

A Small Cause Court has no jurisdiction to file an award under Schedule II, paragraph 20, Civil Procedure Code, which, though it directs payment of money within the pecuniary limits of its jurisdiction, goes on to declare the dissolution of marriage between the parties. [p. 54, col. 1.]

The jurisdiction of a Court to file an award depends on the reliefs awarded by the award. It is not open to a party to confer jurisdiction on a Court by asking for only one relief granted by the award and getting the award filed under paragraph 20, where the other reliefs granted are beyond the competence of the Court. [p. 54, col. 2.]

Mohesh Chandra Kundu v. *Amar Chand Kundu*, 22 Ind. Cas. 793; 18 C. W. N. 867, 19 C. L. J. 260 and *Raghavendra Ayyaji Desai* v. *Gururao Raghavendra Desai*, 19 Ind. Cas. 882; 37 B. 442; 15 Bom. L. R. 362, explained.

The expression 'subject-matter of the award' in the paragraph means the whole matter dealt with and decreed by the award, and not any particular portion which affects any particular party. [p. 54, col. 1.]

Irregularities in the procedure adopted by an arbitrator may be waived by the parties, provided they know of the irregularities and waive them with such knowledge. [p. 54, col. 2.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, Ramnad at Madura, in Small Cause Suit No. 198 of 1917.

Mr. *K. Bashyam Iyengar*, for the Petitioners.—One of the reliefs granted by the award was that 2nd defendant should pay a certain amount to the 2nd plaintiff. That portion of the award is enforceable by the Small Cause Court. The plaintiffs only want that relief. The fact that the other reliefs awarded are beyond the competence of the Court does not disentitle the plaintiffs from having the award filed.

Mr. *K. A. Rajah Aiyar*, for the Respondents.—When it is sought to file the award

under para. 20, Schedule II, Civil Procedure Code, the question will turn on the jurisdiction of the Court over the entire subject-matter of the award. A party cannot give jurisdiction by asking for enforcement of a partial relief which is within the pecuniary jurisdiction of the Court. The action has been misconceived. If the suit was to enforce the payment of the amount decided by the arbitrators without seeking to file the award in Court, the Court might have jurisdiction.

JUDGMENT.—It is clear from the plaint that the suit is to file the award under section 20 of the Second Schedule to the Civil Procedure Code and to direct payment of the money decided by the arbitrators as payable to the plaintiff by the defendants. The Subordinate Judge has in his judgment refused to file the award.

The award, after directing the defendants to pay plaintiffs Rs. 427-1-7 with interest at 6 per cent. per annum, declares the dissolution of the marriage between the 2nd plaintiff and the 2nd defendant. The arbitrators decide that the marriage between the parties has been dissolved pursuant to the custom in vogue amongst the members of the caste and state that "henceforth there shall be no manner of connection between the 2nd plaintiff and 2nd defendant" and that "as sanctioned by the custom of the caste each party shall be at liberty to marry according to his or her pleasure."

I do not think the Small Cause Court has jurisdiction to file an award which, though it directs payment of money within the pecuniary limits of its jurisdiction, goes on to declare the dissolution of marriage between the parties. Section 20 of the Second Schedule to the Civil Procedure Code directs the filing of the award in any Court "having jurisdiction over the subject-matter of the award." By "subject matter of the award" I think is meant the whole matter dealt with and decreed by the award, and not any particular portion which affects any particular party. The jurisdiction of the Court will depend upon the reliefs awarded by the award. *Mohesh Chandra Kundu* v. *Amar Chandra Kundu* (1) and *Raghavendra Ayyaji Desai* v. *Gururao Raghavendra Desai* (2) referred to by the Subordinate Judge do not decide that it is open to a party to confer jurisdiction on a Court by asking for only one relief granted by the award and getting the award filed under section 20, though the other reliefs granted are beyond the competence of the Court. If the suit was simply a suit for a decree in respect of the amount decided by the arbitrators without any prayer to file the award under section 20, the jurisdiction of the Court will no doubt depend on the amount awarded without reference to the subject-matter of the original dispute but when it is sought to file the whole award under section 20, the reliefs granted by the arbitrators must govern jurisdiction.

On the merits, the Subordinate Judge has failed to note that it was open to the parties to waive any error in the procedure adopted by the arbitrators and to see how far the fact that the parties supplied the stamp paper for the award (see Exhibit C) and did not object to evidence recorded by one arbitrator in the absence of others being referred to by them would cure the defect noted by the Judge. That irregularities might be waived is clear from *Manindra Nath Mandal* v. *Mohanunda Roy* (3) and *Moseley* v. *Simpson* (4); it must of course be shown that the parties knew of the irregularities and waived them with such knowledge.

* * * * *

I direct that the application to file the award be returned by the lower Court to be presented to the proper Court. I make no order as to costs.

M. C. P.

Order accordingly.

(1) 22 Ind. Cas. 793; 18 C. W. N. 867; 19 C. L. J. 260.

(2) 19 Ind. Cas. 882; 37 B. 442; 15 Bom. L. R. 362.

(3) 13 Ind. Cas. 161; 15 C. L. J. 360.

(4) (1873) 16 Eq. 226; 42 L. J. Ch. 739; 28 L. T. 727 21 W. R. 694.

RAM CHANDER SARUP *v.* MAZHAR HUSSAIN.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 160 OF 1918.

May 7, 1919.

Present :—Mr. Justice Walsh and Mr. Justice Stuart.

L. RAM CHANDER SARUP—APPLICANT —APPELLANT

versus

Munshi MAZHAR HUSSAIN (RECEIVER) AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 24—Jurisdiction of Insolvency Court to correct errors—Civil Procedure Code (Act V of 1908), s. 152, applicability of—Mistakes of parties, whether can be rectified.

An Insolvency Court has the same jurisdiction that the ordinary Courts of law possess under the Civil Procedure Code to correct any mistake either of a clerk or of the parties themselves upon a question of fact, when a mistake is established. [p. 55, col. 1.]

Where a creditor in insolvency proceedings has exhausted all the remedies open to him for rectifying an error, the Insolvency Court becomes *functus officio* and has no jurisdiction to entertain an application under section 24 of the Provincial Insolvency Act. [p. 55, col. 2.]

Section 152 of the Code of Civil Procedure is confined to the correction of clerical errors made by the Court itself, and has no concern with the mistakes of parties. [p. 56, col. 1.]

First appeal from the order of the 1st Additional Judge, Aligarh, dated the 31st July 1918.

Mr. *Nihal Chand*, for the Appellant.

Mr. *Panna Lal*, for the Respondents.

JUDGMENT.—This is a plain case. The question arises as to whether the present appellant is now in a position under the law to establish what he claims to be the true amount of his debt, namely, some Rs. 6,000 odd. It was stated originally at about that amount by the debtor. In 1913, the creditor himself, who ought to know better than anybody else, stated the amount at Rs. 3,418 odd and supported that claim by affidavit, at which amount it was allowed. He now says that it was a mistake.

No doubt the Insolvency Court has the same jurisdiction that the ordinary Courts of law possess under the Civil Procedure Code to correct any mistake either of a clerk or of the parties themselves upon a question of fact, when a mistake is established. It would appear that this creditor took three years or a little less to discover this serious error. But having discovered it, he applied to the Insolvency Court to rectify the amount of his debt in the Schedule. Whether without extending the 21 days which is given for such applications by the Act, the Court could entertain the application itself on proper grounds after being satisfied that there had been a genuine oversight and that it had only just been discovered, does not now matter, because the Court of Insolvency entertained the application and on the 19th of May 1916 made a formal order upon the creditor's application that the amount of the debt should be entered as Rs. 3,41E odd, the amount which appeared to the Court to be correct according to the creditor's sworn statement. That decision or order may have been right, or may have been wrong. We are not now considering the merits. It was clearly subject to appeal if it was wrong. An application was made to review it. That application for review was rejected. All the creditor's remedies for rectifying any error, if there was an error, being thus exhausted, the order of the 19th of May 1916 became final and binding upon him and, according to a decision of this Court, binding also upon any other Court in which the matter might happen thereafter to be litigated. It was a final decision upon the merits and no Court has jurisdiction to re open it. The present application was made to the same Court, although presided over by a different Judge, on the 3rd of December 1917, nearly two years after the decision on the merits and more than four years after the original. The application appears to have been based upon section 24 of the Insolvency Act and also on section 152 of the Civil Procedure Code. So far as section 24 of the Insolvency Act is concerned, the Court has no jurisdiction to entertain the matter at all. It had already decided it once and was *functus officio*. Under that section the application was properly rejected.

Section 152 seems to have been called into play upon the suggestion that the original error was a clerical error which required amendment. That, however, in the first place begs the question, because the Court by its order of the year 1916 had decided that it was not a mistake, but in the second place it could not in any event have been a

mistake of the Court; the mistake was that of the creditor. Section 152 deals with amendments of clerical errors in orders or decrees of the Court itself which are drawn up not properly representing what the Court decides. The matter did not clearly come under section 152, Code of Civil Procedure. There was obviously no remedy open to the creditor at all. The application was wholly misconceived. This appeal must be dismissed with costs on the higher scale.

Appeal dismissed.

PATNA HIGH COURT.

[SECOND CIVIL APPEAL No. 358 OF 1918.

April 25, 1919.

Present:—Mr. Justice Roe and Mr. Justice Coutts.

SHEO PRASAD MANDER—

DEFENDANT—APPELLANT

versus

BATESWAR MAHTON AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Landlord and tenant—Rent suit—Rate of rent, whether res judicata.

The general rule of law is that a decision in a previous rent suit as to the amount of rent annually payable does not operate as *res judicata* in a suit for the rent of subsequent years, although it may give rise to a presumption that the rent remains the same. This rule does not, however, apply where the suit is based on a contract between the parties and the question of the rate of rent under the contract was a point in issue in the previous suit. [p. 56, col. 2.]

Appeal from a decision of the District Judge, Bhagalpore.

Mr. *Lalit Mohan Ghosh*, for the Appellant.

Mr. *Lachmi Narain Singh*, for the Respondents.

JUDGMENT—This second appeal arises out of a suit for arrears of rent for the years 1320 to 1323 in respect of 48 *bighas* and 5 *cottahs* of land. This land was originally held by the defendant and others as occupancy tenants. They executed a mortgage with possession in favour of the plaintiffs for a sum of Rs. 1,000 and the plaintiffs took possession. Subsequently in 1909 the defendants took a lease of the same land, *patta* and *kabuliyat* being exchanged. The terms of the lease were that the defendants were to pay 70 maunds of wheat, value Rs. 225, to the plaintiffs as rent. The plaintiffs have accordingly sued at this rate. The suit was decreed in the Court of first instance and in the lower Appellate Court and against this decree the defendants have made this second appeal to this Court.

The principal argument adduced on behalf of the defendants, or rather the single defendant who has contested the suit, is that the rent fixed in the lease was a money rent not a produce rent—and that consequently the defendants are entitled to the benefit of section 48 of the Bengal Tenancy Act.

In the Court of first instance it was held by the learned Subordinate Judge that the defendants are not under-*raiyats* and that consequently section 48 of the Bengal Tenancy Act did not apply. The learned District Judge on appeal, however, found that the defendants were under-*raiyats* and that they would have been entitled to the benefit of the section except for the fact that the rent was a produce rent and not a money rent.

We have examined the *kabuliyat* and are of opinion that the rent is a produce rent and not a money rent. It would, therefore, be immaterial whether the defendants are *raiyats* or under *raiyats*. But whatever be the true effect of the *kabuliyat*, the plaintiffs are entitled to succeed. It appears that in 1912 they instituted a suit against these defendants for the rent of 1318 and 1319, at the rate at which they now claim, and obtained a decree. The general rule of law is that a decision in a previous rent suit as to the amount of rent annually payable does not operate as *res judicata* in a suit for the rent of subsequent years, although it may give rise to a presumption that the rent remains the same, but this rule does not apply to a case of the kind now before us. The present suit is one based on a contract between the parties and the question of the rate of rent under the contract was a point in issue in the previous suit. That suit was between the same parties, the matters in dispute were decided by a Court of competent jurisdiction and it is not now open to the parties to re-agitate

them. This was the view taken in *Rajendra Nath Ghose* v. *Tarangini Dasi* (1) and it has been followed in a long series of decisions. In this Court we may refer to the decision in *Musammat Zalikha Bibi* v. *Mahant Krishna Dayal Gir* (2). It is true that there is a subsequent decision of this Court—*Bansraj Lal* v. *Moti Lal* (3)—which might appear, at first sight, to conflict with the decisions we have referred to, but the case was an entirely different one and we do not find that the principle which is laid down in *Rajendra Nath Ghose* v. *Tarangini Dasi* (1) was dissented from. The case was a very peculiar one. The plaintiff was forced by the Court against his will to include certain plots in his plaint; he protested and stated that he intended subsequently to bring an action on this ground. It was held that the principle of estoppel in such a case would not apply. It is clear, therefore, that this was an entirely different case which has no bearing on the case now before us. We dismiss this appeal with costs.

Appeal dismissed.

(1) 1 C. L. J. 248.
(2) 41 Ind. Cas. 778; 2 P. L. W. 146.
(3) 42 Ind. Cas. 425; 3 P. L. W. 360; (1918) Pat. 21.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 1000 OF 1917.
January 10, 1919.
Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.
AMMANI AMMAL—DEFENDANT No. 1—APPELLANT
versus
RAMASWAMI NAIDU AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 2 TO 5—RESPONDENTS.

Vendor and purchaser—Assertion of non-existent title by vendor—Suit for possession by true owner—Right of purchaser to re-imbursement of simple and mortgage debts paid by him and binding on real owner—Equity—Mortgage—Subrogation—Cancellation of sale-deed, whether necessary relief—Specific Relief Act (I of 1877), ss. 39, 41—Contract Act (IX of 1872), ss. 69, 70.

Where property is sold by a person having no title to it, and the true owner or any one deriving title from him afterwards sues to recover possession, the purchaser is not entitled to be re-imbursed for the simple debts of the true owner which he has paid out of the sale consideration, before surrendering the property. [p. 59, col. 2; p. 62, col. 1.]

The right cannot be supported either on the general principles of equity or under the statutory provision contained in section 41 of the Specific Relief Act and the Court will not make an order for compensation where the property has been sold by a stranger as his own property, even though the true owner has benefited thereby. [p. 61, cols. 1 & 2.]

Sabapathy Chetty v. *Ponnusawmy Chetty*, 28 Ind. Cas. 365, *Audimula Mudali* v. *Alamalammal*, 36 Ind. Cas. 365; (1916) 2 M. W. N. 115; 4 L. W. 126, *Bijraj Nopani* v. *Sreemutty Pura Sundary Dasee*, 24 Ind. Cas. 296; 42 C. 56, 27 M. L. J. 93; 1 L. W. 555; 18 C. W. N. 1313; (1914) M. W. N. 679; 16 M. L. T. 338; 12 A. L. J. 1185; 16 Bom. L. R. 796; 20 C. L. J. 368; 41 I. A. 189 (P.C.), *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya*, 43 Ind. Cas. 903; 7 L. W. 124 and *Mohori Bibee* v. *Dharmodas Ghose*, 30 C. 539 (P. C); 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374, explained anddistinguished.

Where, however, the purchaser has released the property from a mortgage debt binding on it, he is entitled to be subrogated to the rights of the mortgagee and to claim to be re-imbursed for the amount paid by him, before he can be directed to deliver the property to the true owner. [p. 59, col. 2; p. 60, col. 1.]

In the suit by the real owner, the plaintiff need not pray for the cancellation of the document. [p. 58, col. 2; p. 60, col. 2.]

Where a person buys property in good faith and for the purpose of clearing a mortgage on that property pays money to the vendor to be so applied then even if the vendor had no title, still as the mortgage was binding on the estate the vendee becomes an equitable assignee of the mortgagee. [p. 62, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 63 of 1916, preferred against the decree of the Court of the Additional District Munsif, Kumbakonam, in Original Suit No. 158 of 1914.

This second appeal came on for hearing on the 12th and 13th September 1918.

Mr. *C. A. Seshagiri Sastri*, for the Appellant.—The 1st defendant has paid simple and mortgage debts binding on the true owner, Abboy Naidu, and therefore, on the plaintiff, his legatee. As regards the simple debts they were admittedly binding on Abboy Naidu. The sale by his mother should be treated as having been effected as his guardian. The plaintiff has benefited by the payment of these debts. The purchaser, having purchased *bona fide*, is entitled to compensation before she can be asked to surrender the property. She can support her claim under section 41 of the Specific Relief Act and on the general principles of equity. See *Sabapathy Chetty* v. *Ponnusawmy Chetty* (1), *Audimula Mudali* v.

(1) 28 Ind. Cas. 365.

Alamalammal (2), *Bijraj Nopani* v. *Sreemutty Pura Sundary Dasee* (3) and *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya* (4).

The claim can also be supported on the analogy of the English doctrine of salvage.

As regards the mortgage debt which was discharged by the 1st defendant, she stands on firmer ground. She is entitled to be subrogated to the rights of the mortgagee.

Mr. *T. V. Muthu Krishnier*, for the Respondents.—There is no obligation on plaintiff to pay any compensation to 1st defendant. Where the vendor has a partial title, the case may be different, or where there is a representative character vested in him. Here the sale was by a person who had absolutely no title to the property.

The English doctrine of salvage has no application to the present case.

Sections 39 and 41 of the Specific Relief Act do not apply. The plaintiff need not sue for the cancellation of the sale-deed, as it was not executed by him or any one from whom he derives title.

There is no principle of equity which requires the Court to award compensation in a suit like the present, where the conveyance was by a person who did not own the estate. See *Ram Tuhul Sing* v. *Biseswar Lall Sahoo* (5), where the Privy Council lay down that it is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises.

JUDGMENT.

SADASIVA AIYAR, J.—The 1st defendant is the appellant before us. The plaintiff brought a suit for possession of certain properties which had been bequeathed to him by his elder brother Abboy Naidu (when the plaintiff was a minor) under a Will dated 4th August 1901. The plaintiff's mother, asserting a title in herself to the property, sold it to the 1st defendant in February 1904 under Exhibit VI for a sum of Rs. 3,400. The title she asserted against her deceased son Abboy Naidu (in whose name the title-deeds stood) and against Abboy Naidu's brother and legatee, the minor plaintiff, was based upon her contention that though the property was purchased in Abboy Naidu's name, Abboy Naidu was a *benamidar* for herself (his mother). The plaintiff, of course, denied that Abboy Naidu was a *benamidar* for his mother and he sued upon his title derived from Abboy Naidu. He also prayed in his plaint for the cancellation, if necessary, of the deed of February 1904 executed by his mother. I might at once say that not only is no such cancellation necessary but that the plaintiff has no legal cause of action to get the relief of the cancellation of a document which was not executed and which does not even purport to have been executed by himself or by anybody from whom he traces his title. The lower Appellate Court has found on the facts in the plaintiff's favour and on his title so found, given a decree for him.

The contentions argued before us in second appeal were that the plaintiff in any event should have been ordered to pay the amounts of the debts binding on Abboy Naidu and, therefore, on his legatee (the plaintiff) and paid by the 1st defendant as purchaser under Exhibit VI before the plaintiff recovers the properties, secondly, that so far at least as a mortgage debt binding on the plaintiff was paid by her, she was entitled to be subrogated to the rights of mortgagee and that the plaintiff ought to be made to pay the amounts due to her as such mortgagee by right of subrogation before recovering the properties.

So far as the debts other than the mortgage debt are concerned, the learned Vakil for the appellant, Mr. Seshagiri Sastri, put forward his contention under three heads. The first head may be formulated thus: though the plaintiff's mother purported to execute the deed in her own right alleging herself to be the sole owner, the 1st defendant as a *bona fide* purchaser for value is entitled to treat the sale deed as having been executed by the plaintiff's mother as his guardian and in that view, the plaintiff is bound to re-imburse so much of the purchase money as went to discharge the debts binding

(2) 36 Ind. Cas. 365; (1916) 2 M. W. N. 115; 4 L. W. 126.

(3) 24 Ind. Cas. 296; 42 C. 56; 27 M. L. J. 93; 1 L W. 555; 18 C. W. N. 1313; (1914) M. W. N. 679; 16 M. L. T. 338; 12 A. L. J. 1185; 16 Bom. L. R. 796; 20 C. L. J. 368; 41 I. A. 189 (P. C.).

(4) 43 Ind. Cas. 908; 7 L. W. 124.

(5) 2 I. A 131 at p. 143; 15 B. L. R. 208; 23 W. R. 305; 3 Sar. P. C. J. 477 (P. C.).

upon the plaintiff. Having heard full arguments, I do not think that any case quoted on the appellant's behalf supports her contention. On the other hand, the decision of their Lordships of the Privy Council in *Balwant Singh* v. *R. Clancy* (6) directly held that where a person who was the *de jure* manager of an undivided family purported to create a mortgage as if he was the full owner denying the right of the junior member of the family, the alienee cannot under either the ordinary principles of equity or under the statutory provision (section 41 of the Specific Relief Act) claim to be reimbursed the portion of the consideration which went to discharge the debts binding on the junior member of the family. As regards the decisions of this Court in *Sabapathy Chetty* v. *Ponnusawmy Chetty* (1) and *Audimula Mudali* v. *Alamalammal* (2), the alienations were by a Hindu father who for certain purposes has got all the powers of a full owner and in whom the interest of a full legal owner is vested for many purposes notwithstanding that he might have undivided sons. The decisions in those cases seem to have gone on the particular facts of those cases and the Court came to the conclusion on the evidence that there was nothing to prevent the Court from holding that the father (alienor) intended also to make the disputed alienation in a capacity which would have given him an interest sufficient to affect the rights of his son also, and that in the case of a *bona fide* purchaser for value such an inference should, if possible, be drawn from the facts and circumstances of those particular cases. In this case it seems to me it is impossible on the evidence and on the pleadings to hold that the plaintiff's mother could have intended to act in any other capacity than that of herself being the full owner. Further in those cases, the documents of alienation were not mere waste papers conveying no title or interest whatever in the property alienated as in this case, but did affect, at least, the part-ownership right of the alienor. In the case of *Bijray Nopani* v. *Sreemutty Pura Sundary Dasee* (3) the document was executed (along with others) by a person who was the full legal owner, who had the right to convey the full legal ownership and who intended to convey such full rights. It was under those circumstances held that the erroneous description of the origin and incidents of his title in the sale-deed did not prevent the alienee from obtaining a valid title to the rights of a full owner. I do not think that that case has any bearing upon the question we are now considering. As regards the English cases of salvage quoted by the appellant's learned Vakil, they were cases where a person who was not the owner of goods paid freight and other similar charges and the Jury were held justified in estimating damages to allow such charges to be deducted in favour of the wrongdoer, where the plaintiff's action was brought for damages in trover or where the defendant had an option to return the goods or to pay damages. Those cases also have no bearing on the question now under consideration. On the other hand there is a case in *Nathu* v. *Balwantrao* (7) which is a direct authority on this point; and respectfully concurring in that decision, I would hold that the 1st defendant has no right to recover any sums which she paid to discharge Abboy Naidu's debts and which were not charged upon any immoveable property. As stated by the Privy Council in *Ram Tuhul Sing* v. *Biseswar Lall Sahoo* (5) quoted in the above case: "It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit, there must be an obligation, *express* or *implied*, to repay."

Then we have left for consideration the other point based upon the allegation that the 1st defendant has released the property from the mortgage charge created by Abboy Naidu by payment of certain sums of money to the mortgagee. I think that if the 1st defendant in good faith purchased the property from the plaintiff's mother and as such purchaser felt herself bound to pay a mortgage charge created by the real owner,

(6) 14 Ind. Cas. 629; 34 A. 296; 16 C. W. N. 577; 23 M. L. J. 18; 11 M. L. T. 344; (1912) M. W. N. 462; 9 A. L. J. 509; 15 C. L. J. 475; 14 Bom. L. R. 422; 39 I. A. 109 (P. C.).

(7) 27 B. 390; 5 Bom. L. R. 301.

which charge the plaintiff was himself under an obligation to meet, she is entitled to be subrogated to the rights of the mortgagee in so far as her money went to discharge that mortgage. I think I need refer only to the two decisions of this Court in *Syamalarayudu* v. *Subbarayudu* (8) and *Chama Swami* v. *Padala Anandu* (9) in support of this proposition. The lower Courts, however, have not gone into that question, namely, whether the 1st defendant after her purchase paid any money to the mortgagee mentioned in Exhibit VI in payment of the mortgage dated 19th April 1899. Before finally disposing of this appeal it is, therefore, necessary to obtain a finding from the lower Appellate Court on the following issue on the evidence on record: Did the 1st defendant pay any amount to the mortgagee under the mortgage-deed of 1899 for the purpose of discharging the encumbrance on the plaint properties and if so, what are the amounts and dates of such payments? The finding will be submitted within four weeks from the date of the receipt of the records and ten days will be allowed for objections.

NAPIER, J.—I agree.

The first point taken by the appellant is that we should not accept the finding of the lower Appellate Court that the plaintiff's mother purported only to convey her own interest and totally ignored any interest in the plaintiff; and reliance is placed on the decision in *Audimula Mudali* v. *Alamalammal* (2), where the Court stated as follows: "In our opinion Courts should incline to the view that the transferor alienated the property in the capacity most beneficial to the *bona fide* purchaser." This doctrine may be properly applicable for the purpose of ascertaining on the evidence what the intention of the transferor is, but where, as in a case like this, the transferor deliberately claimed that the person in whom the title stood was only a *benamidar* for her and that the property was her own absolute property, it is impossible to find any ambiguity and thereby give any scope for the application of this doctrine. We must deal with this case on the footing that a stranger having no interest in any property but making a claim against the titles which were vested in another person sold that property to a third person. It is now further argued that as part of the proceeds of the purchase money went to discharge the debts which would have been binding on the vendor if the title had vested in her and were in fact debts which were binding on the true owner, the true owner cannot recover the property without making compensation for the discharge of those debts. It is sought to support this proposition on two grounds: one, that it is covered by the language of the Specific Relief Act, sections 39 and 41, the other that there is an equity which the Courts should apply. With regard to the claim under the Specific Relief Act, reference to the chapter shows that this claim only arises in suits for cancellation of instruments, section 41 being "On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require." This is undoubtedly an application of the English doctrine of the Chancery Courts that he who seeks equity must do equity; and the first point we have to be satisfied on is whether there was any necessity for the plaintiff in this case to seek equity. As my learned brother pointed out, all that the plaintiff said in this suit was that if it was necessary to have the document cancelled the Court should do it. To my mind it is clear that there is no necessity to have this document cancelled. The illustrations to section 39 indicate that it is only where a party cannot get his legal remedy without first having the document set aside that he comes within the section. This is a suit by the true owner to recover possession of the property. The title adverse to him is not one procured from him or from any one under whom he claims or from any one who purported to convey an interest of his. It seems to me, therefore, that there can be no necessity for him to apply to have the document cancelled and further that the Court would have no jurisdiction to do so. But it is urged on us that in a case reported as *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya* (4), where the suit was to recover possession of property, the Court held that they were empowered to give compensation under this section. The case is Second Appeal No. 803 of 1916,

(8) 21 M. 143; 7 Ind. Dec. (N. S.) 457.
(9) 31 M. 439; 3 M. L. T. 395; 18 M. L. J. 306.

In that case, however, the plaintiff who brought the suit to recover the property himself executed a sale-deed of certain lands to the 2nd defendant jointly with his undivided brother, the 1st defendant. At the time of the conveyance he was a minor. The Court then considered the question as to whether he represented he was of age and found that was not proved. So in that case there was in existence a document from the true owner which on the face of it conveyed the property. In those circumstances, although the suit was one for recovery of property, the learned Judges thought that the document must be set aside first and that therefore the doctrine applied. It is, therefore, no authority for the contentions in this case. I am, therefore, clearly of opinion that this doctrine does not apply.

It is next argued that the equitable doctrine entitles us to give relief, and reliance is placed on the case of *Mohori Bibee* v. *Dharmodas Ghose* (10), a decision of the Privy Council. In that case a minor had executed a mortgage in favour of one Brahmo Datt to secure the payment of Rs. 20,000. A suit was brought on the mortgage. On the day the mortgage was executed the minor signed a declaration that he was of age. Two months after the execution of this mortgage he by his mother as guardian brought a suit against the mortgagee praying for a declaration that the mortgage was void and inoperative and that it should be delivered up and cancelled. Their Lordships of the Privy Council deal with the question as to whether compensation should be given under two heads, on which it was argued, *viz.*, Specific Relief Act and the equitable right. Their Lordships appear to have recognised the possibility of the application of section 41 of the Specific Relief Act to the case. But they say that the lower Courts saw no reason for ordering the return of the money and they themselves would not interfere. They then consider the application of the purely equitable doctrine and state the proposition, "It was also contended that one who seeks equity must do equity." Now it must be noted that in this case there was no question but that the plaintiff was seeking equity, namely, for directing the mortgage to be delivered up and cancelled. And then referring to the decision of the Court of Appeal in *Thurston* v. *Nottingham Permanent Benefit Building-Society* (11), they quoted the language of Lord Justice Romer, which is as follows: "The short answer is that a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void." So that apart from the Statute they held that even where a minor has received a benefit under a void mortgage, he cannot be compelled by any principle of equity to give compensation. The fundamental doctrine was stated in the judgment of the Privy Council in a case which is quoted in *Nathu* v. *Balwantrao* (7), which is *Ram Tuhul Sing* v. *Biseswar Lall Sahoo* (5). The doctrine is as follows: "It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit, there must be an obligation, expressed or implied, to re pay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B*'s debt." We have, therefore, to find some obligation on the part of the plaintiff in this case to repay the amounts which have been paid by the 1st defendant in discharge of his debts. It is well settled that there is no such broad obligation under the Contract Act; and it rests on the 1st defendant to find some doctrine which will enable her to ask the Court to make the order. The language here is a very specific and definite warning to Courts that they must not use their powers simply to avoid hardships. The question in which this very point arose was decided by the Privy Council in *Balwant Singh* v. *R. Clancy* (6). There undoubtedly a person sought to be charged had been largely benefited by money lent by a Bank to his brother for the discharge of debts binding on the family. The brother had, however, borrowed the money claiming to be a Rajah owning

(10) 30 C. 539 (P. C.); 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374.

(11) (1902) 1 Ch. 1; 71 L. J. Ch. 83; 50 W. R. 179; 86 L. T. 35; 18 T. L. R. 135.

an impartible Zemindari. The Privy Council decided that the money was borrowed by him in that capacity and in no other and that it is not open to the Courts to find that because he was the manager of a joint family, the borrowing could be attributed to that capacity; and the claim of the Bank to make his younger brother liable in respect of debts which had been cleared from the joint family property, being the debts of his father, was negatived. It seems to me that we cannot make any order for compensation in this case without directly disregarding the decision in *Balwant Singh* v. *R. Olancy* (6). I am, therefore, of opinion that there is no doctrine which will empower a Court to make an order for compensation where the property has been sold by a stranger as the stranger's property even though the true owner has benefited. That is the broad proposition.

There is, however, another doctrine which may affect some payments in this case, and that is one analogous to the doctrine of salvage. It is dealt with in the case of *Syamalarayudu* v. *Subbarayudu* (8) and *Chama Swami* v. *Padala Anandu* (9) and the doctrine comes to this, that where a person buys property in good faith and for the purpose of clearing a mortgage on that property pays money to the vendor to be so applied then even if the vendor had no title, still as the mortgage was binding on the estate, the vendee becomes an equitable assignee of the mortgage. This doctrine has been applied in those two cases and although some doubts have been thrown upon it in *Shiam Lal* v. *Ram Piari* (12), it seems to me that it is founded on right principles and I think that we should follow the decisions of our Court. I agree, therefore, with the order of my learned brother remanding an issue for trial.

In compliance with the order contained in the above judgment the Temporary Subordinate Judge of Tanjore submitted the following

FINDING.—The High Court in its order dated 13th September 1918, in Second Appeal No. 1000 of 1917 has directed submission of a finding on the following issue on the evidence already on record:

"Did the 1st defendant pay any amount to the mortgagee under the mortgage-deed of 1899 for the purpose of discharging the encumbrance on the plaint properties, and if so, what are the amounts and dates of such payments?"

2 The mortgage bond referred to in the suit is marked Exhibit F, and is dated 19th April 1899. Exhibit VI, dated 1st February 1904, is the sale-deed taken by Ammani Ammal for Rs. 3,400, of which Rs. 2,400 was said to have been paid in cash and Rs. 1,000 retained by her, a security bond having been given for that amount. The vendee, Ammani Ammal, was examined as plaintiff's 1st witness and she says that prior to the execution of Exhibit VI another sale-deed had been executed which could not be registered because of the several mistakes it had, and Exhibit VI was subsequently executed and registersd. Rs. 2,400 is said to have been paid on the day of the infructuous prior sale deed but not under the subsequent sale deed Exhibit VI. She does not know whether the mortgage deed was discharged by the mortgagor, Poongol Ammal, or not, and what amount, if at all, was paid towards it. But the mortgagee, Ramaswami Nayudu, filed a suit registered as Original Suit No. 264 of 1904, on the file of the Mayavaram District Munsif's Court, for the amount due under the mortgage bond Exhibit F, and the suit was compromised, adjustment of the claim having been certified. Ammani Ammal says that, with a view to bring about the compromise, she paid Rs. 200 to Poongol Ammal and obtained a receipt, Exhibit 1-B on 6th October 1905, in token of the discharge of the mortgage claim. The receipt shows that the full amount due under the mortgage bond had been paid to the mortgagee Ramaswami Nayudu, who was examined as plaintiff's 4th witness in this suit. His version is that, subsequent to the institution of the suit, accounts were settled between him and Poongol Ammal, that he had to pay her Rs. 360 towards the amount of rent due under Exhibit E, and towards the price of two head of cattle purchased by him from Poongol Ammal, and that

(12) 4 Ind. Cas. 706; 32 A. 25; 6 A. L. J. 947.

Rs. 283 was paid to him by the 1st defendant through the mortgagor, Poongol Ammal. It was on settlement of his claim as evidenced by Exhibit 1-B, he withdrew the suit.

3. The other persons that refer to the sale deed are defendants' 2nd witness, Vaithinatha Ayyar, and defendants' 3rd witness, Kumaraswami Pillai. Defendants' 2nd witness wrote the first abortive sale-deed and speaks to money having been paid in his presence, though he does not remember how much was paid. Defendants' 3rd witness, who attested Exhibit VI, did not see any cash paid in his presence, but he was told by the vendor that she had received consideration, and he attested the document on that assurance. These are all the facts relevant to the issue that could be culled from the evidence on record with regard to the mortgage deed and its discharge.

4. The question, therefore, to be determined is whether any consideration was paid under the sale-deed, Exhibit VI, and if so, how much of it went towards the discharge of the mortgage-deed, Exhibit F, and if no amount, paid towards Exhibit VI or towards the prior abortive sale-deed, went towards discharge of the mortgage-deed, whether any amount was subsequently paid towards such discharge, and how much.

5 It is clear that no consideration was paid at the time of the execution of Exhibit VI, the sale-deed. The evidence of Ammani Ammal and Vaithinatha Ayyar, D. W. No. 2, tends to show that Rs. 2,400 was paid under the prior infructuous sale-deed and a security bond was executed for the balance of Rs. 1,000. The vendee Ammani Ammal herself had to get some money under Exhibit I ✓, a pro-note executed to her by Poongol Ammal, and the amount due thereunder was deducted from the Rs. 2,400 paid at the execution of the first sale-deed, and only the balance was paid to the vendor. The evidence as to the execution of Exhibit IV, the truth of the debt evidenced by it, and the necessity for Poongol Ammal to borrow that money on the occasion of settling the maintenance claim of Sitalakshimi Ammal is convincing, and I need not dwell upon it. The facts that there was a debt due to Ammani Ammal herself, that a sale-deed was first executed to her and latterly it had to be renewed by Exhibit VI, and that a security bond had to be executed for Rs. 1,000, all go to show that the sale must have been a genuine transaction supported by consideration. There is absolutely no reason why Poongol Ammal should have executed a nominal sale-deed to Ammani Ammal without receiving any consideration for it. Consideration must, therefore, have passed under the document antecedent to Exhibit VI and we have to see whether any portion of that consideration went towards the discharge of the mortgage-deed. There is no evidence on that point, Ammani Ammal herself not knowing anything about it. The fact that the mortgagee had to institute a suit in that very year, about eight months after, shows that the mortgage-deed was not discharged and that Ammani Ammal did not take care to see that the money paid by her actually went in discharge of the mortgage debt. We are, therefore, not practically concerned with the amount paid at the time of the execution of the prior abortive sale-deed.

The next point we have to consider is whether Ammani Ammal paid anything to bring about the withdrawal of Original Suit No. 264 of 1904 on the file of the Kumbakonam Court by payment of any cash. She says she paid Rs. 200 as a present to Poongol Ammal to bring about the compromise, and the mortgagee himself, who actually took the money and executed Exhibit 1-B in token of the discharge of the encumbrance, says that Ammani Ammal paid Rs. 285 to Poongol Ammal, who paid that amount into his hands. Exhibit 1-B does not mention the amount specifically but says that the entire amount due was paid in cash. Whatever may be the truth of the statement that Rs. 360 was set off against the amount due from the mortgagee, there is no doubt that Rs. 285 was paid for the withdrawal of the suit; and as the other amount of Rs. 360 referred to by Ramaswami Nayudu must properly belong to the plaintiff in this suit, having regard to the recognition of his present claim by this Court, it need not be taken into consideration. The 1st defendant herself says that Rs. 200 was paid by her, whereas

the mortgagee says that Rs. 285 was paid by her towards consideration for the adjustment of the maintenance suit. The transaction took place ten years before the date of the deposition, and a woman of the position of Ammani Ammal cannot be expected to remember the fact so vividly as RamasamilNayudu P. W.!No. 4, who is a man of business and who has actually received the amount. I, therefore, believe that the 1st defendant must have paid Rs. 285 on 6th October 1905 towards discharge of the encumbrance, and find that the 1st defendant paid Rs. 285 to the mortgagee under the mortgage-deed of 1893 for the purpose of discharging the encumbrance on the plaint properties, and that amount was paid on the date of Exhibit 1 B, 6th October 1905. The mortgage-deed carried interest at 9 per cent.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding.

The lower Court's decree will be modified by directing that Rs. 285 and interest from date of plaint shall be set off against the supplemental decree for mesne profits directed to be passed by the lower Appellate Court's decree.

The appellant will pay respondents' costs of this second appeal.

M.C.P.

Decree modified.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 2568 OF 1917.

January 18, 1919.

Present :—Mr. Justice Shadi Lal.

FIRM TARA CHAND GHANSHAM DAS—DECREE-HOLDERS—APPELLANTS

versus

JUGAL KISHORE—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908)—Execution of decree—Suspension of execution—Revival of proceedings.

A decree-holder applied on 30th August 1912 to execute his decree against the firm of *B. L.-J. K.* The judgment-debtor having been declared insolvent, the application was struck off the list on 1st October 1912. In the Insolvency Court a controversy arose as to whether *B. L.* was the sole proprietor or whether *J. K.* had also been adjudicated insolvent. On 3rd April 1916 the Court decided that *B. L.* was the sole proprietor of the firm and that he alone had been adjudicated insolvent. On 19th April 1917 the decree-holder applied to execute the decree, but his application was dismissed as barred under Article 182 of Schedule I of the Limitation Act. On appeal:

Held, (1) that the proceedings in execution were not barred, inasmuch as the application of 30th August 1912 not having been disposed of, the later application was one to revive or carry through a pending execution suspended by no act or default of the decree-holder, and that proceedings could be taken against *J. K.*; [p. 65, col. 1.]

(2) that even if the second application could be regarded as a fresh application, then under section 15 of the Limitation Act the period between 1st October 1912 and 3rd April 1916, during which the execution had been stayed by order of the Court, should be excluded. [p. 65, col. 2.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Rohtak, dated the 10th July 1917, dismissing application for execution for Rs. 11,487-11-0 with costs.

Messrs. *Gullu Ram* and *Devi Dayal*, for the Appellants.

Bakhshi *Tek Chand* and Lala *Shamir Chand*, for the Respondent.

JUDGMENT.—The question for determination in this appeal is, whether certain proceedings in execution were barred by limitation as falling under Article 182 of the Indian Limitation Act, 1908. The material facts are few and may be stated briefly as follows:—On the 6th June 1912 the appellants obtained a decree for a certain sum of money against the firm Bhicha Lal-Jugal Kishore, and it was described in the decree that the firm comprised Bhicha Lal, his son Jugal Kishore, and other persons as partners. It is common ground that the respondent, Jugal Kishore, was one of the judgment-debtors.

On the 30th August 1912 the decree-holders made an application for executing the decree against Bhicha Lal-Jugal Kishore, but on the 1st October 1912 the Court passed an order striking the case off the list (*dakhil daftar howe*) on the ground that the firm had been adjudicated an insolvent and that the decretal amount had been entered in the schedule of debts.

It appears from the record of the Insolvency Court that there was a controversy

as to whether Bhichha Lal was the sole proprietor of the firm, or whether Jugal Kishore was also declared an insolvent, in consequence of the order of the Insolvency Court. The matter was not finally set at rest until the 3rd April 1916, when the Court decided that Bhichha Lal was the sole proprietor and that the order of adjudication applied to him and not to any other person.

The application now under consideration was made on the 19th April 1917, and the Subordinate Judge has given effect to the objection that it is barred by time under Article 182 of the Limitation Act.

I have listened to the arguments advanced on both sides and reached the conclusion that the order of the Subordinate Judge is wrong and must be set aside. I consider that the application of the 30th August 1912 was never finally disposed of, and that the application of April 1917 was in substance an application to revive and carry through a pending execution which was suspended by no act or default of the decree-holders. It is perfectly clear that the order of the 1st October 1912 constituted an obstacle in the way of the decree-holders, and that as long as that order was in force they could not ask the Court to execute their decree.

Mr. Tek Chand for the respondent contends that the application of the 30th August 1912 was not made against Jugal Kishore, and that so far as the latter is concerned, the present application is the only application for execution. This contention I am unable to accept. As stated above, the application was against the very firm against whom the decree was passed, and I have no doubt that it was intended to include all the persons who were mentioned in the decree as the members of the firm. It is further clear that the order of the 1st October did not decide any matter which could operate as *res judicata*. Upon these facts I am of opinion that the application of the 19th April 1917 should be viewed not as an application to initiate a new execution, but as an application for the revival of the previous proceedings which were interrupted by the order of the 1st of October. There is a mass of authority for treating such an application as one for the revival of the previous application, *vide, inter alia, Qamar-ud-din Ahmad* v *Jawahir Lal* (1) and *Ghulam Jilani* v. *Yusaf Shah* (2).

But even if we regard the application of 1917 as a new application, I consider that under section 15 of the Limitation Act of 1908, the period during which the execution had been stayed by the order of the Court should be excluded. The terms of the aforesaid section as contained in the Limitation Act of 1908 are perfectly clear, and the decree-holders are entitled to exclude the period from 1st of October 1912 to 3rd April 1916, when it was decided that Jugal Kishore was not an insolvent and that there was nothing in the insolvency proceedings to prevent the decree-holders from taking steps for the recovery of the money from him. The judgment in *Ram Das* v. *Kanshi Ram* (3) cited by Mr. Tek Chand is not in point, because a perusal of the report shows that no order staying execution was passed in that case.

On both the grounds set out above the proceedings in execution are within time, and I accordingly accept the appeal, and setting aside the order of the lower Court return the case with the direction that proceedings for execution be taken against Jugal Kishore in accordance with law. The respondent must pay the costs of the appellant in this Court.

Appeal accepted.

(1) 27 A. 334 P. C. 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810.

(2) 106 P. R. 1894.

(3) 14 Ind. Cas. 335; 155 P. L. R. 1912; 80 P. W. R. 1912.

ALLAHABAD HIGH COURT.

PRELIMINARY OBJECTION IN SECOND CIVIL APPEAL NO. 280 OF 1919.

April 25, 1919.

Present:—Justice Sir George Knox, Kt.

TEJPAL—PLAINTIFF—APPELLANT

versus

JHAGRU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 101 (4)—*High Court, constitution of.*

TEJPAL v. JHAGRU.

Where a High Court is so constituted that not less than one-third of the Judges are Barristers and not less than one-third are members of the Covenanted Civil Serivce, the constitution is in accord with section 101 of the Government of India Act.

Dr. *Tej Bahadur Sapru* (with him Mr. *Lakshmi Narayan*), raised the objection.

JUDGMENT.—A preliminary objection was raised when this second appeal was called on for hearing. It was to the effect that this Court as at present constituted is not competent to hear this or any appeal. The Court consists to-day of an Acting Chief Justice and five Judges, of whom two are Barristers, two are members of the Covenanted Civil Service and one is a person who has held judicial office not inferior to that of Principal Sudder Ameen for a period of not less than five years. As not less than one-third of the above-mentioned Judges are Barristers, and not less than one-third are members of the Covenanted Civil Service, this constitution is in accord with the provisions contained in the Indian High Courts Act, 1861 and the directions of the Letters Patent issued by Her late Imperial Majesty under date the seventeenth day of March in the year of our Lord one thousand eight hundred and sixty-six.

The Indian High Courts Act, 1861, was repealed by the Government of India Act, 1915, and from the first day of January 1916 under the provisions of section 101 of this last Act each High Court shall consist of a Chief Justice and as many other Judges as His Majesty may think fit to appoint: provided that the maximum number of Judges shall be twenty.

It was also enacted that a Judge of a High Court must be—

(*a*) a duly qualified Barrister,

(*b*) a duly qualified member of the Indian Civil Service, or

(*c*) a person having held judicial office not inferior to that of a Subordinate Judge for a period of not less than five years: Provided that not less than one-third of the Judges including the Chief Justice must be such Barristers and that not less than one-third must be members of the Indian Civil Service. It is not necessary for the purposes of this objection to set out the qualifications or the provisions relating to Pleaders, as this objection does not challenge the constitution of the Court on this ground.

There are not and never have been any Additional Judges appointed to this Court.

In 1908 while the Court consisted of a Chief Justice and five puisne Judges His Majesty appointed the late S. Karamat Hussain to be a puisne Judge of the Court, thereby raising the strength of the Court to a Chief Justice and six puisne Judges, and on the retirement of the late S. Karamat Hussain His Majesty in 1912 was pleased to appoint Mr. Justice Rafique to be a puisne Judge of the Court. On the basis of these appointments it is contended that His Majesty has thought fit that this High Court shall consist of a Chief Justice and six puisne Judges. Further that owing to the retirement of Sir Henry Richards the Court consists to-day only of an Acting Chief Justice and five puisne Judges and of the seven Judges necessary to constitute the Court less than one-third, to wit only two, are duly qualified Barristers.

Accepting the contention of the learned Advocate, it will be seen that save as to the number of Judges the constitution of the Court is in harmony with the provisions of the Government of India Act, 1915.

So far as the number of Judges is concerned, the contention now raised is in spirit and principle exactly the same as was raised in *Lal Singh* v. *Ghansham Singh* (1). It was fully considered by a Full Bench of this Court and overruled. By this decision I am bound and I may add that I fully concur with what was laid down in that case by Sir John Edge. I overrule the objection and hold that the Court has jurisdiction to hear this appeal.

Objection overruled.

(1) 9 A. 625 (F. B.) A. W. N. (1887) 154 and 179; 5 Ind. Dec. (N. S.) 854.

MADRAS HIGH COURT.

CIVIL APPEAL No. 403 OF 1917.

November 27, 1918.

Present:— Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

S. M. VENKATACHALLAPATHI AIYAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THAVASI SERVAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 2, 4, App. D, form No. 4—Mortgage decree—Interest subsequent to date fixed for redemption, whether payable on principal, interest and costs—Rate of interest—Contract Act (IX of 1872), s. 74—Stipulation for enhanced interest on default of payment on specified day—Mortgage money, application of, to debts bearing higher interest—Penalty.

Where under the terms of a mortgage bond, the principal amount was payable on a certain day with interest at 9 per cent. per annum and in default with interest at 12 per cent. and it was found that the mortgage consideration was applied in satisfaction of debts bearing interest at 12 per cent. and more.

Held, that the provision for payment of enhanced interest was not a penalty. [p. 67, col. 2.]

Where by the preliminary decree in a mortgage suit a date is fixed for redemption and the property is ordered to be sold on default, subsequent interest is to be calculated on the principal, interest and costs found to be due on the date fixed and not on the principal sum alone, and such further interest is ordinarily to be calculated at 6 per cent. but the Court has a discretion in the matter. [p. 68, col. 2.]

Sundar Koer v. *Rai Sham Krishen*, 34 C. 150; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75; 4 A. L. J. 109; 5 C. L. J. 103; 34 I. A. 9 (P. C.) and *Subbaraya Ravuthaminda Nainar* v. *Ponnusami Nadar*, 21 M. 364; 7 Ind. Dec. (N. S.) 614, followed.

Appeal against the decree of the Court of the Subordinate Judge, Madura, in Original Suit No. 11 of 1917, dated the 29th August 1917.

FACTS appear from the judgment.

Mr. *K. S. Jayarama Aiyar*, for the Appellants.—The language of Order XXXIV, rules 2 and 4, Civil Procedure Code, suggests that interest subsequent to the date fixed for redemption is payable on the aggregate amount due on that date, including interest and costs. *Vide* also Form No. 4 of Appendix D.

The practice in the Indian Courts is the same. *Sundar Koer* v. *Rai Sham Krishen* (1). After the date of the preliminary decree the matter passes from the domain of contract. At what rate subsequent interest is to be awarded is in the discretion of the Court.

The English practice is also the same in foreclosure actions.

The provision for enhanced interest in this case is not penal. The mortgagor was benefited by the extinguishment of debts which carried interest at 12 per cent. and more by the application of the mortgage money.

Messrs. *M. O. Parthasarathy Aiyangar*, and *M. O. Thirumalachariar*, for the Respondents.—The provision for enhanced interest is a penal provision under section 74 of the Contract Act. The method of appropriation of the mortgage money is not relevant to the question.

The language of the section of the Civil Procedure Code does not expressly refer to payment of subsequent interest on the aggregate amount.

JUDGMENT.

ABDUR RAHIM, J.—I do not think the Subordinate Judge was right in treating the provision for payment of interest at 12 per cent. in default of payment on the date fixed in the mortgage bond as penal. The original rate fixed no doubt is 9 per cent. But it is to be borne in mind that the debts to discharge which this mortgage was executed carried interest at 12 per cent. and more. It could not, therefore, be said that the mortgagees were not justified in stipulating for payment of a higher rate, if the money was not paid as promised.

The second question raised by the appeal is one of some importance. It is, whether, in a mortgage decree for sale, interest should be computed on the aggregate amount found to be payable on the date fixed for redemption, that is, consisting of principal, interest and costs, or only on the principal, if the ascertained amount is not paid and property has to be sold in consequence. The matter is now governed by Order XXXIV, rule 4, Civil Procedure Code, which read along with rule 2 provides that in case of default the sale-proceeds of the property sold shall be applied in payment of what is declared due to the plaintiff for principal and interest on the mortgage and for costs of the suit until the date fixed for payment together with subsequent interest

(1) 34 C. 150; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75; 4 A. L. J. 109; 5 C. L. J. 106; 34 I. A. 9 (P. C.).

and subsequent costs. This *prima facie* suggests that the subsequent interest is payable on the aggregate amount and not on the principal alone. The form appended to this rule, form No. 4 of Appendix D to the 1st Schedule of the Code, clearly proceeds upon this above interpretation. But in forms Nos. 7, 8, 9, which are forms of decrees for sale in cases where there are more than one mortgage on this property, provision is made for payment of such subsequent interest and costs as may be allowed by the Court. These forms certainly suggest that the rate of such subsequent interest is left to the discretion of the Court and probably also that the Court may, in a proper case, refuse to allow any further interest.

Before the present Civil Procedure Code, the subject was dealt with in the Transfer of Property Act, and the question arose as to whether the Court had the power to allow interest at all for any period subsequent to the date fixed for payment and as to the proper rate. The Privy Council held in *Sundar Koer* v. *Rai Sham Krishen* (1) that the Calcutta practice of allowing such interest at the Court rate, also adopted in this Court in *Subbaraya Ravuthaminda Nainar* v. *Ponnusami Naaar* (2), was right, contrary to the view of the Allahabad High Court in *Amolak Ram* v. *Lachmi Narain* (3). Their Lordships at page 161* also observed: "They think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree. It will be observed that according to the practice explained by the Registrar, (that is of the Calcutta High Court) which has been followed in this case, the interest is allowed on the aggregate sum, and not merely on the principal money, and this is right, if the mortgagee is treated as a decree-holder or judgment-creditor, but would be wrong if the right to the interest depended on the terms of the mortgage bond." No doubt this reasoning is intended to prove that the contract rate was not to be given, but it contains all the same a clear *dictum* that the practice in Calcutta of allowing interest on the aggregate sum was right.

I have tried to ascertain the practice in the Courts of this Presidency with reference to this matter. It would seem that in the Moffussil Courts the practice cannot be said to be consistent or uniform. When the High Court in its appellate jurisdiction passes a mortgage decree for sale, the practice seems to be to allow interest at the Court rate of 6 per cent. on the aggregate amount. On the Original Side the practice is to provide in the final order for sale, for such subsequent interest and costs as may be allowed by the Court, and I understand that an application for the determination of such interest is generally made at the time of confirmation of the sale. The conclusion that I am led to is that in default of redemption by payment on the date fixed subsequent interest is to be calculated both on the principal and interest declared or found to be payable on that date, and such further interest is ordinarily to be calculated at 6 per cent. but the Court has a discretion in the matter.

The English Law was also discussed at the Bar, and so far as I can gather the practice of the English Courts in a foreclosure action is to compute subsequent interest on the aggregate amount, but in other actions such as by way of administration subsequent interest is allowed only on the principal amount, apparently out of consideration for other creditors of the mortgagor. This is what is to be deduced from *Harris* v. *Harris* (4), *Whatton* v. *Cradock* (5), *Brewin* v. *Austin* (6) and *Elton* v. *Curties* (7). But, in my opinion, a question like this has to be determined with reference to the provisions of the Civil Procedure Code and the practice of the Courts in this Presidency, if there is a uniform and well-established practice. There seems to be no special reasons in

(2) 21 M. 364; 7 Ind. Dec. (N. S.) 614.

(3) 19 A. 174; A. W. N. (1897) 9; 9 Ind. Dec. (N. S.) 115.

*Page of 34 C.—*Ed.*

(4) (1750) 3 Atk. 722; 26 E. R. 1214.

(5) (1836) 1 Keen 267; 6 L. J. Ch. 178; 48 E. R. 309, 44 R. R. 79.

(6) (1838) 2 Keen 211; 48 E. R. 609.

(7) (1882) 19 Ch. D. 49; 51 L. J. Ch. 60; 45 L. T. 435; 30 W. R. 316.

this case why interest should not have been allowed on the amount found to be due on the date fixed, and I think that such interest should be allowed at the rate of 6 per cent.

The decree of the Subordinate Judge will, therefore, be modified by allowing interest from the date of default at 12 per cent. instead of 14 annas per mensem decreed by the Subordinate Judge, and also by calculating interest at the rate of 6 per cent. on the aggregate amount, that is, principal and interest calculated as indicated above and on costs, and not merely on the amount of principal as decreed by the Subordinate Judge, from the date fixed for payment, that is, 28th February 1918, until realisation. The respondents will pay the appellants the costs of this appeal.

OLDFIELD, J.—I agree.

M. C. P.

Appeal allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1412 OF 1917.

March 25, 1919.

Present:—Mr. Justice Roe and Mr. Justice Coutts.

THAKUR PRASAD AURORA AND ANOTHER —APPELLANTS

versus

MANAGER, BARABHUM ENCUMBERED ESTATE, PURULIA, AND HARISH CHANDRA DEB DARPASHA AND ANOTHER —RESPONDENTS.

Chota Nagpur Encumbered Estates Act (VI of 1876), s. 8—Manager, suit against, whether lies—Manager, power of, to criticise debts decreed by competent Courts.

A suit will not lie for a declaration against the manager of an estate notified under the Chota Nagpur Encumbered Estates Act, if it is found, as a question of law or fact, that his action was done in good faith under the provisions of section 8 of the Act but if what he purports to have done was not really an act which he was competent to do under section 8, a suit will lie for a declaration that what he had done was outside the scope of the Act altogether.

In dealing with an estate under section 8 of the Chota Nagpur Encumbered Estates Act the manager must take up and scrutinize all debts and finally pass orders, even upon debts decreed by competent Courts.

Appeal from a decision of the District Judge, Manbhum, dated the 11th May 1917, affirming that of the Sub-Judge, Purulia, dated the 11th December 1916.

Mr. *Naresh Chandra Sinha*, for the Appellants.

Mr. *Fakhruddin*, for the Respondents.

JUDGMENT.

ROE, J.—The appellant in this case sued as plaintiff for a declaration that the manager of an estate notified under the Chota Nagpur Encumbered Estates Act had no jurisdiction to cut down under section 8 interest already decreed by a competent Court. The learned Judge held that no suit would lie under section 22 of the Act and he held further that the action of the manager was justified by section 8 of the Act. With regard to the question whether a suit would lie I am of opinion that from the moment it is found as a question of law or fact that the manager's action was done in good faith under the provisions of section 8 then no suit would lie for a declaration against him, but if what he purported to do was not really an act which he was competent to do under section 8 then a suit would lie for a declaration that what he had done was outside the scope of the Act altogether. On the merits I am satisfied that what was done was done within the scope of the Act. Section 11 clearly contemplates a list of all debts and if it did not include the decreed debts, the Act would be in many cases defeated. Rule 14 clearly indicates that the list made under section 11 should include decreed debts, and under section 8 that the list contemplated in section 11 be prepared. Therefore I hold that the manager in dealing with the estate under section 8 must take up and scrutinize all debts and finally pass orders even upon debts decreed by competent Courts.

I would dismiss this appeal with costs.

COUTTS, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 97 OF 1918.

November 19, 1918.

Present:—Mr. Daniels, A. J. C.

Mahant SITA RAM DAS—PLAINTIFF—APPELLANT

versus

His Highness Maharaja MAHENDRA PRATAB SINGH AND ANOTHER —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII,

KHEDON LAL *v.* RAJENDRA NARAIN SINGH.

r. 1—*Order giving leave to withdraw suit, whether decree—Appeal, whether lies.*

An order under Order XXIII,. rule 1, Civil Procedure Code, not being a decree, is not appealable, although a portion of the order may require the plaintiff to pay costs.

Appeal from the decree of the Subordinate Judge, Fyzabad, dated the 18th June 1918.

Babu *Basudeo Lal*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—The appellant filed a suit against the respondent, the Maharaja of Tikamgarh, without obtaining the permission of the Governor-General in Council as required by section 86, Civil Procedure Code. At the first hearing the respondent took objection to the maintainability of the suit and thereupon the appellant applied for and obtained permission to withdraw it under Order XXIII, rule 1, with permission to bring a fresh suit on terms of paying the defendant's costs. The present appeal is brought against that portion of the order which required the appellant to pay costs.

A preliminary objection is taken that no appeal lies, as it has been held in several cases, which are collected in Woodroffe and Ameer Ali's Civil Procedure Code, Second Edition, page 1073, and in Agarwala's Indian Practice, that an order under Order XXIII, rule 1, is not a decree and that no appeal lies against it, though it is no doubt open to revision. The appellant contends that that portion of the order which requires him to pay costs should be treated as a decree, but in one of the cases negativing the right of appeal, namely, *Mary Dick* v. *Louisa Dick* (1), the appeal was on a point of costs only. I cannot, therefore, accept the appellant's contention.

I am asked to treat the appeal as a revision but even if I do so, I see no reason why the order of the lower Court should be interfered with. It is certainly the usual practice to require the plaintiff to pay costs in these cases, and in the present case costs had been incurred by the defendant who had Counsel present in Court and it was only on objection being taken by the defendant that the application to withdraw was filed. Under these circumstances I dismiss the appeal with costs.

Appeal dismissed.

(1) 15 A. 169; A. W. N. (1893) 78; 7 Ind. Dec. (N. S.) 826.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1186 OF 1908.

August 5, 1912.

Present:—Justice Sir Ashutosh Mookerjee, KT., and Mr. Justice Holmwood.

KHEDON LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAJENDRA NARAIN SINGH—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 142—Declaration of title and possession, suit for—Possession and dispossession, allegation of—Burden of proof—Submerged land—Presumption.

Where in a suit for declaration of title to land and for recovery of its possession, the plaintiff alleges his prior possession and subsequent dispossession by the defendant, the burden is primarily upon the plaintiff to show possession and dispossession within 12 years of the institution of the suit, but the nature of the proof of possession must depend upon the nature of the case. If the land was wholly or partially subject to inundation, the plaintiff must be deemed to have been in possession of the submerged land during the period it was covered by water, no matter who was in possession at the date of the submergence. [p. 71, cols. 1 & 2.]

Appeal against the decision of the District Judge, Bhagalpur, dated the 23rd March 1908, reversing that of the Sub-Judge, Bhagalpur, dated the 25th March 1907.

Dr. *Rash Behary Ghose*, Babus *Umakali Mukerjee* and *Gurudas Singh*, for the Appellants.

Babus *Dwarka Nath Chuckerbutty* and *Biraj Mohan Majumdar*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiffs in a suit for declaration of title to immoveable property and for recovery of possession thereof with mesne profits. The property in dispute covers an area of 247 *bighas*, claimed by the plaintiffs as part of their Mouza Judia, and by the defendants as part of their

village Koriaputti. The Subordinate Judge found upon the question of title that approximately one half of the disputed area fell within the estate of the plaintiffs. With reference to the question of limitation, he found that as the land was subject to inundation by the water of the river Kosi from time to time, the burden was upon the defendants to establish that the title of the plaintiffs had been extinguished by adverse possession on their part. Upon the evidence, he held that the defendants had failed to establish such adverse possession for the statutory period; and in this view, decreed the suit in part. Both the parties were dissatisfied with this decision and appealed to the District Judge. Upon the appeal of the defendants the District Judge held that the burden was upon the plaintiffs to establish that they were in possession and were subsequently dispossessed, as alleged by them, within 12 years before the commencement of the suit. He found that the plaintiffs had failed to discharge the burden that lay upon them, and in this view dismissed the suit. On the present appeal by the plaintiffs, it has been contended that the decision of the District Judge upon the question of limitation cannot be supported. In our opinion, there is no answer to this argument.

We shall for the purposes of this appeal assume that the plaintiffs are proprietors of the disputed land as alleged by them. It may be conceded that when they alleged their prior possession and subsequent dispossession by the defendants, the burden is primarily upon them to establish, as laid down by their Lordships of the Judicial Committee in *Mchima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1), that they were in possession within the statutory period. But in the determination of this question of possession, the nature of the land must be first considered. If, as the Subordinate Judge found, the land was wholly or partially subject to inundation by the water of the river Kosi, the plaintiffs must be deemed to have been in possession of the submerged portion during the period that such tract was covered by water, no matter who was in possession at the date of the submergence: *Secretary of State for India* v. *Krishnamoni Gupta* (2). In our opinion, the judgments of both the Courts below are open to criticism on the ground that neither of the learned Judges ascertained the precise tract of land to which the principle of submergence applies; nor did they find, at what period, the water receded and the land re-appeared before the suit. It is conceivable that part of the land was reclaimed more than twelve years before the commencement of the suit; in respect of such portion, the plaintiffs may be rightly called upon to prove their possession within twelve years. But in respect of some portion, at any rate, of the disputed land, it is clear from the evidence of the defendants themselves that the area has been waste or submerged or unfit for cultivation in quite recent periods. In respect of such land, the principle laid down by their Lordships of the Judicial Committee in the cases of *Rajkumar Roy* v. *Gobind Chunder Roy* (3) and *Radha Gobind Roy* v. *Inglis* (4) clearly applies. As was pointed out by Mr. Justice Wilson in the cases of *Mono Mohun Ghose* v. *Mothura Mohun Roy* (5) and *Mahomed Ali Khan* v. *Khaja Abdul Gunny*, (6) although, as a general rule, where the plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years, the nature of the proof of possession must depend upon the nature of the case. The District Judge in the Court below appears to have lost sight of this aspect of the case and has held, erroneously as we think, that the burden lies upon the plaintiffs to establish their possession unless they can prove that the whole of the land was entirely waste. He does not appear to have realised that the question of possession requires examination from different standpoints in view of the present or past condition of different portions of the disputed land.

(1) 16 C. 473; 16 I. A. 23 (P. C.); 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312.

(2) 29 C. 518; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 269 (P. C.).

(3) 19 C. 660; 19 I. A. 140; 6 Sar. P. C. J. 140; 9 Ind. Dec. (N. S.) 883 (P. C.)

(4) 7 C. L. R. 364; 3 Suth. P. C. J. 809 (P. C.).

(5) 7 C. 225; 8 C. L. R. 126; 3 Ind. Dec. (N. S.) 694.

(6) 9 C. 744; 12 C. L. R. 257; 4 Ind. Dec. (N. S.) 1145.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him for reconsideration. We notice from the judgment of the District Judge that he was not satisfied with the manner in which the property had been surveyed in the Court of first instance. We further observe that the original survey maps were not produced. The District Judge will, therefore, consider whether it would not be desirable to have the lands accurately surveyed by a professional surveyor with reference to the original survey maps, and give direction accordingly. It is obviously desirable in a case of this description that the question of title should be satisfactorily decided in the first instance before the question of limitation is considered. The costs of this appeal will abide the result.

Appeal decreed; Case remanded.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 167 OF 1916.

November 18, 1918.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Shah.

SHRIDHAR MADHAVRAO DHOPAOKAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GANPATI PUNJA GODSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 95—Execution of decree—Property in possession of judgment-debtor—Delivery of possession, how to be made—Symbolical possession, whether operates to save limitation—Limitation Act (IX of 1908), Sch I, Art. 144.

In a suit for possession of certain immoveable property filed on 3rd July 1913, the plaintiffs alleged that their father had purchased the property at an auction sale, and that a receipt for possession was given to the bailiff on 3rd July 1901. It was found that the property had all along been in the possession of the defendants, who were not disturbed in their possession on the date of the receipt :

Held, that the provisions of Order XXI, rule 95, of the Civil Procedure Code not having been complied with, the suit was barred by time. [p. 72, col. 2; p. 73, col. 2.]

Appeal against the decision of the First Class Subordinate Judge, Nasik, in Appeal No. 1 of 1914, confirming the decree passed by the Joint Subordinate Judge, Nasik, in Civil Suit No. 237 of 1913.

Mr. *M. V. Bhat*, for the Appellants.

Mr. *Y. N. Nadkarni*, for the Respondents.

JUDGMENT.

SCOTT, C. J.—In this suit, which was filed on the 3rd of July 1913, the plaintiffs alleged that in execution of a decree in a suit of 1890 their father purchased the plaint property at an auction sale, and a receipt for possession was given by the plaintiffs to the bailiff on the 3rd of July 1901. This suit is for possession; it is filed exactly on the day the twelfth year expires. Both Courts have held that the cultivable land and the house, which are the subject of the suit, were, on the 3rd July 1901, and had for some time previously been, in the possession of the defendants Nos. 1 to 3, and that the defendants Nos. 1 to 3 were not disturbed in their possession on the date of the receipt, but that statements were made in it both by the plaintiffs and by the bailiff as to possession having been given to the plaintiffs, which were entirely false. Order XXI, rule 95, of the Code provides that "Where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf...and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser, or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same."

The form prescribed for the warrant to the bailiff is given in Appendix E, No. 39, and runs as follows:—"Whereas...has become the certified purchaser of...at a sale in execution of decree in suit No...of 19...you are hereby ordered to put the said...the certified purchaser, as aforesaid, in possession of the same."

It is clear, therefore, that the provisions of the Civil Procedure Code have not been complied with. It is, however, argued that there has been what is called symbolical possession, and it is contended that the provisions of the Code, as interpreted in

Mahadev Sakharam v. *Janu Namji Hatley* (1), may be disregarded in consequence of a decision in the Privy Council in *Radha Krishna* v. *Ram Bahadur* (2). There, according to the judgment of the Judicial Committee, a sale took place, and the mortgagees were the purchasers. They received a sale certificate that they were entitled to all the Zemindari rights in eight annas *pucca* of Mouza Nagdah, and the land being in occupation of cultivating tenants under an apparently *bona fide* title, they received formal possession as usual after due proclamation by beat of drum in 1898. That was, therefore, a case falling under section 319 of the Civil Procedure Code of 1882, which provides that "when the property sold is in the occupancy of a tenant or other person entitled to occupy the same, and a certificate in respect thereof has been granted under section 316, the Court shall order delivery thereof to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or in such other mode as may be customary, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser."

The difficulty supposed to be created by the Privy Council judgment is due to a reference in the concluding paragraph to a Full Bench decision of the Calcutta High Court in *Juggobandhu Mukerjee* v. *Ram Chunder Bysack* (3), in which it was said that symbolical possession availed to dispossess the defendants sufficiently, because they were parties to the proceedings in which it was ordered and given, and their Lordships observed that there was no reason to question it or to hold that the rule of procedure should be altered.

In the Calcutta case it was said that where land was in the occupation of the defendant, delivery must be by placing the plaintiff in direct possession under section 223 of the Code of 1859, but where it was in the occupation of *ryots* the decree awarding possession to the plaintiff as against the defendant (not in actual occupation) could only be enforced by proclamation and as in contemplation of law both parties must be considered as being present at the time when the delivery is made. The delivery thus given by proclamation must be deemed equivalent to actual possession. This would be so only under section 224 of the Code of 1859, corresponding with section 264 of the Code of 1882 and Order XXI, rule 36, of the present Code or section 319 and Order XXI, rule 96, dealing with the case of delivery to a purchaser at a Court-sale of land in occupation of tenants.

The present case, however, falls under section 318 of the Code of 1882, which is re-enacted in Order XXI, rule 95.

We affirm the decree and dismiss the appeal with costs.

Appeal dismissed.

(1) 14 Ind. Cas. 447; 36 B. 373; 14 Bom. L. R. 115 (F. B).

(2) 43 Ind. Cas. 268; 20 Bom. L. R. 502 (P. C.); 16 A. L. J. 23; 23 M. L. T. 26; 4 P. L. W. 9; 34 M. L. J. 97; 7 L. W. 149; 22 C. W. N. 330; 27 C. L. J. 191; (1918) M. W. N. 163.

(3) 5 C. 584 (F. B.); 5 C. L. R. 548; 2 Shome L. R. 68; 2 Ind. Dec. (N. S.) 979.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 135 OF 1916.

April 23, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

Babu JAGDIP NARAIN RAI *alias* BACHA RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM SARUP KHAN AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Regulation XVII of 1806—Mortgage—Foreclosure—Title of mortgagee, when becomes absolute—Notice, defective service of, effect of—Proof of service of notice—Burden of proof.

If, upon an application for foreclosure, proceedings are held in accordance with the provisions of Regulation XVII of 1806, the title of the mortgagee becomes absolute upon the expiry of the year of grace, although no suit is brought by the mortgagee for a declaration of his right as absolute owner of the mortgaged property. [p. 74, col. 1.]

Where, upon an application for foreclosure, notices were issued to *R.* and *S.* and four others, the mortgagors, and an endorsement on the notices on behalf of those on whom they purported to be served showed that three notices and a copy of the petition were received by *R.* for himself and two other

and the remaining three notices were received by *S.* for himself and two others:

Held, (1) that due service of the notice had not been effected upon all the mortgagors, and that, therefore, the mortgage had not been foreclosed, nor had the mortgagee acquired the absolute ownership of the property; [p. 76, col. 1.]

(2) that it lay upon the mortgagee to prove that notice of foreclosure had been duly served upon the mortgagors. [p. 75, col. 1.]

First appeal against the decision of the Subordinate Judge, Ghazipur, dated the 15th February 1916.

Messrs. *Lakshmi Narain* and *O'Conor*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage by way of conditional sale made on the 19th of January 1861. The mortgagees made an application for foreclosure proceedings under Regulation XVII of 1806 on the 25th May 1882. Notice of those proceedings was issued as required by the provisions of the Regulation and on the 15th of July 1882, the District Judge recorded an order to the effect that the proceedings had taken place. If these proceedings were regularly held and notice was properly served, the title of the mortgagees by way of conditional sale became absolute on the expiry of the year of grace. It is, however, contended on behalf of the respondents that as the mortgagees did not institute a suit for a declaration of their right as absolute proprietors of the mortgaged property, the mortgage must be deemed still to subsist and the mortgagors or some of them are entitled to redeem the mortgage. Reliance is placed on the ruling of their Lordships of the Privy Council in *Forbes* v. *Ameeroonnissa Begum* (1). That ruling was considered by this Court in several cases which were referred to in the judgment of the Full Bench in *Ali Abbas* v. *Kalka Prasad* (2). In that case it was held that the title of a mortgagee became absolute upon the expiry of the year of grace, if the foreclosure proceedings were held in accordance with the provisions of Regulation XVII of 1806. That, no doubt, was a case in which pre-emption was claimed in respect of a sale which had become absolute after the holding of foreclosure proceedings, but the question as to the date when the title of the mortgagees as absolute owners of the property accrued had to be decided and was decided. This ruling was approved of by their Lordships of the Privy Council in *Batul Begum* v. *Mansur Ali Khan* (3). In that case their Lordships referring to the year of grace observed as follows:—"The mortgagee's right of property had then become mature, and the mere fact that he had not enforced that right by a suit of possession does not affect the question." The matter is, therefore, concluded by the last mentioned decision and we must hold that, although no suit was brought by the mortgagees for a declaration of their right as absolute owners of the property, they acquired such right upon the expiry of the year of grace, provided, of course, that the proceedings upon the application for foreclosure were held in accordance with law. The Court below has decreed the plaintiffs' claim upon the finding that due service of notice of foreclosure had not been proved. It was held by the Privy Council in *Norendra Narain Singh* v. *Dwarka Lal Mundur* (4) that the functions of the Judge under section 8, Regulation XVII of 1806, were purely ministerial. In the judgment in that case it was observed as follows:—"Their Lordships, considering that the duties of the Zillah Judge in the matter of a foreclosure are of a ministerial nature, considering the vast importance to mortgagors of the notification, and the consequences which follow, if they do not redeem within the prescribed time, are of opinion that the service of it should be established by evidence in a suit like the present, which is brought, in fact, to enforce the foreclosure. The proceedings of the Judge are *ex parte*; and even if the Judge examined the Nazir or the person who served the notice, it would be unsatisfactory that the estate of the mortgagor should depend upon his opinion. The argument indeed was not pressed that it would be

(1) 10 M. I. A. 340; 5 W. R. P. C. 47; 1 Ind. Jur. (N. S.) 117; 1 Suth. P. C. J. 621; 2 Sar. P. C. J. 153; 19 E. R. 1002.

(2) 14 A. 405 (F. B.); A. W. N. (1892) 108; 7 Ind. Dec. (N. S.) 627.

(3) 24 A. 17 P. C.; 5 C. W. N. 888; 28 I. A. 248; 3 Bom. L. R. 707; 8 Sar. P. C. J. 133.

(4) 3 C. 397 (P. C.); 1 C. L. R. 369; 5 I. A. 18; 3 Suth. P. C. J. 480; 3 Sar. P. C. J. 771; 2 Ind. Jur. 117; 1 Ind. Dec. (N. S.) 839.

conclusive, but it would be going far to say that it is of such authority as to be *prima facie* evidence, which should shift the onus of proof upon such an important point, and relieve the mortgagee from giving affirmative proof of the due performance of a condition necessary to be established before the foreclosure can attach upon the estate."

Having regard to these observations of their Lordships, it lay heavily upon the mortgagees in this case to prove that the notice of foreclosure was duly served upon the mortgagors. The proceeding recorded by the District Judge in which he stated that the notice had been duly served would, in view of these remarks, be of very little weight in determining that the notice was duly and properly served. As has been stated above, upon the filing of the petition of the 25th of May 1882, notice was issued to the mortgagors. That notice is printed at page 8 of the appellants' book and at page 9 we find an endorsement made on the notice on behalf of those on whom it purported to have been served. The translation of the endorsement as given at page 9 of the appellants' book is not very accurate. We have referred to the endorsement as made in Hindi and we agree with the learned Subordinate Judge that the endorsement was to the effect that three notices and a copy of the petition were received by Rupan Khan for himself and for *Musammat* Lakhpati and *Musammat* Sobhagi and the remaining three notices were received by Swarath Khan for himself and for Chikhuri Khan and *Musammat* Gunjasi Kunwar. This endorsement, therefore, shows that notice was not served upon all the mortgagors but only upon two of them. It seems that those who were acting in the interest of the mortgagees felt this difficulty and they accordingly got the serving officer to make a return in the terms mentioned in the report of service dated the 22nd of June 1882 printed at page 10 of the appellants' book. In that return, it was stated that the *musammats* took the notices intended for them behind the door leaves and the males took them in the presence of the witnesses mentioned in the return. The serving officer was one Durga, who is now dead; his evidence, therefore, could not be recorded in the present case. This report is inconsistent with the endorsement as to receipt of notice as contained on the back of the notice, written out by the Patwari Sheoambar Das. The Patwari Sheoambar Das and the persons who are said to have witnessed the endorsement are all dead. The defendants, however, have examined two witnesses with a view to prove that the notices were actually served upon the three female mortgagors and the three male mortgagors personally. These witnesses are Ram Lakhan Rai and Behari Rai. These two witnesses profess to bear out the report of the serving officer, but their statements are contradicted by the endorsement on the notices to which we have already referred. Furthermore, as pointed out by the learned Subordinate Judge, Ram Lakhan Rai has the same interest as the mortgagees in this case and, therefore, his statement should be looked upon with great caution.

There remains the evidence of Behari Rai. The learned Subordinate Judge has given cogent reasons for disbelieving this witness and we agree with him. We are also of opinion that the return of the serving officer and the statements made by the two witnesses are not credible

The learned Counsel for the appellants has asked us to take into consideration the statements contained in two depositions recorded by the District Judge in the course of the foreclosure proceedings. Those are the depositions of Alyar and Bhadesar Rai. These two persons are dead and the depositions are sought to be used as evidence under the provisions of section 33 of the Evidence Act. No doubt, the mortgagors were parties to the proceedings relating to foreclosure, but it must be shown, in order to make the evidence of these two witnesses admissible, that they had an opportunity of cross-examining the witnesses. If, as it is contended on behalf of the plaintiffs, notice of foreclosure was not duly served on them, these depositions cannot be used as evidence to prove service of notice. We are, therefore, of opinion that these two depositions cannot be used in this case and the learned Subordinate Judge was right in not referring to them in his judgment. The next piece of evidence on which the appellants rely is a proceeding recorded in 1892

by the Revenue Authorities in regard to the entry of names of some of the mortgagees in respect of a portion of the mortgaged property. The order passed in 1892 appears to have been based on the foreclosure proceedings held in 1882. This order, therefore, can carry very little weight. Reference is made to a mortgage-deed executed in 1894, but we do not think that that document carries us any further. Upon a consideration of the whole of the evidence we are of opinion, in concurrence with the findings of the Court below, that proper service of notice on all the mortgagors has not been established and, therefore, it cannot be held that the mortgage has been foreclosed and the defendants have acquired the absolute ownership of the property. The plaintiffs, who represent some of the mortgagors, are entitled to the decree for redemption granted to them by the Court below. We dismiss the appeal with costs, including in this Court-fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPLICATION IN ORIGINAL CIVIL TESTAMENTARY SUIT NO. 7 OF 1914.

February 25, 1918.

Present:—Mr. Justice Greaves.

HARI BHUSAN DATTA—APPLICANT

versus

MANMATHA NATH DATTA AND OTHERS—CAVEATORS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 1—Right to sue, survival of—Letters of Administration, application for, by residuary legatee—Death of residuary legatee—Right to obtain grant, whether survives to heir.

A residuary legatee under a Will applied for grant of Letters of Administration to the estate of the testator with the copy of the Will annexed and during the pendency of the application died leaving his son as his heir and legal representative. The latter applied to be substituted in the place of his deceased father and to be granted Letters of Administration with the copy of the Will annexed:

Held, that the right of the legatee to obtain a grant of administration was a personal right and this right did not devolve on his heir. [p. 76, col. 2.]

Mr. *A. C. Ghose*, for the Applicant.

Sir *B. C. Mitter* (with him Mr. *K. K. Ghosh*), for the Caveators.

JUDGMENT.—This is an application by Haribhusan Datta for an order that the fact of the death of his father Hem Bhusan Datta be recorded, that the cause title of the suit should be amended by substituting his name in place of that of his deceased father, and that other consequential amendments should be made in the petition whereby these proceedings were originated, and that thereupon the suit should be proceeded with and Letters of Administration with copy of the Will annexed of Sreemutty Nrityamoni Dassee should be granted to the applicant.

Sreemutty Nrittyamoni Dassee died on the 19th May 1914. Hem Bhusan Datta on the 23rd June 1914 petitioned this Court for a grant of administration with a copy of the Will annexed to the estate of Nrityamoni dated the 19th May 1914. I have not before me a copy of the Will or of the petition, but I understand that no executors were named in the Will and that Hem Bhusan Datta was the residuary legatee. A caveat or caveats were entered by the defendants and, on the 4th December 1914, it was ordered that the matter should be set down as a contentious cause. On the 8th August 1917, Hem Bhusan Datta died leaving the applicant as his son, heir and legal representative. By virtue of section 197 of the Succession Act the applicant is now the person primarily entitled to a grant if the Will is established.

It is urged on behalf of the applicant that now that the matter is a contentious cause, it is governed by the Code of Civil Procedure and that, under the provisions of Order XXII, he is entitled to be substituted as plaintiff as the right to sue survives. The sole question that arises on this application is whether any right to sue has survived to the applicant. I do not think that it has. The right to a grant of administration is a personal right, and although the applicant, if the Will is established, may be the proper person to obtain a grant, this would be so, not by virtue of any right to administration, which he inherits from his father, but by virtue of the fact that as heir of his father to the residue he is the person most interested in the estate. The reasoning of Mr. Justice Harington in *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee* (1) seems to me to be equally applicable to the present applica-

(1) 3 Ind Cas. 995; 36 C. 799.

tion: in that case the executor named in the Will of which Probate was sought died before obtaining a grant, his widow sought to be substituted for him in the suit as being his heiress, and Mr. Justice Harington held that as the executor's right was derived under the Will, the right did not survive to his widow: in the present case the right which Hem Bhusan sought was a right from the Court and if he had obtained a grant, his title would have been derived from the Court and cannot, I think, devolve on his heir.

The result is, that the application fails and must be dismissed with costs. There is nothing to prevent the applicant, if he is so minded, from applying for a grant, and if he does so, it is open for him to apply to adopt such material proceedings as have been taken in the present suit.

Application dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1282 OF 1917.
April 14, 1919.
Present:—Mr. Justice Das.

LACHMI SAHU—PLAINTIFF—APPELLANT
versus
RADHA KRISHNA SAHU—DEFENDANT—RESPONDENT.

Joint tenants—Adverse possession by one joint tenant—Ouster—Knowledge of other tenants.

The possession of one joint tenant is the possession of all and there can be no dispossession by one joint tenant until there is an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy. [p. 78, col. 1.]

Appeal from a decision of the District Judge, Saran.

Mr. *Rajendra Prasad*, for the Appellant.

Mr. *Ram Prasad*, for the Respondent.

JUDGMENT.—On the 5th July 1915 the plaintiff, who is the appellant before me, filed the suit out of which this appeal arises, for partition of the house and premises mentioned in the plaint; the plaintiff's case being that he was entitled to a 12 annas interest therein and that the defendant was entitled to 4 annas interest therein. The defendant resisted the suit on two grounds, *firstly*, on the ground that the plaintiff had no title to the property and *secondly*, on the ground that the plaintiff's suit was barred by limitation. The facts admitted or found by the lower Appellate Court are the following:—

The house in question belonged to one Partap Narain Gir, who mortgaged the house to the plaintiff's father and the defendant's father jointly in the proportion of 12 annas to the plaintiff's father and 4 annas to the defendant's father. The suit was brought by the plaintiff's father and the defendant's father on the foot of the mortgage against Partap Narain Gir and they obtained a mortgage decree in that suit. They jointly executed the mortgage decree and purchased the house jointly and obtained possession in their joint names on the 3rd July 1903. It would seem, therefore, that the plaintiff and the defendant are jointly entitled to the house and premises in suit, but it is the defendant's case that the plaintiff's father had borrowed Rs. 49 on a simple bond from the defendant's father and that in lieu of this debt and in consideration of the defendant's father bearing all the expenses of the mortgage suit the plaintiff's father gave up in favour of the defendant's father all his right in the mortgaged property. The lower Appellate Court has come to the conclusion that the defendant has not been able to prove this part of the case. The learned Vakil appearing on behalf of the respondent says that the whole story has not been disbelieved, but that only a portion of it has been found by the lower Appellate Court not to have been established by him. It is true that the lower Appellate Court says nothing as regards the case made by the defendant that his father bore all the expenses of the mortgage suit, but the story was one and entire, and in my opinion, this portion of the story could not be separated from the other portion in which the defendant set up a bond executed by the plaintiff's father in favour of the defendant's father. So far as the bond is concerned, the lower Appellate Court has given cogent reasons for coming to the conclusion that it has not been established. That finding is, of course,

binding on me and I think that the lower Appellate Court has rejected the whole of the defendant's case on this point.

That being so, it must be held that the plaintiff and the defendant acquired a joint title to the house in question and were the joint owners in respect thereto. The lower Appellate Court has, however, dismissed the plaintiff's suit on the ground that the defendant has been in exclusive possession of the house and premises ever since the purchase of the house in the joint names of the plaintiff and the defendant. That finding is again binding on me in second appeal; but, in my opinion, it does not dispose of the appeal. For the purpose of this argument it must be remembered that the plaintiff and the defendant were joint owners, or, what would be called in England, tenants-in-common with respect to this house. It has been pointed out by Mr. Justice Wilson in a very celebrated case, *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (1), that many acts which would be clearly adverse, and might amount to dispossession as between a stranger and the true owner of land, would between joint owners naturally bear a different construction. This view is founded upon the well established principle that the possession of one joint tenant is possession of all and that there is no dispossession until there is an assertion of a hostile title to the knowledge of the co owner sought to be excluded from the joint property. The question was debated in the case of *Ahmad Raza Khan* v. *Ram Lal* (2), where Mr. Justice Chamier came to the conclusion on a review of the authorities that possession of one co owner is in law the possession of all the co-owners and nothing short of ouster or something equivalent to ouster will put an end to that possession. Where a co-owner in possession did not deny the title of the other co-owners till shortly before the institution of the suit and never laid claim to more than his share, it was presumed that the co-owner in possession was in possession on his own behalf as well as on behalf of his co owners.

(1) 9 C. 744 (F. B.); 12 C. L. R. 257; 4 Ind. Dec. (N. S.) 1145.
(2) 26 Ind. Cas. 922; 37 A. 203; 13 A. L. J. 204.

That being so, it is clearly not sufficient for the lower Appellate Court to dismiss the plaintiff's suit on the finding that the defendant has been in exclusive possession of the property ever since its purchase. The learned Vakil appearing on behalf of the respondent has pressed on me the use of the words "exclusive possession" appearing in the judgment of the lower Appellate Court. I take that finding to mean that the defendant has been, so far as he is concerned, in possession of the property ever since its purchase, but it does not mean that there has been an assertion of a hostile title by him to the knowledge of the plaintiff. On this question, unfortunately there is no finding as to when the defendant first asserted a hostile title to this house to the knowledge of the plaintiff. All that we get from the judgment is that in 1908 the plaintiff demanded rent from the defendant and that the defendant sent a reply denying the plaintiff's title and setting up the same case as has now been put forward by the defendant. Therefore, there was, undoubtedly, an assertion of a hostile title in 1908, but that, of course, is not sufficient for the accrual of a title by adverse possession. But the learned Vakil on behalf of the respondent says that the question should be investigated by the lower Appellate Court from this point of view, and I think he is right. It may be that on a consideration of all the evidence, the lower Appellate Court may come to the conclusion that there was an assertion of a hostile title from the beginning, and I think, having regard to the fact that there is no definite finding on this point, I cannot in this appeal give a decree to the plaintiff for partition of the house and premises.

Another point that has been argued before me is that under the guise of a partition suit, the plaintiff has asked the Court to adjudicate on a question of title between him and the defendant. The plaintiff's suit is a very simple one. He says that the defendant and I purchased the property and we have all along been in joint possession. Therefore, I asked for partition. I have come to the conclusion that his allegation as to his title is correct. Therefore, it is the defendant who raised the question of title in the suit. But, having regard

to the fact that there was, undoubtedly, an assertion of a hostile title by the defendant certainly in 1908 and that, therefore, there was a dispossession, I think it was necessary for the plaintiff to sue for possession as well as for partition, because it is well established that there must be unity of title as well as of possession to entitle the plaintiff to maintain an action for partition. Therefore, strictly speaking the plaintiff's suit should have been a suit first of all for joint possession and then for partition. This only, in my opinion, affects the question of Court-fees payable by the plaintiff on his plaint.

Another matter which was argued on behalf of the respondent as a preliminary point was that this appeal was not brought within time. It appears that the memorandum of appeal was filed on 31st October 1917 with copies of the judgment but without a copy of the decree. The decree was filed on 1st November and, therefore, the appeal was out of time by one day. The appellant says that the lower Court opened on the same day on which the High Court opened and he could not procure the copy of the decree within time. I am empowered under the Act to extend the period and I think, in the circumstances of the case, it should be extended.

The result is that this case must go back to the lower Appellate Court to be disposed of according to law. The appellant is entitled to the costs of this Court. Costs of the Courts below will abide the result and will be disposed of by the lower Appellate Court. This decree will be drawn up upon payment by the plaintiff of the proper Court fees payable on a suit for possession and partition.

Case sent back.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 826 OF 1917.

October 15, 1918.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Shah.

GULAM GOUS MIA KHOT AND OTHERS —PLAINTIFFS Nos. 1 & 3—APPELLANTS

versus

SHRIRAM PANDURANG JAIRAMRAO— DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), ss. 6, 7, Sch. I, Art. 144—Mortgage by Muhammadan—Death of mortgagor —Sale of equity of redemption by widow—Redemption, suit for, by son and daughters—Limitation.

In 1895 a Muhammadan mortgaged certain property to the defendant. In 1901 the mortgagor being dead, his widow purported to sell the equity of redemption to the mortgagee. In April 1914 the son and daughters of the mortgagor filed a suit for redemption of the mortgage. It appeared that all the plaintiffs except one had attained majority more than three years prior to the institution of the suit:

Held, (1) that the sale of the equity of redemption by the mortgagor's widow could only operate to transfer her $\frac{1}{8}$th share in the property; [p. 79, col. 2.]

(2) that the right to redeem being indivisible, neither of the plaintiffs who had attained majority more than three years before the institution of the suit was qualified to discharge or release the equity of redemption, and that, therefore, the suit, having been brought within three years of the date when the youngest plaintiff attained majority, was within time, having regard to the provisions of section 7 of the Limitation Act. [p. 80, col. 1.]

Appeal from the decision of the Assistant Judge, Thana, in Cross-Appeals Nos. 309 and 315 of 1915, varying the decree passed by the Second Class Subordinate Judge, Bhiwandi, in Civil Suit No. 84 of 1914.

Mr. *W. B. Pradhan*, for the Appellants.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

SCOTT, C. J.—Mia Khot in 1895 mortgaged the property in suit to Jairam, the the father of the defendants Nos. 1 and 2. In 1901 the mortgagor being dead, his widow purported to sell the equity of redemption to Jairam. Jairam subsequently sold his interest in the property to the defendant No. 3.

The sale by the mortgagor's widow could only transfer her 1/8th share as a Muhammadan widow to the mortgagee: the remaining 28/32nds in the equity of the redemption belonged the plaintiffs, the son and daughters of the deceased. The present suit was filed on the 21st of April 1914 for redemption. The defence is that the

suit is, as to all the plaintiffs' interests except that of plaintiff No. 2, barred by limitation because Jairam obtained possession at the time of the sale, the plaintiff No. 3 was a major at that date and the plaintiff No. 1 became a major in May 1908 and did not sue for redemption or possession within three years. The lower Court has held the suit barred as regards the plaintiffs Nos. 1 and 3 under Article 144 read with section 6 of the Limitation Act, on the ground that the possession of Jairam became adverse in 1901.

This conclusion, however, appears to be inconsistent with section 7 of the Limitation Act, according to which, where out of a several persons jointly entitled to sue one is under disability and a discharge cannot be given in respect of the cause of action by any other of them, time will not run until the disability has ceased. Here the cause of action in the plaintiffs is the equity of redemption. The mother has not discharged and was not qualified to discharge it. Mr. Justice Chitty in *Bolton* v. *Salmon* (1) said: "Where a mortgage is made by two tenants-in-common, both of them must be parties to the action to redeem; one cannot redeem in the absence of the other. Where two different estates are mortgaged, the person entitled to redeem one estate cannot bring an action to redeem without making the person entitled to redeem the other estate a party [see *Cholmondeley* v. *Clinton* (2) j. For this purpose there is no difference between a mortgage of two different estates or two undivided shares of the same estate." For this reason neither of the plaintiffs who attained majority more than three years before the date of the institution of this suit was qualified to discharge or release the equity of redemption. The right was indivisible and the suit having been brought within three years of the date when the youngest plaintiff attained majority is within time.

SHAH, J.—I concur. I desire to add that even treating the possession of the mortgagee and his transferee as the possession of a purchaser and not that of a mortgagee, I think the result would be the same. The plaintiffs as co-sharers would be jointly entitled to sue him in respect of their shares for partition, and none of them would be competent to give a discharge in respect of the whole interest not vested in the purchaser. Thus under section 7 of the Limitation Act the right of the three plaintiffs to recover possession of 28/32th share in the property would be within time, as the claim of one of them, who was under a disability, is within time. The purchaser in possession would be equitably entitled to have his rights under the simple mortgage satisfied before he can be called upon to part with his possession. The result is substantially the same as if he were a mortgagee in possession, with this difference that he may not be liable to account as a mortgagee in possession.

Appeal decreed.

(1) (1891) 2 Ch. 48 at p. 52; 64 L. T. 222; 39 W. R. 589.

(2) (1820) 2 J. & W. 1 at p. 134; 37 E. R. 527; 22 R. R. 84.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 1 OF 1918.

April 2, 1919.

Present:—Justice Sir Asutosh Mookerjee, KT., Justice Sir Charles Chitty, KT., and Mr. Justice Walmsley.

DINABANDHU JANA—DEFENDANT—APPELLANT

versus

DURGA PRASAD JANA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 89 (1), Sch. II, paras. 17, 22—Specific Relief Act (I of 1877), s. 21—Arbitration—Agreement to refer dispute—Suit by party to agreement, maintainability of - Stay of suit—Procedure.

Sub-section 1 of section 89 of the Civil Procedure Code, read with paragraph 22 of the Second Schedule of the Code, makes the concluding provision of section 21 of the Specific Relief Act inapplicable to all arbitration agreements and awards governed by the Schedule. [p. 82, col. 1.]

Where the parties to a dispute agree to refer it to arbitration and subsequently one of them brings a suit to enforce his rights, the defendant can neither seek specific performance of the arbitration agreement nor set it up as a bar to the suit brought against him in contravention of the agreement

DINABANDHU JANA v. DURGA PRASAD JANA.

His remedy is to apply for a stay of the suit under paragraph 18 of Schedule II to the Civil Procedure Code and the burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration, and not on the defendant to show that no such reason exists. [p. 82, col. 2: p. 83, col. 1.]

After the suit is stayed, it is open to either party to apply under paragraph 17 (1) of the Second Schedule of the Code for a reference to arbitration, and the Court can make an order under clause (4) of the paragraph. [p. 84, col. 1.]

Letters Patent appeal against the decision of Mr. Justice Fletcher, in Appeal from Original Decree No 330 of 1914, dated the 8th January 1915, reported as 44 Ind. Cas. 279, reversing the decree of the Subordinate Judge, Midnapore, dated the 30th January 1914.

Babu *Sarani Kanta Sinha*, for the Appellant.

Babus *Jyotis Chandra Hazra*, *Sarada Charan Maiti* and *Gopendra Nath Das*, for the Respondents.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from the judgment of a Division Court of two Judges who were equally divided in opinion in an appeal from original decree.

On the 5th August 1911, the present suit was instituted by the plaintiff respondent against his three brothers for partition of joint properties and for incidental reliefs. It appears that two days previously the parties had entered into an agreement to refer the matters in controversy to the arbitration of three persons mentioned in the document and to abide by their decision. The defendant in his written statement urged that the suit was not maintainable in view of this agreement of arbitration. The Subordinate Judge held that section 21 of the Specific Relief Act did not operate as a bar, as the institution of the suit did not constitute by itself a refusal by the plaintiff to perform the contract of arbitration. In support of this view reference was made to the decision of Wilson, J., in *Koomud Chunder Dass* v. *Chunder Kant Mookerjee* (1). The suit was then tried on the merits and a decree made in favour of the plaintiff. On appeal to this Court, it was urged that the suit was barred under section 21 of the Specific Relief Act. Fletcher, J., overruled this contention on the authority of the decisions in *Koomud Chunder Dass* v. *Chunder Kant Mookerjee* (1) and *W. Crisp* v. *Adlard* (2). Shamsul Huda, J., held, on the other hand, that the decision in *Ram Chandra Pal* v. *Krishna Lal Pal* (3) supported the contention of the defendants. The result was that Fletcher, J., dismissed the appeal and Shamsul Huda, J., allowed the appeal, so that under section 98 (2) of the Civil Procedure Code, the decree of the Subordinate Judge stood confirmed. The present appeal is directed against that decree.

The appeal was argued at first on the assumption that the rights of the parties were governed by section 21 of the Specific Relief Act. It was urged with considerable force that there was really no conflict in principle between the decisions in *Koomul Chunder Dass* v. *Chunder Kant Mookerjee* (1) and *Ram Chandra Pal* v. *Krishna Lal Pal* (3) and that the conclusion in each case was based upon its special facts. In the former case, the defendant, who set up the usual arbitration clause in a mercantile contract as a bar to the suit, had ample opportunity to claim a reference to arbitration before the plaintiff came into Court, but had never expressed a wish to go to arbitration; in these circumstances, the plaintiff could not justly be deemed to have refused to perform the agreement. In the latter case, there was an express refusal antecedent to the suit. On the other hand, the language used by Petheram, C. J., in *W. Crisp* *Adlard* (2) may, perhaps, be open to comment, because the conduct of the plaintiff antecedent to the suit, followed by its institution, may indicate that he has refused to perform the agreement of arbitration, so as to bring into operation the provision of section 21 of the Specific Relief Act. When we look to the facts of that case, it seems probable that all that was intended to be decided by this Court was that refusal to go to arbitration *pendente lite* did not bar a suit for which there was a good cause of action at the date of institution. It is needless, however, to discuss this aspect of the matter in detail, as, at the conclusion of the arguments, it transpired that section

(1) 5 C. 498; 5 C. L. R. 284; 2 Ind. Dec. (N. S.) 925.

(2) 23 C 956; 12 Ind. Dec. (N. S.) 635.

(3) 17 Ind. Cas. 600; 17 C. W. N. 351.

21 of the Specific Relief Act had no application to the case.

Section 89 (1) of the Civil Procedure Code provides as follows:

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, *all* references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder shall be governed by the provisions contained in the second schedule."

One of the provisions contained in the Second Schedule mentioned, is in the following terms:

"22. The last thirty-seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration or to any award to which the provisions of this schedule apply."

The words of section 21 of the Specific Relief Act thus rendered inapplicable are as follows:—

"But if any person who has made such a contract (that is, a contract to refer present or future differences to arbitration) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

The position then is that sub-section 1 of section 89, Civil Procedure Code, which is framed in very general terms, read with paragraph 22 of the Second Schedule, makes inapplicable, to all arbitration agreements and awards governed by the schedule, the concluding provision of section 21 of the Specific Relief Act. There is no room for controversy that in the present case, the arbitration agreement is governed by the Second Schedule and may form the subject-matter of an application under paragraph 17 to file it in Court. Consequently, the concluding provision of section 21 of the Specific Relief Act, which would otherwise have barred the suit instituted in contravention of the arbitration agreement, is of no assistance to the defendant. At the same time, the following words of section 21 retain their place:

"And save as provided by the Code of Civil Procedure and the Indian Arbitration Act, 1899, no contract to refer present or future differences to arbitration shall be specifically enforced."

Thus the defendant can neither seek specific performance of the arbitration agreement nor set it up as a bar to the suit brought against him in contravention of the agreement. What then is the remedy of the defendant? The answer is provided by paragraph 18 of the Second Schedule of the Civil Procedure Code, which is in these terms: "Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit."

The result of this provision is that when the Court is apprised that the suit has been instituted in contravention of an arbitration agreement, the Court has a discretion to stay the suit. Indeed, as Lord Selborne said in *Willesford* v. *Watson* (4): "if parties choose to determine for themselves, that they will have a domestic *forum* instead of resorting to the ordinary Courts, then since that Act of Parliament (that is, the Common Law Procedure Act, 1854, section 11, which corresponds to paragraph 18 of the Civil Procedure Code) was passed, a *prima facie* duty is cast upon the Courts to act upon such an agreement." As Sir George Jessel put it in *Hodgson* v. *Railway Passengers' Assurance Co.* (5): "The plaintiffs are in the position of a party applying, and if there is any reason why the matter should not be referred to arbitration, it is their duty to bring it forward and present it to the Judge, and if they cannot do so, the Judge is quite justified in being satisfied that there is no reason." The burden, therefore, lies on the plaintiff to show that some

(4) (1873) 8 Ch. App. 473 at p. 480; 42 L. J. Ch. 447; 28 L. T. 428; 21 W. R. 350.

(5) (1882) 9 Q. B. D. 188.

sufficient reason exists why the matter should not be referred to arbitration, and not on the defendant to show that no such reason exists; it is the *prima facie* duty of the Court to act upon the agreement between the parties: *Lyon* v. *Johnson* (6) and *Clegg* v. *Olegg* (7). In the case before us, the appropriate course to follow would have been for the defendant to obtain a stay of the suit and then on an application by either party under paragraph 17 (1) a reference to the arbitrators by the Court under paragraph 17 (4).

A reference to the history of the legislation on this subject in India and in England confirms the view we take as to the rights and obligations of the parties in the events which have happened here. Section 28 of the Indian Contract Act, 1872, invalidated agreements in restraint of legal proceedings for the enforcement of rights in the ordinary tribunals. The first exception, however, saved contracts to refer to arbitration future disputes between the parties; it further provided that suits might be brought for specific performance of such agreements and that the existence of the agreements might be pleaded as a bar to suits instituted in contravention thereof. The second exception saved contracts to refer questions that have already arisen. The second clause of the first exception was repealed by the Specific Relief Act, 1877; section 21 barred suits for specific performance of such arbitration agreements, but preserved the right to set them up as a bar to suits brought in defiance thereof. The Indian Arbitration Act, 1899, which has a restricted local application, excluded by section 3 the operation of the last thirty-seven words of section 21 of the Specific Relief Act and by section 19 conferred on the Court power to stay proceedings where there was a submission. The Civil Procedure Code, 1908, was, in respect of the matter now before us, modelled on the provisions of the Indian Arbitration Act, 1899; paragraph 22 corresponds to section 3 and paragraph 18 to section 19. The result of these legislative enactments is to bring the law here substantially in conformity with the law in England. The successive stages of the development of that law are indicated by Vaughan Williams, L. J., and Fletcher Moulton, L. J., in *Doleman and Sons* v. *Ossett Corporation* (8). In *Mitchell* v. *Harris* (9) Lord Lough-Borough, L. C., repudiated the suggestion that an agreement to refer, where no reference had taken place, would stop a Court of law, as also the idea of a bill to enjoin a party from proceeding at law under a notion of giving effect to such a covenant. Indeed, it appears to have been treated in later cases as settled law that an agreement to arbitrate did not oust the jurisdiction of the Court and the pendency of an arbitration was a bad plea: *Thompson* v. *Charnock* (10) and *Harris* v. *Reynolds* (11). In the case last mentioned, Lord Denman, C. J., ruled that the pendency of an arbitration was no answer to an action for recovery of a debt, and the plea as a plea in bar was clearly bad. The defendant was consequently in a position of great disadvantage, and his remedy appears to have been limited to a suit for damages for breach of contract. This was obviously unsatisfactory, and led to the enactment of section 11 of the Common Law Procedure Act, 1854. The object of the Legislature was to enable effect to be given to the arbitration agreement before the action was tried, and this was achieved by the provisions that the action might be stayed by the order of a Judge made in the exercise of his discretion. This was reproduced in section 4 of the Arbitration Act, 1889 (52 & 53 Vic. c. 49). We may add that our conclusion is in harmony with the view adopted in the cases of *Sheo Babu* v. *Udit Narain* (12) and *Appavu* v. *Seeni* (13).

The substance of the matter thus is that for the determination of the controversy between the parties, there were two competent tribunals available, the Court and the arbitrators. The plaintiff contracted to choose the latter; he has in fact taken

(6) (1889) 40 Ch. D. 579; 58 L. J. Ch. 626; 60 L. T. 223; 37 W. R. 427.

(7) (1890) 44 Ch. D. 209; 59 L. J. Ch. 520; 62 L. T. 821; 38 W. R. 638.

(8) (1912) 3 K. B. 257; 81 L. J. K. B. 1032; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.

(9) (1793) 2 Ves. Jr. 129 at p. 137; 4 Bro. C. C. 311; 30 E. R. 557.

(10) (1799) 8 T. R. 139; 101 E. R. 1310.

(11) (1845) 7 Q. B. 71; 14 L. J. Q. B. 241; 9 Jur. 808; 115 E. R. 414.

(12) 24 Ind. Cas. 490; 12 A. L. J. 757.

(13) 42 Ind Cas. 514; 41 M. 115; 33 M. L. J. 177; 6 L. W. 243

the former. His opponents are not allowed to enforce specific performance of the contract or to plead the contract as a conclusive bar to the suit; but the law permits them to apply to the Court to stay the suit in the exercise of its judicial discretion, so as to enable either of the parties to obtain a reference to the arbitrators. This, the true aspect of the situation, has been overlooked till the concluding stage of this protracted litigation.

The result is that this appeal is allowed and the decree of the Court, made in affirmance of that of the Subordinate Judge, set aside. The suit is remitted to the Court of first instance to be taken up at the stage in which it was when the issues were framed. The Court will first determine, whether the suit should be stayed under paragraph 18 of the Second Schedule of the Civil Procedure Code. If an order for stay is made, then either party may take proceedings under paragraph 17. If the suit is not stayed it will be retried. But we may point out that under section 104, sub-section 1, clause (*e*), an appeal lies from an order staying or refusing to stay a suit under paragraph 18. As the ground on which the appeal has succeeded was not taken at any earlier stage of the proceedings, we direct each party to bear his own costs in all the Courts.

Appeal allowed;
Suit remanded.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 75 OF 1918.

February 4, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

ARUNACHALA VELAN—PLAINTIFF—APPELLANT

versus

VENKATARAMA AYYAR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 5, 6—Mortgage, suit for enforcement of—Relinquishment of claim on portion of hypotheca—Decree for sale of other portions—Deficiency—Personal decree, application for, maintainability of—'Mortgaged property,' 'such sale' in rr. 5, 6, meaning of.

The words 'mortgaged property,' in Order XXXIV, rule 5 (2), mean all the items mortgaged and the words 'such sale' in rule 6 mean the sale of the entire hypotheca. [p. 86, col. 1.]

A mortgagee suing for the enforcement of his mortgage, who wilfully relinquishes his claim on some of the items of the hypotheca and obtains a decree for the sale of the remaining items, cannot, in the event of the proceeds being insufficient to satisfy the decree amount, apply for a personal decree under Order XXXIV, rule 6, Civil Procedure Code. [p. 85, col. 2.]

Satish Ranjan Dass v. *Mercantile Bank of India Ltd.*, 48 Ind. Cas. 322; 45 C. 702 and *Ram Ranjan Chakravarti* v. *Indra Narain Dass*, 33 C. 890; 10 C. W. N. 862, followed.

Sheo Prasad v. *Behari Lal*, 25 A. 79; A. W. N. (1902), 203, *Ghafur Hasan Khan* v. *Muhammad Kifayat-ullah Khan*, 28 A. 19; 2 A. L. J. 413; A. W. N. (1905) 165, *Pirbhu Narain Singh* v. *Amir Singh*, 29 A. 369; A. W. N. (1907) 83 and *Gopal Panda* v. *Baikuntha Mahapatra*, 42 Ind. Cas. 56; 2 P. L. J. 538, dissented from.

Appeal against the order of the Court of the Subordinate Judge, Negapatam, in Appeal Suit No. 18 of 1918 (Appeal Suit No. 676 of 1917, on the file of the District Court, Tanjore), preferred against the order of the District Munsif, Patukota, in Interlocutory Appeal No. 1574 of 1917, in Original Suit No. 322 of 1913.

FACTS appear from the judgment.

Mr. *T. V. Gopalaswami Mudaliar*, for the Appellant.—A mortgagee cannot be deprived of his right to apply for a personal decree merely because he waives his claim in respect of portions of the mortgaged property. The relinquishment is a direct advantage to the mortgagor: see *Sheo Prasad* v *Behari Lal* (1). The same view was taken in *Ghafur Hasan Khan* v. *Muhammad Kifayat-ullah Khan* (2) and *Pirbhu Narain Singh* v. *Amir Singh* (3). In *Gopal Panda* v. *Baikuntha Mahapatra* (4) it was laid down that a personal decree could be granted where the relinquishment did not prejudice the mortgagee. The Calcutta decisions have taken a narrow view of the matter.

Mr. *S. Vardachari*, for the Respondent.—The plaintiff has deliberately chosen to relinquish his claim in portions of the hypotheca and having contented himself with a decree for the sale of the remainder

(1) 25 A 79; A. W. N. (1902) 203.
(2) 28 A. 19; 2 A. L. J. 413; A. W. N. (1905),'165.
(3) 29 A. 369; A. W. N. (1907) 83.
(4) 42 Ind. Cas. 56; 2 P. L. J. 538.

he took the risk and cannot complain of a deficiency. The language of rules 5 and 6 of Order XXXIV, Civil Procedure Code, clearly suggests that all the mortgaged property available should be brought to sale before application can be made for a personal decree : see *Ram Ranjan Chakravarti* v. *Indra Narain Dass* (5) and *Satish Ranjan Dass* v. *Mercantile Bank of India Ltd.* (6). The Allahabad rulings proceed upon a narrow interpretation of the rules.

JUDGMENT.

OLDFIELD, J.—I concur with the conclusion reached in the judgment, which my learned brother is about to deliver. Each case, as I understand him to hold, must be decided on its own merits ; and it is sufficient here that appellant, who by his own choice has proceeded and obtained a decree against a portion only of the mortgaged property, has suggested no reason whatever for exempting the remainder. That is a sufficient ground of decision in the present case: and whilst I agree that special circumstances may conceivably justify the grant of a personal decree, before the whole property comprised in the mortgage has been exhausted, I do not feel called on to attempt any definition of those circumstances or any estimate of the degree of difficulty in proceeding against the remaining profits, which would entitle the mortgagee to other relief.

The appeal fails and is dismissed with costs.

SESHAGIRI AIYAR, J.—This appeal can be disposed of on a short point. The respondent executed a mortgage to the appellant in respect of six items of property. In the suit on the mortgage the appellant relinquished his claim to four items of property and obtained a decree for sale of only two of the six items. After selling the two items, he made an application for a personal decree under Order XXXIV, rule 6, Civil Procedure Code. The District Munsif granted the application, relying upon *Sheo Prasad* v. *Behari Lal* (1) and *Ghafur Hasan Khan* v. *Muhammad Kifayat ullah Khan* (2). The Subordinate Judge was of opinion that the mortgage contained no personal covenant to pay and dismissed the application. It is doubtful whether this view of the Subordinate Judge is well founded, in the face of the decree and having regard to the language of the document. But I think that his decision can be supported on the ground that as the appellant has not exhausted his remedies in respect of all the items of the mortgaged property, he is not entitled to a personal decree. I accept the reservation stated by Sir John Woodroffe in *Satish Ranjan Dass* v. *Mercantile Bank of India Ltd.* (6) that the matter must be looked at rationally and that the personal remedy should be enforced only when there is deficiency after the sale of the mortgaged property *available for sale*. In other words, if the mortgagee does all that is reasonably possible to bring to sale the mortgaged properties, his action should not be scanned with undue severity. The principle is that the decree-holder should take steps to bring the entire mortgaged property that may be available to sale. Sanderson, C. J., says, that not less than the whole of the properties mentioned in the decree must be sold in order to comply with the provisions of the rules and with the terms of the decrees, that the question of sufficiency could not arise unless it was intended the whole should be sold, if necessary, to liquidate the amount secured by the mortgage. The case before the Calcutta High Court was one in which there was a decree in respect of all the mortgaged properties. But the mortgagee claimed a personal decree after selling only some items in the decree. The principle of that decision will apply with equal force to a case where a mortgagee without any reason relinquishes his claim in respect of some of the properties mortgaged. In the earlier case in that Court, *Ram Ranjan Chakravarti* v. *Indra Narain Dass* (5), this was distinctly laid down. In that case substantial portions of the mortgaged property were not included in the decree and the application under section 90 of the Transfer of Property Act was made after selling all the properties comprised in the decree. The learned Judges held that the mortgagee was entitled to this relief. In the Madras High Court there is no direct decision. The observations in *Shanmuga Pillai* v. *Ramanathan Chetti* (7)

(5) 33 C. 890; 10 C. W. N. 862.
(6) 48 Ind. Cas. 322; 45 C. 702;

(7) 17 M. 309 at p. 314; 4 M. L. J. 91; 6 Ind. Dec, (N. S.) 214.

point to the same conclusion. In that case one of the properties in respect of which decree was obtained was claimed by the brother of the judgment-debtor. He was not a party to the decree. He had also instituted a suit for partition. In that suit, the property in dispute fell to the share of the brother. Thereupon the mortgagee, without taking steps to sell that property, asked for a personal decree against the judgment-debtor. Muthusami Aiyar, J., held that he was entitled to such a decree. The learned Judge says :—" The respondent was therefore justified in not proceeding against Tiyagaraya Pillai's share, lest by so doing he may run the risk of involving himself in litigation which may entail on him expense." This *dictum* shows that it is not the duty of a mortgagee to put himself to unnecessary expense and to involve himself in fruitless litigation before seeking for a personal decree. But it is clear from this case and from the Calcutta cases that it is not open to a mortgagee to give up his rights unreasonably against portions of the mortgaged property, with a view of making the judgment-debtor personally liable. The language of rules 5 and 6 of Order XXXIV, Civil Procedure Code, suggests that such a procedure is not what the Legislature contemplated. *Prima facie* the mortgage must include all the properties in the suit. Rule 5, clause 2, speaks of *the mortgaged property* being brought to sale. That means all the items mortgaged. The next clause or a sufficient part thereof indicates that direction is given where it is possible to get full satisfaction out of the portion of the properties mortgaged. Rule 6 directly makes it a condition precedent to the application that the net proceeds of "such sale," namely, the sale of the entire hypotheca, should be found insufficient to pay the amount due to the plaintiff. In Jones on Mortgages, Volume II, section 1225B, the rule is thus stated :—"The purpose of the foreclosure suit is to enforce the right of redemption and personal judgment in such a suit can only be awarded when the mortgaged premises will not produce the amount found to be collectable." The Allahabad High Court has consistently taken a different view. In *Sheo Prasad* v. *Behari Lal* (1) it was stated that there is nothing to prevent a mortgagee relinquishing his claim against a portion of the mortgaged property and then obtaining a decree under section 90 of the Transfer of Property Act. With all deference, it seems to me that the meaning put upon the words 'of any such sale' is too narrow. The same view has been taken in *Gafur Hasan Khan* v. *Muhammad Kifayat-ullah Khan* (2) and was accepted as good law in *Pirbhu Narain Singh* v. *Amir Singh* (3). In *Gopal Panda* v. *Baikuntha Mahapatra* (4), the learned Judges say that if the mortgagee is not prejudiced by the giving up of certain items of property a personal decree can be passed. It is difficult to say how this prejudice can be ascertained. *Prima facie* when a personal decree is asked without recourse to the property mortgaged, it would ordinarily prejudice the judgment-debtor.

I am free to confess that a great deal can be said for either view of the question. But the reason of the rule seems to be in favour of the Calcutta view and as a learned Judge of this High Court had very largely adopted the same view, I prefer to follow those decisions and to hold that the mortgagee is not entitled to a personal decree in the present case. I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

M. C. P.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 114 OF 1912.

December 9, 1918.

Present :—Mr. Stuart, J. C.

PARAGI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GAURI SHANKAR—PLAINTIFF—RESPONDENT.

Will, claim based on—Proof, nature of—Hindu Law—Temple, offerings made at—Transfer of right to receive offerings, validity of.

In a suit based upon a Will, the mere production of the Will proves nothing; proof must be adduced that the Will has been acted upon. [p. 87, col. 2.]

The transfer of a right to receive gifts made by the worshippers at a temple to one of the *pujaris*

in his office of officiating priest, is usually void as being against public policy, for the simple reason that if such transfers were permitted generally, there would be nothing to prevent the offerings at a shrine of one religion coming into the possession of a person of another religion. Such transfers are void unless they are proved to be according to custom or usage, when their validity will be judged according to the conditions of such custom or usage. [p. 87, col. 2.]

Appeal from the decree of the District Judge, Sitapur, dated the 28th January 1918, confirming that of the Munsif, Sitapur, dated the 23rd August 1917.

Pandit *Harkaran Nath Misra*, for the Appellants.

Mr. *J. P. C. Bhattacharji* and Babu *Basudeo Lal*, for the Respondent.

JUDGMENT.—This suit relates to a transfer made by the five sons of Bhagwan Din of their right to receive offerings at the temple of Shiva in the village Muhammadpur in favour of Mahant Gauri Shankar. The suit was brought by Gauri Shankar for a declaration that the transfer was a good one. The religious service at the temple in question is by Goshains, who act as *pujaris* and receive the offerings of the worshippers. These offerings are divided into five equal shares. The defendants are *pujaris* entitled to the offerings falling in one share and the plaintiff is a *pujari* who has an interest in another share. The case for the defendants was as follows: They stated that Bhagwan Din had no right to share in the offerings, that the right to the offerings lay originally with Shambhu, that Shambhu had two sons Bakhtawari and Durjan who lived jointly, that on Bakhtawari's death Durjan succeeded to the whole of the property of the joint family by survivorship, that they are the descendants of Durjan, and that they have succeeded to the whole right to collect offerings originally possessed by Shambhu. The plaintiff agreed that Bakhtawari and Durjan were the sons of Shambhu. His case was that Bakhtawari had separated from Durjan, that Bakhtawari had left no son but had left a daughter, that Bhagwan Din was the son of the daughter, and that Bakhtawari had devised his share in the rights by Will to Bhagwan Din.

The lower Courts do not appear to have appreciated the exact nature of the dispute. They appear to have treated the defendants as outsiders and do not seem to have understood that on the admissions of the parties the defendants are entitled at any rate to one-tenth of the offerings. They have treated the succession of Bhagwan Din to the property entirely on the basis of a certified copy of a Will that has not been produced, which they have presumed to be genuine without looking into the question as to who succeeded to Bakhtawari's property when he died. I do not say that the Courts were wrong in presuming the Will to be genuine under the thirty years' rule, but the Will in itself does not settle the question. The mere production of a Will does not necessarily prove anything. It is necessary to prove that the Will was acted on. The Will may be a genuine Will and may have been revoked. To decide a point like this on the basis of a Will alone is not satisfactory. The Courts do not seem to have appreciated the necessity of inquiring who succeeded to the property of Bakhtawari when he died.

A second point was raised which has been dealt with under an erroneous impression as to the law. The subject of the transfer is the right to receive gifts made by the worshippers at the temple to one of the *pujaris* in his office of officiating priest. The law on the subject has been discussed in many High Courts. I need not quote the decisions. It is sufficient to state their substance. A transfer of such rights is usually void as being against public policy, for the simple reason that if such transfers were permitted generally, there would be nothing to prevent the offerings at a shrine of one religion coming into the possession of a person of another religion. It has been held by all High Courts that such a practice cannot be permitted. The law is that such transfers are void unless they are proved to be according to custom or usage when their validity will be judged according to the conditions of such custom or usage. It may well be said in this case that the present transfer is quite unobjectionable. It has been made by some *pujaris* in favour of another *pujari*. That may be granted. But to lay down, as the lower Courts have laid down, that such a transfer can be permitted generally is not correct and this transfer can only be held to be valid if the plaintiff can prove that there is a custom of the temple under which trans-

fers are permitted and that this transfer is according to the conditions of that custom.

As the lower Appellate Court has not decided these points and as it will be necessary to take further evidence before these points are decided, I remit the case to the learned District Judge of Sitapur for the decision of the two following issues:—

1. Who succeeded to the property of Bakhtawari on his death? The burden of proof is on the plaintiff who alleges separation.

2. Is there a custom of the temple permitting a transfer? If so, is the transfer made valid according to its conditions?

The learned District Judge will record such evidence as the parties may wish to produce upon these issues and will certify and send the evidence to this Court with his findings upon the said issues on a date not later than two months from the date on which he receives a copy of this order. Ten days will then be allowed for objections.

Issues remitted.

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER NO. 76 OF 1918.
January 21, 1919.
Present:—Mr. Justice Piggott and Mr. Justice Walsh.
JADDO TIWARI—OPPOSITE PARTY—APPELLANT
versus
BARAM DEO SINGH—APPLICANT—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 34, 45—Guardian, appointment of, subject to furnishing security—Failure to furnish security, effect of—Accounts, failure to furnish—Guardian, liability of.

Where a person is appointed to be the guardian of the property of a minor subject to furnishing certain security and he enters into possession and management of the minor's property, the fact of his failure to furnish security would not exonerate him from disciplinary action on the part of the Court under section 45, clause (1) (*b*) of the Guardians and Wards Act.

First appeal from an order of the District Judge, Ghazipur.

Mr. *Uma Shanker Bajpai*, for the Appellant.

JUDGMENT.—This is an appeal by a guardian against an order which has subjected him to disciplinary action on the part of the Court under the provisions of section 45, clause 1 (*b*), of Act VIII of 1890. The main point taken is that the order appointing the appellant Jaddo Tewari to be guardian of the minor Sri Kant Acharya was made subject to his furnishing certain security. He admittedly failed to furnish the security required and the contention is that by so failing he made his appointment a nullity and ceased to be liable to any action on the part of the District Judge under the provisions of the Act in question. In view of the wording of section 34, clause (*o*), of the Act there seems no force in this contention from a technical point of view. As a matter of fact we note that the appellant did enter into possession and management of the minor's property as his guardian and can scarcely be heard to say that, by failing to comply with one of the orders of the Court, he has escaped the liability for his failure to comply with another. The other points taken in the appeal are of no force. The appellant's subsequent compliance with another order does not relieve him from liability for having failed to comply with the previous order. We dismiss this appeal. As it has been heard *ex parte*, we make no order as to costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
APPEAL FROM ORIGINAL DECREE NO. 473 OF 1915.
January 27, 1919.
Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Panton.
BISWANATH BHATTACHARJEE AND OTHERS—DEFENDANTS—APPELLANTS
versus
GOVINDA CHANDRA DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 32, 87—Presentation of document for registration by am-mukhtar, *validity of—Registration, defect in, effect of—Stamp duty*—Hundi *written on more stamp papers than*

BISWANATH BHATTACHARJEE v. GOVINDA CHANDRA DAS.

one, validity of—Negotiable Instruments Act (XXVI of 1881), s. 5—Bill of Exchange, whether includes hundi—Contract Act (IX of 1872), s. 60—Appropriation of payment towards interest.

Improper registration of a document, or an error on the part of the Registrar, does not affect the validity of the document. [p. 92, cols. 1 & 2.]

The presentation of a document for registration by a person holding an *am-mukhtarnama* empowering him to do all acts relating to the executant's estate in various Courts and offices, among others "in the District Registration Office", etc, is a presentation by a person duly authorised. [p. 92, cols. 1 & 2.]

A *hundi* may be written on more papers than one, provided the aggregate value of the stamp papers used represents the correct value of the stamp to which such *hundi* is liable. [p. 91, col. 2.]

A Bill of Exchange may include a *hundi*, but it does not follow that a *hundi* includes a Bill of Exchange. [p. 91, col. 2.]

Where payments are made in liquidation of a debt, and the amount due on account of interest largely exceeds the amount paid, the creditor is justified in appropriating such payments towards interest. [p. 93, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Dacca, dated the 21st June 1915.

Mr. *B. Chuckerbutty*, Babus *Joges Chandra Roy*, *Dwarka Nath Chuckerbutty*, *Kshitis Chandra Neogi*, *Satis Chandra Bhattacharjee*, *Prokas Chunder Pakrasi*, *Surendra Nath Das Gupta* and *Hemendra Nath Bose*, for the Appellants.

Sir *Rash Behary Ghose*, Dr. *Sarat Chandra Basak*, Babus *Kunja Lal Das* and *Sures Chunder Das*, for the Respondents.

JUDGMENT.

CHITTY, J.—This suit was instituted by Govinda Chandra Das for himself and as executor to the estate of Hari Mohan Roy to recover from Biswanath Bhattacharjya and his son Jogesh Nath Bhattacharjya Rs. 70,362-8-0, being the amount due for principal and interest on a Bill of Exchange for Rs. 50,000 and to enforce that claim as a charge upon the property mentioned in a letter of hypothecation which was said to have accompanied the bill. The Bill of Exchange was dated 2nd August 1908, and was drawn by Jogesh Nath on his father who, according to the plaintiff's case, accepted it. Jogesh drew the bill at Dacca. It was taken to Elenga by two of the plaintiff's men, and is said to have been there accepted by Biswanath on 4th August 1908, when he also signed the letter of hypothecation accompanying the bill. Plaintiff's case is that two payments were made for interest by Jogesh: one of Rs. 3,000 on 7th November 1910 and the other of Rs. 1,000 on 27th October 1911. It is conceded that these payments were made by Jogesh by cheque. The suit was filed on 2nd January 1914 and if the interest was so paid, would be within time.

Biswanath died on 11th Chait 1320 (=25th March 1914). A written statement, purporting but not proved to have been signed by him the day before he died, was filed by his four sons the present appellants, in the July following. They had then been substituted as his representatives and they put in a further written statement on their own behalf in almost precisely the same terms. Jogesh in his personal capacity filed a written statement but did not defend the suit, nor did he take any part in the defence put forward by his three brothers, although he was then also on the record as one of his father's representatives; nor did he venture into the witness-box to give evidence. A number of issues were raised, the contesting defendants taking every imaginable defence. The learned Subordinate Judge decided against them on all points and the four sons joined in filing the present appeal.

Before us four questions have been raised.—(1) Did Biswanath accept the Bill of Exchange and sign the letter of hypothecation as alleged? (2) whether the Bill of Exchange was duly stamped; (3) whether the letter of hypothecation was properly stamped and registered; and (4) whether the claim is barred by limitation.

The first question is one entirely of fact. It is conceded that Jogesh drew the Bill of Exchange at Dacca on 2nd August 1908. The defendants' case is that it was never taken to their father Biswanath at Elenga for acceptance, or for signature of the letter of hypothecation; and that the signatures purporting to be his on both documents are forgeries. It is not suggested who did forge or could have forged these signatures. So far as direct evidence goes of Biswanath's execution, the case rests on the evidence of the plaintiff's witnesses Haralal Chakravarty and Gouranga Chandra Das, who are said to have gone to procure the execution of the letter of hypothecation and acceptance of the Bill of Exchange by Biswanath, against the evidence of Biswanath's son Tarak Nath who tries to make out that his father was then seriously ill and who

swears of his personal knowledge that Biswanath could not have executed those documents on the date alleged. I do not propose to discuss the evidence on this question at any great length because I entirely agree with the conclusion to which the learned Subordinate Judge has come, that Biswanath did accept the Bill of Exchange and sign the letter of hypothecation as alleged by the plaintiff. There seems no reason whatever to disbelieve the evidence of the plaintiff's witnesses on this point, and we have the further evidence of the plaintiff himself that he sent these two men to Elenga for this very purpose. That there was a sum of money due to the plaintiff from Biswanath and Jogesh at the time is proved beyond the shadow of doubt. There had been a number of Hundis drawn by Jogesh for his father and two small ones drawn by Jogesh and Trailokhya Nath, a Naib of Biswanath, the amounts of which were admittedly outstanding in August 1908. Those Hundis were of different dates, from 29th March 1906 down to 28th July 1908. There is correspondence on the record which shows that there was an idea of having the sums due on these Hundis consolidated and one document being given for the whole amount. It appears that Biswanath with his son Jogesh was carrying on business of various descriptions; among others, he was taking leases of forests for which he required large advances from time to time. It is admitted that the first two of the Hundis for Rs. 10,000 each were given to the plaintiff to secure Rs. 20,000 which was kept in deposit with the plaintiff for the purpose of paying a quarter of the price for the timber Mahal. That Biswanath accepted this Bill of Exchange is also supported by the letter which he wrote to the plaintiff, dated 15th Kartik 1316 (=1st November 1909), in which he promised to pay the interest as soon as possible. It is clear that this letter can only refer to interest on the Bill of Exchange. At that time there was no other debt outstanding against Biswanath to which he could be alluding.

The evidence on the defendants' side on this question of fact is of a purely negative character. They try to make out that Biswanath was seriously ill for some 8 or 10 days both before and after 4th August 1908. The learned Subordinate Judge has characterised Taraknath as an "arch liar," and I entirely agree with him that his evidence cannot possibly be believed. The whole story of this alleged illness of Biswanath is clearly an afterthought manufactured to meet the present claim. The most important witness who would be able to prove this serious illness was a Doctor named Rebati Mohan Dutt, who was said to have been summoned from Calcutta on 31st July 1908 and who is said to have stayed at Elenga treating Biswanath for eight days on a fee of Rs. 100 a day. This man has not been called. An application was made to examine him on commission, but it was plain that he was then in the neighbourhood and apparently carrying on his profession. Then it was said that he was seriously ill. The Judge properly refused to believe this and ordered him to be summoned to give evidence in Court. This ordeal he declined to face; and, as the learned Judge remarks, he thereupon "made himself scarce and it is not known where he has gone." There is no evidence on the record worth the name that he treated Biswanath at all. The prescriptions which he is said to have given are produced by another medical practitioner, Rajani Nath Sen. The proof of payment of the Rs. 800, which would have been a point very much in favour of the defendants' case, was not in the first instance attempted. Subsequently a man Jagabandhu Talukdar, a servant of the defendants, who had already been examined, was recalled to say that he had handed over the money to and taken a receipt from Rebati Mohan Dutt. There is nothing to show that the receipt is in Rebati's handwriting or that he was ever paid this very large sum of Rs. 800 by Biswanath or any member of his family. It does not appear in the family accounts. There is, moreover, as the learned Subordinate Judge has pointed out, irrefragable evidence in contemporary documents showing that Biswanath could not possibly have been ill at that time. On 1st August 1908, an application was presented to the Civil Court for the examination of Biswanath and his son Sarada Nath on commission. In that application it was distinctly stated that Biswanath was unable to come to Court on account of old age

and Sarada Nath on account of ill health. The Vakalatnama on the strength of which that application was presented was signed by Biswanath personally just before the application was made. It is inconceivable that, if Biswanath was then believed to be on his death-bed, an application to examine him on commission would have been made at all or that, if it were made, it would not have been made on the ground that he was too ill as well as too old to attend the Court.

On the whole evidence, I think that there can be no possible doubt that Biswanath accepted this Bill of Exchange and executed the letter of hypothecation, as the plaintiff alleges, on 4th August 1908.

The next point is whether the Bill of Exchange was duly stamped. The argument of the learned Counsel for the appellant, as I understood it, was that Nilkanta Shaha, the stamp-vendor, was not a licensed stamp-vendor in 1908 who was authorized to grant a certificate for the use of three pieces of stamped paper to make up the stamp of Rs. 30, and that it was not open to the executant of the Bill of Exchange to use three pieces of stamped paper to make up the stamp on that document. With regard to Nilkanta Shaha, before the appeal came on for hearing, it was represented to us that the defendants had in the Court below made a case of forgery having been committed in the registers of the Collector relating to stamp vendors and we were asked to send for these books for the purpose of judging whether fresh evidence should be taken on this point. It should be noted that the learned Subordinate Judge had himself called for these registers, had inspected them in the presence of the Pleaders of both parties and had come to the conclusion that there was no ground for suspicion. Two of the registers—parts of register No. 72—were actually marked as exhibits in the Court below. The other, said to be a list of stamp vendors, was not marked as an exhibit, as it appeared unnecessary. On the documents being produced before us it was at once apparent that there was no ground whatever for any suggestion of the registers having been tampered with. The only alteration in the register No. 72 was an alteration in the figures of the years, printed forms for previous years having been bound up and used for subsequent years, the figures of those years being entered in manuscript. As to the list, it is at most of a negative value. It may be conceded that the name of Nilkanta Shaha does not appear in that list, and no suggestion of forgery is made in connection with it. The man's name, however, does appear in the register of stamp-vendors of that year. It may be that he was licensed to sell Court-fees at the several Courts. The question is of no importance because the argument of the learned Counsel appears to be based on an erroneous reading of the rules of the Governor-General in Council then in force relating to the manner in which stamps should be affixed to various instruments. The learned Counsel relied on certain rules which relate to Hundis. Rule 4 relating to Bills of Exchange is different, and under that rule the document is correctly stamped. A Bill of Exchange may include a Hundi; but it does not follow that a Hundi includes a Bill of Exchange. Though this document has been loosely described in the lower Court and by the parties as a Hundi, it is, in fact, a Bill of Exchange; it was intended to be a Bill of Exchange; and the rules relating to stamping of Bills of Exchange would apply to it. Rule No. 6 especially authorizes the joining of two or more sheets of stamped papers together, subject only to the proviso that a portion of the instrument shall be written on each sheet so used. That is admittedly the case here, the document being written across all three. There is no question that the document was written on three "Hundi" stamp papers of the aggregate value of Rs. 30. It was, therefore, correctly stamped.

We then come to the question of the admissibility in evidence of the letter of hypothecation. As to this it is contended that as the document was not properly stamped, it was not capable of registration, and that having been improperly registered it was invalid to create any charge. It was further urged that it was not presented for registration by a person authorized to do so. As to the registration it is clear upon the evidence that the document, when presented to the Registrar, was examined by him and he came to the conclusion, rightly or wrongly, that, being a

letter of hypothecation accompanying a Bill of Exchange, it was exempt from duty under Article 40, Exemption (2) of Schedule I of the Stamp Act, II of 1899. He accordingly certified on the Bill of Exchange that it was properly stamped and registered the letter of hypothecation without requiring any further duty to be paid in respect of it. In this connection the learned Counsel for the appellant relied upon section 35, which provides that "No instrument chargeable with duty shall be admitted in evidence for any purpose by any persons having by law or consent of parties authority to receive evidence; or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped." It was urged that this prohibition of registration of an instrument not duly stamped implied that such an instrument, if improperly registered, would be invalid in law. He was confronted with proviso (*a*) to that section and he was forced to contend that that proviso did not refer to documents compulsorily registrable. This shows the fallacy of the argument, for there is nothing in that proviso so to restrict its scope. It is obvious that this document might have been admitted in evidence in the Court below, had the Judge so thought fit, on payment of the stamp duty payable and the penalty prescribed by section 35. It cannot be said that the document was incapable of registration inasmuch as it was registered. An improper registration by the Registrar could not possibly affect the validity of the document. Section 87 of the Registration Act says that "Nothing done in good faith pursuant to this Act...by any registering officer shall be deemed invalid merely by reason of any defect in his.....procedure."

Nor can it be successfully argued that this document was presented for registration by an unauthorized person. It was presented for registration by Jogesh Nath Bhattacharjya, who along with his brothers held an *am-mukhtearnama* (Exhibit 1) from his father Biswanath, dated 4th Chait 1310. By this document Biswanath empowered any of the said *am mukhtears* to do all acts relating to his estate in various Courts and offices, among others "in the District Registration Office and Sub-Registration Office, etc., subordinate thereto." This general power would clearly authorise any of the *am-mukhtears* to present and procure the registration of any document relating to his estate. That power is in no way curtailed by the special power which follows, that any of his *mukhtears* might borrow money by executing on his behalf by signing his name *bakalam* hand-notes, Hundis, promissory notes, or hypothecation bonds, with Hundis, bonds or any other document, and present those documents in any Registration Office according to necessity and get them registered. I am of opinion, therefore, that Jogesh was fully authorized to present and get registered this letter of hypothecation.

It may be an arguable point whether the course taken by Biswanath and his sons, which was accepted by the Sub-Registrar and later by the learned Subordinate Judge, was correct according to law. It can hardly have been intended by the Legislature that a debtor in the Muffussil desiring to mortgage his property should, by executing a Bill of Exchange and giving a mortgage in the shape of a letter of hypothecation accompanying such bill, be able to evade the stamp laws and effect a mortgage for the duty chargeable only on a Bill of Exchange. But, in my opinion, we are precluded from going into the propriety of that proceeding by the provisions of section 36 of the Stamp Act. The Registrar may have been wrong in thinking that the letter of hypothecation was exempt from stamp duty and registering it as such. The learned Subordinate Judge may also have been in error in admitting it in evidence on the same ground. But as he admitted the document in evidence, that admission, except as is provided for by section 61, which does not affect the liability of the defendant, cannot be called in question in this suit. The question of the validity of a registration, where there has been some error on the part of the Registrar, was many years ago considered by the Judicial Committee of the Privy Council, who held that in spite of such error the registration would nevertheless be good. (See *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (1) and *Muhammad Ewaz* v. *Birj Lal* (2). It follows that the

(1) 15 B. L. R. 228; 24 W. R. 75; 2 I. A. 210; 3 Sar. P. C. J. 509 (P. C.).

(2) 1 A. 465 (P. C.); 4 I. A. 166; 3 Sar. P. C. J. 735; 3 Suth. P. C. J. 438; 1 Ind. Dec. (N. S.) 820.

validity of the document registered would not be thereby affected. It would be most dangerous if such were the law; nor does it lie in the mouth of the representatives of the executant of this letter of hypothecation, who was responsible for the proper stamping of that document, now to plead that his contract was not binding upon him because he had succeeded in defrauding the revenue.

The last question is that of limitation. There is no evidence on the part of the appellants-defendants of any appropriation by Jogesh of these sums of Rs. 3,000 and Rs. 1,000. They were undoubtedly paid by Jogesh by cheque against this Bill of Exchange. The creditor was justified in appropriating them towards the sum then due for interest, which largely exceeded these amounts. That he did so appropriate them is clear from his notice (Exhibit 10-P) dated 19th Chait 1319 (=1st April 1913), where the two sums are duly credited against the interest which he was then demanding in respect of this bill.

The result, in my opinion, is that the decision of the learned Subordinate Judge was correct, and that this appeal must be dismissed with costs.

PANTON, J.—I agree.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 170 OF 1918.

January 25, 1919.

Present:—Mr. Batten, A. J. C.

LAXMAN—DEFENDANT—APPELLANT

versus

TATYA—PLAINTIFF—RESPONDENT.

Hindu Law—Partition of self-acquired property by father among sons, effect of—Gift and partition, distinction between—Registration, whether necessary.

A Hindu father can during his lifetime partition his self-acquired property among his sons. [p. 94, col. 2.]

The effect of such a partition, however, is different from that of a gift. A gift requires acceptance by the donee, whereas a partition is binding on the sons irrespective of their consent. [p. 94, col. 2.]

In the case of a gift of self-acquired property by the father any property not gifted remains the joint property of the sons on the father's death, the gifted property being the separate property of the son to whom it was given. The effect of a partition of the property is different; the sons become separate in all respects and do not remain joint [p. 94, col. 2.]

The transaction by which a partition of self-acquired property is effected by a father among his sons is not a gift within the meaning of the Transfer of Property Act and cannot, under Hindu Law, be distinguished from a partition of joint ancestral property. It is not necessary for such distribution or partition to be effected by a registered deed. [p. 94, col. 2.]

Appeal against the decree of the Additional District Judge, Chanda, in Civil Appeal No. 17 of 1918, dated the 21st March 1918, arising out of Civil Suit No. 142 of 1917, decided by the Munsif, Chanda, on the 14th December 1917.

Sir *Bipin Krishna Bose* and Mr. *V. Bose*, for the Appellant.

Mr. *V. D. Sathaye*, for the Respondent.

JUDGMENT.—The case of the respondent-plaintiff is that in his father's lifetime his two brothers Laxman and Urkuda seized in June 1916 parts of the tenancy land which stood in the name of the father and began to cultivate them separately. Thereupon some friends intervened and the father Nago, who has died since the institution of the suit, divided the fields giving the five absolute occupancy fields to the plaintiff and dividing the 17 occupancy fields between the other two brothers. This partition was effected about the 15th November 1916 and was followed up by a deed of gift dated the 29th November 1916, by which the father formally gave the absolute occupancy fields to the plaintiff. The plaintiff complains that he was never allowed by the defendants to cultivate the land allotted to his share. The defendants Laxman and Urkuda pleaded that in June 1916 Nago partitioned the fields among his three sons and that the absolute occupancy fields fell to the share of the 1st defendant Laxman. The parties are agreed as to the fields which fell to Urkuda, who was discharged from the suit. The real dispute is whether the remaining occupancy fields fell to the plaintiff and the absolute occupancy fields to Laxman as contended by the defendant or whether the absolute occupancy fields fell to the share of the plaintiff and the remaining occupancy fields to the

share of defendant No. 1. It is to be observed that there is no dispute as to the numbers and areas of the absolute occupancy fields or of the fields which fell to Urkuda, but the parties are not agreed as to the other occupancy fields, for while the plaintiff mentions 10, Laxman mentions only 9. It will thus be seen that while the defendant says that there was a partition in June 1916, the plaintiff says there was only a seizure by the defendant in June and that the actual partition, followed by a deed of gift, took place in November. The first Court held that the plaintiff failed to prove that the absolute occupancy fields fell to the share of the plaintiff at partition. It also held that the deed of gift was not valid as possession was not delivered and as there having already been a partition, Nago had nothing which he could gift. The plaintiff's suit was, therefore, dismissed. On appeal the Additional District Judge upheld the finding of the first Court that the plaintiff had failed to establish that the absolute occupancy fields in suit fell to his share at the partition. He, however, held that Nago was competent to make a gift of the fields and that the gift by the deed was a valid gift, because the fields being Nago's self-acquired property, there could be no partition of property which was not joint and Nago could not convey his fields to his sons by the so-called partition, a transaction in the nature of a gift, without a registered instrument according to section 123 of the Transfer of Property Act. He held that the gift by the deed was a valid one, although possession was not delivered because the donor was not actually in possession and did all he could in the matter of giving possession. This last view has not been attacked in appeal.

In appeal a new point of law is raised. It is to the effect that though the property was admittedly the self-acquired property of Nago, the transaction by which he partitioned the property and transferred it to his sons was not a gift within the meaning of the Transfer of Property Act and cannot under Hindu Law be distinguished from a partition of joint ancestral property and that, therefore, it was not necessary for the distribution or partition to be effected by a registered deed. In support of this contention I am referred to section 2 of Chapter I of the Mitakshara which deals with partitions and especially to placitum 6 thereof, which makes it clear that a father can make a partition for the benefit of his sons of his self-acquired property. In support of the meaning sought to be attached to these passages in the Mitakshara I am referred to *Kandasami* v. *Doraisami Ayyar* (1), which was followed in *Murugayya* v. *Palaniyandi* (2). These were cases of partition of joint ancestral property but the whole meaning of the Mitakshara is reviewed, and it is clear that a father can during his lifetime partition his self-acquired property among his sons. The effect of such a partition is quite different from that of a gift. A gift requires acceptance by the donee, whereas a partition is binding on the sons irrespective of their consent. The question of the fairness of the partition, as to which there is a distinction between ancestral and self-acquired property, has not been raised in this case. Moreover, in the case of a gift any property not gifted is the joint property of the sons on the father's death, the gifted property being the separate property of the son to whom it was given. The effect of a partition of the nature in question is different; the sons become separate in all respects and do not remain joint. No ruling or authority has been cited on behalf of the respondent to meet the argument raised for the appellant, and I am of opinion that the appellant's contentions are correct and that the transaction of partition set up by both parties, or rather whichever of those transactions really took place, could not be regarded as a gift requiring to be effected by a registered deed. If, therefore, there was a partition it was a valid one and if the partition was not as stated by the plaintiff, it would be a bar to any subsequent dealing with the property by Nago against the terms of the partition. It is to be observed that the plaintiff does not say that the deed of gift evidenced an independent gift; he merely sets up the deed of gift as ratifying a previous par-

(1) 2 M. 317; 5 Ind. Jur. 352; 1 Ind. Dec. (N. S.) 491.

(2) 36 Ind. Cas. 507; 31 M. L. J. 147; (1916) 2 M. W. N. 284.

tition. If he succeeds in proving the partition set up by him, the deed of gift though in his favour would be a superfluity. The grounds on which the lower Appellate Court has given a decree in favour of the plaintiff are, therefore, erroneous.

The lower Appellate Court agrees with the first Court in holding the partition set up by the plaintiff not to be established. It is urged for the respondent-plaintiff that the judgment of the Additional District Judge on this point is inadequate: this contention must be upheld. The Additional District Judge gave very little attention to the point, as he thought it of small importance. Even the judgment of the first Court does not adequately deal with the question. Neither the plaintiff nor Laxman have themselves given evidence, though it is difficult to see how the facts can be properly arrived at without knowing what they can prove. Moreover it is the plaintiff's case that he has never been in possession of the fields which the defendant says fell to the plaintiff's share at the partition. If he has not, it would support the plaintiff's case; if he has, the fact would support the defendant's case. There has been no discussion as to the possession of these occupancy fields and no adequate discussion as to the possession since the alleged partitions of the absolute occupancy fields. In dealing with the evidence the first Court has treated the evidence piecemeal and has failed to compare the case of the plaintiff with that of the defendant and to weigh probabilities. Moreover, the question as to whether Nago would be likely to make a deed of gift at variance with the previous partition has not been considered.

With these remarks the appeal is remanded for further trial. There will be a refund certificate as to the Court-fee paid on appeal. Other costs will be costs in the suit.

Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 281 OF 1918.

February 17, 1919.

Present:—Mr. Daniels, A. J. C.

RAM DAYAL—PLAINTIFF—APPELLANT

versus

RAMPAL SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 93—Execution of decree—Sale—Auction-purchaser deprived of property by paramount claimant, remedies of—Suit to recover purchase-money, maintainability of.

A purchaser at a Court-sale in execution of a decree, who is afterwards deprived of the property purchased by him by a person claiming title paramount, cannot recover his purchase-money by suit from the person to whom it has been paid. [p. 97, col. 2; p. 98, col. 1.]

Appeal from the decree of the District Judge, Rae Bareli, dated the 29th April 1918, confirming that of the Subordinate Judge, Partabgarh, dated the 22nd January 1918.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellant.

Syed *Ali Mohammad* holding brief of Syed *Wazir Hasan*, for the Respondents.

JUDGMENT.—The question raised in this appeal is whether a purchaser at a Court-sale in execution of a decree (in this case a a mortgage decree), who is afterwards deprived of the property by a person claiming title paramount, can recover his purchase-money by suit from the person to whom it has been paid. The Courts below have answered the question in the negative.

The plaintiff-appellant is the auction-purchaser and the defendants-respondents are the judgment creditor and the judgment-debtor in the suit in which the sale took place. The date of the sale was 27th October 1914. Prior to this date on 18th July 1914 one *Musammat* Gauhar Bibi had instituted a suit claiming that the property belonged to her and not to the judgment-debtor. The suit was decreed in her favour on 18th March 1915 and the decree was confirmed by the lower Appellate Court on 14th June 1915 and by this Court on 30th August 1916. The plaintiff made two applications for refund. The first was made pending the decision of the appeal to the District Judge and was rejected as premature. The second was made after the decision of this Court in second appeal and was rejected on the

ground that his remedy, if any, lay by a suit.

The question is one on which the authorities are divided. Under the Code of 1882 the right of suit was established by a Full Bench decision of five Judges, who were unanimous in their opinion, in *Munna Singh* v. *Gajadhar Singh* (1). That decision was doubted but followed in *Kishan Lal* v. *Muhammad Safdar Ali Khan* (2). The same view was taken at Calcutta ; *vide Ram Kumar Shaha* v. *Ram Gour Shaha* (3). The first case in the United Provinces in which the question appears to have arisen under the Code of 1908 is *Muhammad Najib Ullah* v. *Jai Narain* (4). The learned Judges who decided that case considered that as a Bench they were bound by the Full Bench ruling in *Munna Singh* v. *Gajadhar Singh* (1), but doubted its correctness. They were in doubt whether to refer the question afresh to a larger Bench but decided to remit an issue to the lower Court. What became of the case ultimately does not appear. There is nothing in the judgment to indicate that the learned Judges considered that any change in the law had been made by the passing of the Code of 1908. Three years later the same question arose in *Nannu Lal* v. *Bhagwan Das* (5) and a Bench consisting of the Chief Justice and Mr. Justice Rafique, relying on the difference between the language of section 315 of the Code of 1882 and Order XXI, rule 93, of the Code of 1908, held that the Full Bench ruling in *Munna Singh* v. *Gajadhar Singh* (1) was no longer good law and that no right of suit exists under the present Code. The learned Advocate for the appellant in a very able argument has suggested that the difference in language is immaterial, but in fact a substantial change has been made. Section 315 provided two cases in which a refund could be claimed. The first was when the sale had been set aside under section 312 or 313. The second was when it was found that the judgment-debtor had no saleable interest in the property which purported to be sold. These two provisions overlapped to a certain extent, since if the sale had been set aside under section 313, it must have been on the ground that the judgment-debtor had no saleable interest in it; this was the only case covered by section 313. The object, therefore, of adding the words "or when it is found that the judgment debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it" in section 315 could only be to enable a purchaser, in a case where the judgment-debtor was afterwards found to have had no saleable interest in the property, to recover his money even though proceedings to set aside the sale under section 313 had not been taken. The fact that these words have been omitted in the new Code is substantial argument in favour of the view which the Court adopted. Another equally possible reason for the omission, however, is that whereas the procedure by application is suitable as long as the money has not been disbursed, *i. e.*, when the sale has not been confirmed, the remedy by suit is more appropriate when it has already been paid to the decree holder.

The decision in *Nannu Lal* v. *Bhagwan Das* (5) has been followed by another Bench of the same Court in *Man Mohan Lal* v. *Gopi Nath* (6). On the other hand in *Girdhar Das* v. *Sidheshwari Prasad* (7), another Bench of the same Court, relying on the earlier rulings in *Kishan Lal* v. *Muhammad Safdar Ali Khan* (2) and *Muhammad Najib Ullah* v. *Jai Narain* (4) and without referring to the ruling in *Nannu Lal* v. *Bhagwan Das* (5), held, in a case where the same property had been sold twice over in execution proceedings and bought by different purchasers, that the second set of purchasers who were afterwards deprived of the property could recover it.

The earliest reported case on this question under the Code of 1908 is *Rustomji Ardeshir Irani* v. *Vinayak Gangadhar Bhat* (8), in which the Court (Scott, C. J., and Batchelor, J.) held that the present Code of Civil Procedure recognised a modified

(1) 5 A. 577 (F. B.); A. W. N. (1883) 130; 3 Ind. Dec. (N. S.) 491.
(2) 13 A. 383; A. W. N. (1891) 138; 7 Ind. Dec. (N. S.) 244.
(3) 2 Ind. Cas. 559; 37 C. 67; 13 C. W. N. 1080; 10 C. L. J. 558.
(4) 26 Ind. Cas. 59; 36 A. 529; 12 A. L. J. 908.
(5) 37 Ind. Cas. 9; 39 A. 114; 14 A. L. J. 1216.
(6) 46 Ind. Cas. 103; 16 A. L. J. 511.
(7) 44 Ind. Cas. 697; 40 A. 411; 16 A. L. J. 236.
(8) 7 Ind. Cas. 955; 35 B. 29; 12 Bom. L. R. 723.

warranty of title at a Court-sale and that a suit did, therefore, lie. The Privy Council decision in *Dorab Ally Khan* v. *Executors of Khajah Moheeooddeen* (9) has generally been relied on as establishing the principle that there is no such warranty; but as was pointed out by the learned Judges who decided *Ram Kumar Shaha* v. *Ram Gour Shaha* (3), that decision was based on the language of the Code of 1859 according to which only the right, title and interest of the judgment-debtor in the property could be sold. The Madras High Court has, however, in *Parvathi Ammal* v. *Govindasami Pillai* (10) and in *Tirumalaisami Naidu* v. *Subramaniam Chettiar* (11) refused to follow the Bombay ruling and has held, as the Allahabad High Court did in *Nannu Lal* v. *Bhagwan Das* (5), that while there was a right of suit under the old Code there is none under the present Code. In a previous case, *Parvathi Ammal* v. *Govindasami Pillai* (10), the same Court had held that while in general the principle of *caveat emptor* applied to Court-sales, a purchaser had a right of suit where he had been put to loss owing to a sale which was afterwards set aside on account of irregularities on the part of the decree-holder.

The same view which now prevails in Allahabad has been taken by the learned Judicial Commissioner in an unreported case, Second Civil Appeal No. 34 of 1914. I must own that the state of the law thus established appears to me extremely unsatisfactory. In the Privy Council decision in *Dorab Ally Khan* v. *Executors of Khajah Moheeooddeen* (9), to which a reference has already been made, their Lordships of the Privy Council pointed out that the rule of *caveat emptor* which prevailed in England at private sale was based on the fact that a purchaser had full opportunity of investigating the title for himself. If, therefore, he chose to purchase property in which the title was bad he had only himself to blame. At a Court sale, however, the purchaser had very scanty opportunities of investigating the title and, therefore, as the reason for the rule failed, the rule of *caveat emptor* could not properly be applied to sales by the Sheriff which were governed by rules peculiar to such sales. Even in the case of private sales the rule was discarded when the Transfer of Property Act was passed and it is illogical in principle, and unfortunate in its result, that it should be held to apply to sales in execution. Not only is it contrary to natural justice that a man who has paid good money and got nothing for it should not be able to recover, but the result must in the long run be highly injurious alike to the person whose property is sold and to creditors with claims against such property. It is impossible that property should fetch an adequate price when the purchaser has no guarantee that he will not be paying his money for nothing. The whole thing is reduced to a gamble. If the title turns out to be good, the purchaser has probably secured the property for about half its value. If it turns out to be bad, he not only loses its purchase money but in many cases large additional sums which he has spent in endeavouring to defend it. In many cases, as indeed in the present case, no application could be made under Order XXI, rule 93, since limitation for such application is one month only under Article 166 of the Limitation Act, while the judgment establishing the judgment-debtor's want of title was not passed till some five months afterwards and the case was not finally settled till nearly two years after the sale. To confine the purchaser to his remedy under rule 93 is, therefore, in many cases to deprive him of all redress.

Strictly speaking, as has been pointed out on behalf of the appellant, the conditions laid down in Order XXI, rule 93, do not apply to the right of suit at all but merely to the conditions under which a refund can be obtained by application. The prohibition against suit contained in rule 92 is also confined to suits the object of which is to set aside an order confirming or refusing to confirm a sale and does not touch a suit like the present. It seems difficult to believe that the Legislature can have intended that an auction purchaser who is deprived of his property by a person

(9) 3 C. 806 (P. C.); 2 C. L. R. 529; 5 I. A. 116; 3 Suth. P. C. J. 519; 3 Sar. P. C. J. 818; 2 Ind. Jur. 426; 1 Ind. Dec. (N. s.) 1097.
(10) 30 Ind. Cas. 827; 39 M. 803; 2 L. W. 861; 29 M. L. J. 467; (1915) M. W. N. 797.
(11) 45 Ind. Cas. 109 40 M. 1009.

claiming a paramount title, should have a right to recover his money on making an application under rule 93 but should have no means whatever of recovering it where the circumstances are such that no application under that rule could possibly have been made.

Sitting as a Single Judge I feel bound to follow the law as laid down by the Judicial Commissioner in Second Civil Appeal No. 34 of 1914. I might perhaps have been disposed to refer the case to a Bench with a view to the question being settled one way or the other once for all but for a finding of the lower Appellate Court that the appellant, when he purchased the property, knew that the judgment-debtor's title was bad. The appellant contends that the evidence does not support this finding, but he admits that at any rate it supports a finding that the appellant knew at the time of his purchase that the title was doubtful, Gauhar Bibi had actually filed her suit claiming the property three months before the sale took place. If the appellant purchased knowing the title to be doubtful, he must be assumed to have taken the risk In these circumstances I should not be justified in making a reference to a Bench. I accordingly dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 2 AND 10 OF 1910.

December 17, 1912.

Present:— Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

MAKUND SINGH AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

SARASWATI BIBI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Res judicata *in execution proceedings—Question decided at one stage, whether can be re-agitated—Appeal in suit for mesne profits Dismissal of appeal as against some respondents, effect of—Abatement of appeal.*

A decree directed that if possession of the property in dispute was delivered by the defendants to the plaintiffs within one month from the date thereof, the defendants would not be held liable for mesne profits; but that if possession was not so delivered, the defendants would be liable for mesne profits for the period antecedent to and during the pendency of the suit. The decree also contained a direction that in the event of ascertainment of mesne profits the shares of the parties would be first determined, and possession would be delivered according to the shares so calculated. The decree-holders applied for execution of their decree, asking for delivery of possession and stating that an application for ascertainment of mesne profits would be made separately. In answer to this application the judgment-debtors objected that possession had already been delivered by them to the decree-holders. The Court investigated the question in controversy and came to the conclusion that possession had not been delivered. The extent of the shares of the parties was determined and possession was delivered accordingly. Subsequently, the plaintiffs applied for ascertainment of mesne profits, whereupon the judgment-debtors objected that mesne profits could not be claimed as possession had been delivered within one month from the date of the decree:

Held, that the question whether or not possession had been delivered was directly and substantially in issue between the parties in the previous application for execution, and that the decision thereon must be deemed to be conclusive between them at all subsequent stages of the execution proceedings. [*p.* 99, col. 2.]

A decree for possession with mesne profits was obtained against three persons *B*, *A.* and *S S.* died leaving as his representatives three infant sons. In an appeal against the decree the Appellate Court decided in favour of the appellants. In second appeal all the appellants in the lower Appellate Court were made respondents but the second appeal against two of the minors was dismissed for want of prosecution:

Held, that the appeal should not fail in its entirety and that the whole claim for mesne profits should not be dismissed and that it was still open to the decree-holder to obtain a decree, as against the judgment-debtors other than the two minors against whom the appeal had been dismissed, in respect of what would be their share of the mesne profits. [p. 100, col. 1.]

Appeals against the orders of the Subordinate Judge, Monghyr, dated the 6th October 1909.

Babu *Karunamoy Bose* (for Babu *Khetra Mohan Sen*), for the Appellants.

Babus *Dwarka Nath Chuckerbutty* and *Harihar Prosad Singh*, for the Respondents.

JUDGMENT.—This appeal is directed against an order in a proceeding for assessment of mesne profits. The appellants, who were plaintiffs in the original suit, obtained a decree in the primary Court, on the 30th June 1902, for recovery of possession and

mesne profits. This decree was affirmed by this Court on the 14th June 1905. The decree directed that if possession was delivered by the defendants to the plaintiffs within one month from the date thereof, the defendants would not be held liable for mesne profits; but if possession was not so delivered, the defendants would be liable for mesne profits for the period antecedent to and during the pendency of the suit. The decree also contained a direction that in the event of ascertainment of mesne profits, the shares of the parties would be first determined and possession would be delivered according to the shares so calculated. The case for the appellants is that possession was not amicably delivered, and on the 13th December 1905 they applied for execution of the decree. In this application, they prayed that the shares of the plaintiffs and defendants might be determined and that joint possession might be delivered in accordance with the result of this enquiry; it was further stated that an application for ascertainment of mesne profits would be made separately. In answer to this application, the judgment debtors objected that possession had already been delivered by them to the decree-holders. The Court investigated the question in controversy and came to the conclusion that possession had not been delivered. The extent of the shares of the parties was determined and possession delivered accordingly. This order was made on the 26th May 1906. On the 20th May 1909, the plaintiffs applied for ascertainment of mesne profits. The judgment-debtors objected that mesne profits could not be claimed as possession had been delivered within one month from the date of the decree. The Subordinate Judge has now found that possession was delivered as alleged. On the present appeal by the decree-holders, it has been contended that the matter is concluded by the order of the 26th May 1906. On behalf of the respondents it has been argued that the question is open for consideration, inasmuch as the question now under discussion, namely, the amount of mesne profits payable by the defendants to the plaintiffs, was not before the Court on the application of the 13th December 1905. In our opinion, there is no room for serious discussion that the rights of the parties must be taken to have been determined by the order of the 26th May 1906. It is true that mesne profits were not claimed in the application of the 13th December 1905, but possession was demanded by the decree holders. This application was resisted by the defendants on the ground that possession had been previously amicably delivered by them. The Court was, therefore, invited by the parties to determine whether or not possession had been delivered. The question was directly and substantially in issue between the parties and the decision thereon must be deemed conclusive between them at all subsequent stages of the execution proceedings: *Mungul Pershad* v. *Grija Kant* (1), *Ram Kirpal* v. *Rup Kuari* (2) and *Beni Ram* v. *Nanhu Mal* (3). We hold accordingly that possession was not delivered as alleged by the defendants and that their liability to pay mesne profits must be determined on the basis of the order of the 26th May 1906.

The result is that this appeal is allowed, the order of the Subordinate Judge set aside and the case remanded to him in order that the amount of mesne profits may be calculated. The appellants are entitled to their costs both in this Court and in the Courts below. We assess the hearing-fee in this Court at two gold *mohurs*.

A difficulty, however, has arisen, to which we must now advert. The decree for possession was obtained against three persons, Bolakilal, Abdulla Yunus and Sital Prosad. Sital Prosad subsequently died and left as his representatives three infant sons. The order of the Court below was made in favour of all these persons, and, in the present appeal, not only the widow of Bolakilal and Abdulla Yunus but also the three infant sons of Sital Prosad were joined as respondents. These infants had been represented in the Court below by one of the officers in the Court of the District Judge as their guardian *ad litem*. In this Court, that officer has been discharged and the Deputy Registrar appointed guardian

(1) 8 C. 52 (P. C.); 8 I. A. 123; 11 C. L. R. 113; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32.

(2) 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind Dec. (N. S.) 718.

(3) 7 A. 102; 11 I. A. 181; 4 Sar. P. C. J. 564; 4 Ind. Dec. (N. S.) 138.

ad litem. The appellants were directed to deposit the prescribed costs for the appointment of a Vakil on behalf of the Deputy Registrar, and to file the usual indemnity bond. This order they failed to carry out, and as a consequence, on the 14th June 1912, the appeal was dismissed in so far as the minors were concerned. Before this order was made, it had been held on the 27th July 1910 that one of the sons of Sital Prosad, Gobindo Prosad by name, had attained majority. The order of dismissal of the 14th June 1912 would consequently apply to two of the three infant sons of Sital Prosad, namely, Hari Prosad and Giaya Prosad. It is plain that in so far as they are concerned, the order of the Subordinate Judge cannot be disturbed. This raises the question, whether the appellants are entitled to any relief, and, if so, what. The appellants have argued that it is immaterial that the appeal has already been dismissed as against the two infant sons of Sital Prosad, and, that it is still open to them to obtain a decree for the entire mesne profits against the widow [of Bolakilal, Abdulla Yunus and the major son of Sital Prosad. In our opinion, this view cannot possibly be supported. Nor can we accept the extreme contention of the judgment-debtors that the appeal should fail in its entirety, and the whole claim for mesne profits be dismissed. The position is precisely the same as if the decree holders had entered into a compromise with two of the three sons of Sital Prosad and released them from liability. In that event, the decree holders would still be entitled to obtain a decree as against the three judgment-debtors in respect of what would be their share of the mesne profits. This is clear from the decision of this Court in *Ram Ratan Kapali* v. *Aswini Kumar Dutt* (4). We accordingly direct the Subordinate Judge to assess mesne profits on the basis of the order of the 26th May 1906; but the amount will be calculated, only in respect of the shares of Bolakilal and Abdulla Yunus and a third share of Sital Prosad. The Subordinate Judge will be at liberty to take evidence to enable him to determine the respective shares of the judgment debtors; if no evidence is given, the presumption will be that the original judgment-debtors were liable in equal shares.

It is conceded that this order will govern the other appeal (Miscellaneous Appeal No. 10 of 1910); but there will be no separate order for costs.

Appeals allowed.

(4) 6 Ind. Cas. 69; 37 C. 559; 14 C. W. N. 849; 11 C. L. J. 503.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2502 OF 1917.

January 20, 1919.

Present:—Mr. Justice Scott-Smith.

Musammat JEEWNI—PLAINTIFF—APPELLANT

versus

Musammat MISRI AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution of decree—Sale—Auction-purchaser, position of.

An auction-purchaser at a sale in execution of a decree is in no better position in respect of his purchase than the judgment-debtor whose right, title and interest he has purchased. So that where a judgment-debtor owns a portion of a house which is sold in execution, the auction-purchaser cannot set up a claim to the whole of the house. [p. 101, col. 1.]

Second appeal from the decree of the District Judge, Delhi, dated the 11th July 1917, reversing that of the Senior Subordinate Judge, Rohtak, dated the 16th December 1916.

Mr. *Manohar Lal*, for the Appellant.

Lala *Shamir Chand*, for the Respondents.

JUDGMENT.—The facts of the case out of which the present second appeal arises are given clearly in the judgment of the lower Appellate Court and need not be repeated. The plaintiff, who is the widow of the auction-purchaser of the house in the suit, sued for a declaration that she was the owner of the whole house and her suit has been dismissed on the ground that defendant No. 1 was the donee of a $\frac{1}{3}$rd share, a previous application by her under Order XXI, rule 58, Civil Procedure Code,

in regard to this $\frac{1}{3}$rd share having been allowed. The view which the lower Appellate Court took was that defendant No. 1 having previously established her right to a $\frac{1}{3}$rd share in the house, the right, title and interest of Bhiku judgment-debtor only extended to $\frac{2}{3}$rds of the property. The purchaser at the auction-sale could not be in a better position than the judgment debtor whose right, title and interest he purchased. In my opinion the decision of the lower Appellate Court is sound.

Order XXI, rule 63, Civil Procedure Code, shows that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. The order, therefore, by which defendant No. 1's right was acknowledged is conclusive. No doubt the auction purchaser was not a party to those objection proceedings but that fact, in my opinion, is immaterial. As pointed out in Woodroffe and Ameer Ali's Civil Procedure Code in the notes under Order XXI, rule 94, no property can be sold except that which belongs to the defendant in the suit. What interest of the defendant passes is a mixed question of law and fact depending on the questions what could be sold and what was in fact sold. To ascertain this, the decree and the whole execution proceedings must be looked at. Now, it was finally decided that defendant No. 1 owned $\frac{1}{3}$rd share in the house and Bikhu judgment debtor owned $\frac{2}{3}$rds. The efore the Court had no power to sell more than a $\frac{2}{3}$rds share.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO 838 OF 1916.

November 19, 1918.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Shah.

CHINTO MAHADEO KHANDEKAR—APPELLANT

versus

MADHAV RAMCHANDRA PATKAR—RESPONDENT.

Khoti Settlement Act (I of 1880), s. 20, scope of—Entry in Settlement register that interest of occupancy tenant is not transferable, whether conclusive.

The rule of evidence laid down in section 20 of the Khoti Settlement Act, that the entry in the Settlement register purporting to record the fact that the interest of any occupancy tenant is not transferable shall be conclusive evidence, cannot apply where according to a judgment *inter partes* the person relying on the section is not an occupancy tenant: for the fact of the tenancy of the individual is not conclusively settled by the entry. [p. 102, col. 1.]

Appeal from the decision of the Assistant Judge, Ratnagiri, in Appeal No. 254 of 1914, confirming the decree passed by the Subordinate Judge, Rajapur, in Civil Suit No. 83 of 1912.

Mr. *H. C. Coyajee* (with him Mr. *B. G. Kher*), for the Appellant.

Mr. *K. N. Koyajee*, for Respondent No. 1.

JUDGMENT.

SCOTT, C. J.—Thirty *thikans* of khoti land in the jurisdiction of the Rajapur Court were held prior to 1883 by the Khandekar family as occupancy tenants. Seven of these *thikans* were attached and sold by Vithal Haldvenkar as mortgagee of the khoti interest under a decree for payment of the khot's dues which had been obtained against Yessaji Khandekar. Vithal purchased the attached interests by a *benami* sale and having taken a transfer obtained possession from the Khandekars. This led to litigation in which Yessaji's brothers claimed that the sale did not affect 5/6ths of the occupancy rights in these *thikans*.

At that time the Khoti Act (section 9) provided that occupancy rights should be heritable but not otherwise transferable, 'unless in any case the tenant proves that such right of transfer has been exercised in respect of the land in his occupancy independently of the consent of the khot at some time within thirty years next previous to the commencement of the revenue year 1865 6.' The question of transferability was not discussed in the first Court which decided adversely to the contention of Yessaji's brothers, but it was apparently considered in the first Appellate Court where it was stated by the Judge that as a matter of custom it must be held that this (occupancy) right was transferable as it had been actually sold through the Court at the instance of the Khot.

The learned Judge held, however, that the decree and sale of Yessaji's interest

would not affect the interests of his brother. On second appeal in the High Court it was assumed that the property could be sold under a decree for the khot's dues and it was held that in fact the interest of all the parties had been sold.

The result was that Vithal as purchaser acquired the whole of the interest of the occupancy tenants in these *thikans*. The Khandekars, therefore, could not as against Vithal and his assigns assert title as occupancy tenants.

By various mesne assignments Patkar, defendant No. 1 in the first suit (who is plaintiff in the second suit), has become the owner of the interests acquired by Vithal in 1883. The defendant No. 1 in Suit No. 53 of 1912 is sued by one of the Khandekars in respect of four of the seven *thikans* now in his possession, while in Suit No. 290 of 1913 he sues the Khandekars for the possession of the other three *thikans*.

Both suits are occasioned by the Mamlatdar's decrees for possession against the respective plaintiffs

Both suits have been decided in the lower Courts against the Khandekars. In these appeals it is contended that whether or not the decision in the suit of 1885 against Vithal decided that the Khandekars' interests were validly transferred to him, the subsequent assignments under which their opponent Patkar claims title are invalid under the Khoti Act, section 9.

This, however, would not profit the plaintiff Khandekar in Suit No. 53 of 1912 (who suing in ejectment must prove his title), unless he can show that he is an occupancy tenant.

He is, however, precluded from agitating a claim as occupancy tenant in a Court of law against Hari or his assigns by the decision that the occupancy rights of the Khandekars had been sold to Hari—section 40 of the Evidence Act and section 11 of the Civil Procedure Code. The rule of evidence laid down in section 20 of the Khoti Settlement Act, that the entry in the Settlement register purporting to record the fact that the interest of any occupancy tenant is not transferable shall be conclusive evidence, cannot apply where according to a judgment *inter partes* the person relying on the section is not an occupancy tenant; for the fact of the tenancy of the individual is not conclusively settled by the entry.

In the Suit No. 290 of 1913 where Patkar is the plaintiff and the Khandekars are tenants—the same estoppel by judgment prevents the latter from asserting an occupancy tenure and it is held as a fact that the Khandekars were in possession for many years since 1890 as ordinary and not occupancy tenants. They cannot, therefore, resist the claim of the plaintiff who has acquired the title of those to whom the Khandekars attorned as tenants.

The result is that the decree of the lower Appellate Court is affirmed and the appeals dismissed with costs in both cases.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 174 OF 1918.

November 27, 1918.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Krishnan.

VENKATASAWMI NAIK AND ANOTHER—DEFENDANTS NOS. 1 AND 3—APPELLANTS

versus

SIVANU MUDALI AND ANOTHER—PLAINTIFFS AND DEFENDANT NO. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 37, 38—Mortgage decree passed by Court having no territorial jurisdiction over hypotheca—Execution, application for, whether can be presented to Court having jurisdiction without transfer of decree from Court which passed it Transfer for execution, when not competent.

A mortgage decree was passed by the Additional Munsif's Court of Tinnevelly, which had no jurisdiction over the hypotheca but which was established only to aid the other Courts. An application for execution was made to the Koilpatti Munsif's Court which had jurisdiction over the hypotheca, but without a transfer of the decree from the Additional Munsif's Court which had not ceased to exist:

Held, that the Koilpatti Munsif's Court had no jurisdiction to execute until the decree was transferred to it by the Court which had passed it. [p. 103, col. 2.]

No transfer of a decree should be made for execution so as to evade the provisions of the Limitation Act or to validate an invalid application. [p. 103, col. 2.]

VENKATASAWMI NAIK *v.* SIVANU MUDALI.

Appeal against the order, dated the 26th November 1917, of the District Court of Tinnevelly, in Appeal Suit No. 86 of 1917, preferred against the decree of the Court of the District Munsif, Koilpatti, in Execution Petition No. 190 of 1916, in Original Suit No. 280 of 1906 on the file of the Court of the Additional District Munsif, Tinnevelly.

FACTS appear from the judgment.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellants.—No transfer of the decree was made to the Koilpatti Court by the Court which passed the decree. The fact that the Koilpatti Munsif's Court had jurisdiction over the mortgaged properties will not confer on it jurisdiction for purposes of execution, unless the decree was transferred under section 24 or section 39, Civil Procedure Code. The Additional Munsif's Court of Tennevelly was not abolished at the time and what jurisdiction it had at the time of passing the decree it still continued to possess. The application for execution should have been formally presented to it and the plaintiff should have got the decree transferred to the Koilpatti Court.

The District Court's direction that its order allowing execution should be treated as an order for transfer of the decree was clearly wrong. At the date of the order an application for execution was barred.

Mr. *M. D. Devadoss*, for the Respondents. —The Koilpatti Court, as the Court which had jurisdiction over the mortgaged properties, had power to entertain the execution application. In any event it was competent to the District Court to transfer the decree and its order directing the transfer cures whatever initial defects there were.

JUDGMENT.—The appeal turns solely on the question of whether the District Munsif of Koilpatti had jurisdiction to entertain a petition (Execution Petition No. 190 of 1916) presented to him for execution of a mortgage decree passed by the Additional District Munsif of Tinnevelly in Original Suit No. 280 of 1906 on his file. Territorial jurisdiction over the hypotheca sought to be brought to sale in execution of the mortgage decree admittedly lay with the Koilpatti Court while the Tinnevelly Court had no local jurisdiction at all, but was established simply to aid the other Courts of the District, by disposing of suits transferred from their file. There had been a transfer of territorial jurisdiction to the Koilpatti Court from that of Srivilliputtur in which the suit had originally been filed; but it is agreed that this circumstance makes no difference to the question for disposal, and we may consider the latter as if territorial jurisdiction had always been with the Koilpatti Court. No order had been passed transferring the decree under section 24 or section 39 of the Civil Procedure Code and the question is whether in these circumstances the Koilpatti Court had jurisdiction to execute it under section 38 of the Civil Procedure Code as the Court which passed it.

In our opinion the answer must be in the negative. Section 37 of the Code of Civil Procedure gives an extended significance to the term "Court which passed a decree", but contains nothing applicable to the present case. The Tinnevelly Court has certainly not ceased to exist and it cannot be said to have ceased to have jurisdiction to execute its own decree. Whatever jurisdiction as regards execution it possessed at the time of passing the decree, it still possesses. In fact this portion of section 37 of the Civil Procedure Code clearly has reference to transfers of territorial jurisdiction from one Court to another.

We must, therefore, hold that the Koilpatti Court had no jurisdiction to execute the decree, unless and until the decree-holder got the decree transferred to it for execution. The order of the Koilpatti District Munsif rejecting the execution petition was, therefore, right.

In the concluding portion of his judgment, the District Judge directs that his order allowing execution should operate as a transfer of the decree to the Koilpatti Court's file; but, in so doing, he appears to have overlooked the fact that at the date of his order an application for execution would apparently have been time-barred unless petitioner could claim the benefit of section 14 of the Indian Limitation Act, a point which has not been considered. No transfer order should be made so as to evade the provisions of the Limitation Act or to validate an invalid application.

The District Judge's order must be set aside and that of the District Munsif restored with costs to the appellant throughout.

M. C. P.

Appeal allowed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 71 OF 1916.

March 16, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

NITAI CHANDRA NASKAR AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

Srimati CHAMPAKLATA DEBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Sale—Consideration not paid —Title, whether passes.

The failure to pay the consideration for a conveyance does not defeat the conveyance, except where there is an agreement that it should take effect only if the consideration is first paid. If the intention is that title should pass immediately even though the consideration has not been paid, the title passes, and when the title has thus passed to the purchaser, the vendor or his representatives may sue for the recovery of the purchase-money. [p. 105, col. 2.]

Letters Patent appeal against the decision of Mr. Justice Newbould, dated the 13th March 1916, in Appeal from Appellate Decree No. 1195 of 1914, against the decree of the Additional District Judge of 24 Pergannahs, dated the 16th March 1914, reversing that of the Munsif, 2nd Court, Baruipore, dated the 30th April 1913.

FACTS appear from the following judgment of

NEWBOULD, J.—The property in dispute in this case is a certain tank, which formerly belonged to one Dasarath Sardar. Dasarath Sardar before his death executed a deed of sale conveying this property to one Gopal, who had lived all his life with Dasarath and his wife. After the death of Dasarath and his widow, Dasarath's property was inherited by the defendant No. 4, who sold this tank in dispute to the plaintiffs. The case turns on the question whether Dasarath's title to the tank passed to Gopal. It is now not disputed that, although the deed of sale was executed, no consideration was paid by Gopal. I agree with the lower Appellate Court in holding that it was the intention of Dasarath to transfer the property. There is no real difference between the facts of the present case and those of the case of *Gostho Behary Ghosh* v. *Rohini Gowalini* (1), on which the lower Appellate Court relies. It is contended that, if this *kobala* be regarded as a deed of gift, it is inoperative because the provisions of section 123 of the Transfer of Property Act have not been complied with. That section requires that a deed of gift should be attested by at least two witnesses. The deed of conveyance in the present case, on the face of it, appears to have been attested by four witnesses one of whom has been examined, as required by section 68 of the Evidence Act. Though the plaintiffs did not admit the execution of this document by Dasarath, they never expressly denied it and there can be no doubt that the document which was duly registered was executed by him. If the document must be regarded as a deed of gift, I hold that the formal proof that has been given in this case is sufficient for the provisions of section 123 of the Transfer of Property Act. The main contention of the plaintiffs in the lower Courts was that the document was executed under undue influence by Gopal. On second appeal, the finding of the lower Appellate Court against this contention is conclusive. It is contended that, in coming to this finding, the learned District Judge has not considered all the evidence; but the learned District Judge stated in his judgment that he formed this opinion after looking into all the facts of the case. On the facts found, the execution of the deed was sufficient to pass the title to the property from Dasarath to Gopal, and the plaintiffs' case was, therefore, rightly dismissed. I accordingly dismiss the appeal with costs.

Babu *Jyotish Chandra Hazra*, for the Appellants.

(1) 4 Ind. Cas. 541; 13 C. W. N. 692.

NITAI CHANDRA NASKAR *v.* CHAMPAKLATA DEBI.

Dr. *Dwarkanath Mitter* and Babu *Hit Lal Guha*, for the Respondents.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Newbould in a suit for recovery of possession of land. The rival claimants to the property, which admittedly belonged at one time to Dasarath Sardar, were a purchaser from the heir of Dasarath and a purchaser from Dasarath himself. The question in controversy, consequently, is, whether the property formed part of the estate of Dasarath at the time of his death or had vested in the defendant by the conveyance executed by Dasarath on the 16th July 1909. This conveyance was impeached on two grounds: first, that it was obtained by undue influence, and, secondly, that no consideration was paid for it. The plea that it was obtained by undue influence has been negatived and no question of law obviously arises on that part of the case. It has also been found that consideration was not actually paid at the time of the transfer, though the vendor did intend that title should transfer from himself to the purchaser. This is a finding that the transaction was not colourable, but was intended to be genuine and operative. The question thus arises, whether the validity of the intended transfer was affected by the circumstance that the purchaser did not pay to the vendor the consideration named in the deed. The District Judge felt some difficulty in the determination of this point and held that the deed, if not operative as a conveyance, could be upheld as a gift. There is, however, an obvious difficulty in the adoption of that position, because, under section 123 of the Transfer of Property Act, a deed of gift must be attested by two witnesses. The decision of the Judicial Committee in *Ismail Mussajee* v. *Hafiz Boo* (2), where a deed, in form a conveyance, was treated as a gift, is of no assistance, as the parties there were Mahomedans entitled to the benefit of section 129 of the Transfer of Property Act. Consequently, the transaction in this case, if operative, must be upheld as a conveyance. Now the appellant has broadly contended that as consideration has not been paid for the conveyance, it is inoperative in law. In our opinion, there is no foundation for this comprehensive proposition. The definition of sale given in section 54 of the Transfer of Property Act negatives the contention of the appellant: "Sale" is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. The true test is, what is the intention of the parties to the transaction. If the intention is that title should pass immediately even though the consideration has not been paid, the title passes; that is, the failure to pay the consideration for a conveyance does not defeat the conveyance, except where there is an agreement that it should take effect only if the consideration is first paid: *Gostho Behary Ghosh* v. *Rohini Gowalini* (1), *Ponnayya Goundan* v. *Muttu Goundan* (3), *Subbaier* v. *Moniam Subramania Iyer* (4), *Manogi Singh* v. *Sarat Lal Mahto* (5); *Sarat Chandra Naskar* v. *Hari Pada Mistri* (6) and *Kashi Das Gosain* v. *Chaithru Patras Uraon* (7). When the title has passed to the purchaser, the vendor or his representatives may sue for recovery of the purchase-money. Consequently, in the case before us, let us assume that the vendor or his representatives might have been able to exact payment of the consideration money; but that does not invalidate the transfer. The conveyance thus did take effect upon execution and registration, as it was intended that title should vest immediately in the purchaser. In this view, the suit of the plaintiff has been rightly dismissed. The result is that this appeal is dismissed with costs.

Appeal dismissed.

(2) 33 C. 773; 10 C. W. N. 570 (P. C.); 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137; 33 I. A. 86.

(3) 17 M. 146; 6 Ind. Dec. (N. S.) 100.

(4) 10 Ind. Cas. 546; 36 M. 8; 10 M. L. T. 51; (1911) 2 M. W. N. 6; 21 M. L. J. 800.

(5) 4 C. L. J. 334.

(6) 4 C. L. J. 335.

(7) 23 Ind. Cas. 813; 19 C. L. J. 239.

LAXMIBAI v. BHAGWANT SITARAM.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 183-B OF 1918.

February 18, 1919.

Present:—Mr. Mittra, A. J. C.

LAXMIBAI—PLAINTIFF—APPELLANT

versus

BHAGWANT SITARAM—DEFENDANT—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 80—Interest—Agreement to pay interest, absence of, effect of—Liability under s. 80, whether excluded—Interest, when chargeable.

The statutory liability imposed by section 80 of the Negotiable Instruments Act upon the executant of a promissory note to pay interest is not excluded by the absence of an agreement to pay interest.

Under section 80 of the Negotiable Instruments Act, interest at six per cent. per annum is to be calculated from the date on which the consideration under the instrument ought to have been paid by the party charged, until tender or realization.

In the absence of proof of a demand before suit, the plaintiff is entitled to interest at six per cent. per annum from the date of the suit.

Appeal against the decree of the District Judge, Amraoti, in Civil Appeal No. 217 of 1917, decided on the 13th February 1918, arising out of Civil Suit No. 122 of 1916, decided by the Subordinate Judge, Morsi, on the 17th November 1917.

JUDGMENT.—This appeal arises out of a suit based upon a promissory note which is silent as to the rate of interest, if any, payable by the defendants. The plaintiff claimed interest at the rate of twelve per cent. per annum on the basis of an express agreement as well as by way of damages for non payment after demand. The defendant denied the agreement and denied the demand. Whether there was a demand by the plaintiff has not been put in issue. Both the Courts below are agreed that the express agreement pleaded by the plaintiff has not been proved. The first Court allowed interest at six per cent. per annum under the provisions of section 80 of the Negotiable Instruments Act. The lower Appellate Court has disallowed interest altogether.

The amount due under the promissory note was the consideration for the sale of two fields to the defendant. The promissory note recites that the purchaser had not the money in cash to pay the consideration and hence the promissory note was executed. The lower Appellate Court holds, notwithstanding this recital, that the money was kept with the defendant as the plaintiff was afraid of her husband's creditors, and rejects the plaintiff's version that the money was not paid because the season was over and the defendant had not ready cash with him. Whether the view of the learned District Judge is correct or not upon the evidence, it seems to me that he has gone beyond the defendant's pleading. He pleaded the absence of an agreement relating to interest, but he did not plead an express agreement that no interest was to be charged. The defendant's statutory liability under section 80 of the Negotiable Instruments Act is not excluded by the absence of an agreement such as the defendant has pleaded. In this view it is unnecessary to consider whether an oral agreement not to charge interest is admissible in evidence. The fact that the wording of the receipt is consistent with there being no provision for interest is also irrelevant. Any reference to interest might have been regarded as converting the receipt into an agreement, for which stamp duty had to be paid as such.

But under section 80, interest at six per cent. per annum is to be calculated from the date at which the instrument ought to have been paid by the party charged, until tender or realisation. I can find no plea of a tender on the part of the defendant. In the absence of proof of a demand before suit, the plaintiff should be given interest at six per cent. per annum from the date of the suit. The parties are entitled to have a trial of the issue, whether there was a demand before the suit on the promissory note. This issue arises upon the plaintiff's plea and the defendant's denial. The decree of the lower Appellate Court is set aside and the appeal is remanded to that Court for the determination of this issue. If more convenient, the issue may be sent down to the Court of first instance for trial and finding. The costs of this appeal and the costs in the two lower Courts will be in the discretion of the District Judge when finally disposing of the case.

Case remanded.

JAUHARI SINGH *v.* GANGA SAHAI.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 88 OF 1917.

May 14, 1919.

Present :—Sir George Knox, KT., Acting Chief Justice, and Justice Sir P. C. Banerji, KT.

JAUHARI SINGH—PLAINTIFF—APPELLANT

versus

GANGA SAHAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mortgages in favour of two persons—Usufructuary mortgage in favour of one—Discharge by usufructuary mortgagee, effect of—Transfer of Property Act (IV of 1882), s. 67, applicability of—Severance of interest of mortgagees.

One of two mortgagees, each having a half share in two mortgages, took a usufructuary mortgage of the whole of the property mortgaged from the mortgagors, the consideration being the amount of the two simple mortgages, and gave a discharge for both mortgages:

Held, that the discharge operated only in respect of the share of the usufructuary mortgagee, and that the other mortgagee was entitled to recover his share. [p. 103, col. 2.]

Where there has been a severance of the interests of the mortgagees, section 67 of the Transfer of Property Act has no application. [p. 107, col. 2.]

Appeal against the order of Mr. Justice Rafique, dated the 25th of April 1917, in Second Appeal No. 1581 of 1915.

Mr. *P. L. Banerji*, for the Appellant.

Messrs *B. K. Mukerji* and *S. C. Chaudhury*, for the Respondents.

JUDGMENT.—This and the connected Appeal No. 89 of 1917 arise out of two suits brought by the plaintiff-appellant on the basis of two mortgages. One of these mortgages was executed on the 3rd of February 1902 by Kashi Ram in favour of the plaintiff Jauhari Singh and his brother Balwant Singh. The other mortgage was dated the 12th of April 1902 and was executed by Ganga Sahai, the brother of Kashi Ram, in favour of the same mortgagees. On the 30th of June 1913 Balwant Singh alone took a usufructuary mortgage from the two mortgagors in respect of the whole of the property mortgaged by them and the consideration for the usufructuary mortgage was the amount of the two simple mortgages of 1902 mentioned above. Jauhari Singh alleged that he had a half share in the two mortgages and he brought these suits to recover his half share of the mortgage money. He made parties to the suit the mortgagors and his own brother Balwant Singh. Balwant Singh's defence was that the amount of the two mortgages had been advanced by him alone and that Jauhari Singh had no interest in the mortgages The Court of first instance accepted this contention and on that ground amongst others dismissed the suit. The lower Appellate Court on the other hand found that the mortgages were made in favour of Jauhari Singh and Balwant Singh and that both of them owned the two mortgages and the share of Jauhari Singh was one half in each of the two mortgages. But the learned Judge upheld the decree of the Court of first instance, on the ground that one of two mortgagees could not bring a suit for his share of the mortgage money. This decree of the lower Appellate Court has been affirmed by a learned Judge of this Court.

We are unable to agree with the learned Judge of this Court. When Balwant Singh took a usufructuary mortgage of the property of the mortgagors from both mortgagors in lieu of the amounts of the two mortgages, he gave them a discharge for the two mortgages. As Jauhari Singh has been found to have owned a half share in the two mortgages, that discharge could only operate in respect of the half share of Balwant Singh himself. The two mortgages were, therefore, in law discharged to the extent of one half and as they were discharged to that extent only, the portion of the mortgages which remained undischarged was the half share which belonged to Jauhari Singh. This Jauhari Singh is entitled to recover. Section 67, no doubt, provides that one of several mortgagees cannot seek to enforce the mortgage unless there has been a severance of the interests of the mortgagees. This provision in the section was clearly enacted for the benefit of the mortgagor. Balwant Singh can no longer put forward any claim against the mortgagors, and so far as his interests are concerned, there has been a severance of interests of the mortgagees and this has been effected by the consent of the mortgagors. It is true that the mortgagors in this case consented to obtain a full discharge from Balwant Singh ; but the legal effect of that discharge was that it operated in respect of Balwant Singh's own share only. So that in law the act of the mortgagors and

Balwant Singh amounted to a severance with the consent of the mortgagors of the interests of the mortgagees. The case of *Gobind Ram* v. *Sundar Singh* (1) has been relied on by the respondents and by the learned Judge of this Court. The facts of that case are not similar to those of the present. We have referred to the paper-book in that case, and find that what was alleged there was that one of the mortgagees in collusion with the mortgagors had given back the mortgage-deed to the mortgagor. It was not asserted that a discharge had been given to the mortgagors by one of the mortgagees. We think that that case is no authority as against the appellant in the circumstances of the case before us. The result is that we allow the appeal, set aside the decrees of this Court and of the Courts below and decree the plaintiff's claim with costs in all Courts. The mortgagors will have six months from this date to pay off the amount of the decree. Interest will be paid at the contractual rate up to the date fixed for payment and thereafter at 6 per cent. per annum.

Appeal allowed.

(1) A. W. N. (1892) 246.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 3135 OF 1918.

February 20, 1919.

Present:—Mr. Justice Abdur Raoof.

SANT LAL—APPELLANT

versus

ISHAR DAS AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1 —Injunction restraining third person from alienating property not in dispute, validity of.

An injunction restraining the alienation of property *pendente lite* can only be legally issued to a person who is a party to the suit and in respect of property in dispute. Where, therefore, in an insolvency proceeding an injunction was issued to a secured creditor, who had been paid off out of the sale-proceeds of the insolvent's estate, restraining him from alienating *his* property till the final decision of certain objections:

Held, that there was no warrant in law for such injunction. [p. 109, col. 1.]

Miscellaneous first appeal from the order of the District Judge, Karnal, dated the 9th November 1918, issuing an injunction against the appellant not to alienate his property.

Lala *Shamair Chand*, for the Appellant.

Babu *Ram Sarup*, for Ishar Das, Respondent.

JUDGMENT.—*Prima facie* no appeal lies to this Court under section 46 (2) of Act III of 1907 but I grant leave to appeal under section 46 (3).

The order of the District Judge cannot be sustained in this case. One Bicha Lal was adjudicated an insolvent. Ishar Das was appointed the Receiver. He attached certain properties of the insolvent with a view to sell them and realise money. A number of objectors came forward and filed objections. All those objections except one were disallowed. Thereupon objectors came up in appeal to this Court and the matter was remanded to the learned District Judge for disposal, by a learned Judge of this Court. During the pendency of the proceedings before the District Judge the Receiver made an application to that Court with a very peculiar prayer. He stated in the petition that subsequent to the order of the District Judge disallowing the objection of the several objectors certain properties had been sold and out of the proceeds of those sales one Sant Lal, a secured creditor, had been paid off. He further stated: "Now objections have been filed by the relations of the bankrupt and the file has been sent back by the Chief Court for reviewing the judgment. So if by any chance the objectors prove that some of the property sold by the Receiver belongs to them and so that might necessitate a refund of money by Sant Lal." Upon this statement of the circumstances under which the application was made, the applicant prayed that an injunction might be issued against Sant Lal restraining him from alienating any of his property till the final decision of the objections. This prayer has been granted by the learned District Judge and Sant Lal has, therefore, filed this appeal from his order.

It has been contended before me that there is no warrant for such an order in the law. Under the Code of Civil Procedure order for an injunction can be issued only under certain conditions specified in the Order XXXIX, rule 1. Here the property of Sant

Lal is in no way in dispute. The conditions mentioned either in clause (*a*) or (*b*) do not exist. Sant Lal was no party to the proceedings pending before the District Judge. Besides the ground upon which the application was made was not a ground upon which a Court could or ought to have granted an injunction. I allow the appeal and set aside the order granting the injunction against Sant Lal with costs in all Courts.

Appeal accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 559 OF 1917.

November 26, 1918.

Present:—Mr. Justice Heaton and Mr. Justice Pratt.

DAUDBHAI ALLIBHAI—PLAINTIFF —APPELLANT

versus

DAYA RAMA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res udicata—*Decree not based on finding—Finding, whether* res judicata—*'Finally decided,' meaning of.*

Plaintiff sued defendant for ejectment and arrears of rent. Defendant pleaded that he was a permanent tenant and could not, therefore, be ejected. The Court found that the defendant was a tenant from year to year, but that a legal notice to quit had not been served upon him. It, therefore, decreed the claim for arrears of rent, but dismissed the claim for ejectment. Subsequently the plaintiff gave the defendant a notice to quit and sued to eject him:

Held, that although the issue as to the nature of the defendant's tenancy was directly and substantially in issue in the previous suit, it could not be said to have been finally decided in that suit and that, therefore, it was not *res judicata*. [p. 110, col. 2.]

Per *Pratt, J.*—The question, whether an issue was substantially raised and decided in a suit is a matter of fact to be decided upon the circumstances of each particular case. [p. 110, col. 1.]

Where a decree is not based upon a finding but is made in spite of it, the finding cannot operate as *res judicata*. [p. 110, col. 2.]

Per *Heaton, J.*—The Legislature did not intend the words "finally decided" in section 11 of the Civil Procedure Code to apply to a finding not followed by anything peculiarly appropriate to itself. [p. 111, cols. 1 & 2.]

Where a finding is followed by a result which would equally follow from something essentially different, that finding cannot be regarded as a final decision. It is merely an expression of opinion and nothing more. [p. 111, col. 2.]

Appeal from the decision of the Joint First Class Subordinate Judge A. P., at Surat, in Appeal No. 49 of 1914, confirming the decree passed by the Second Class Subordinate Judge at Surat, in Civil Suit No. 136 of 1918.

Mr. *Coyajee* (with him Mr. *B. G. Rao*), for the Appellant.

Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.

PRATT, J.—This appeal raises a point of *res judicata*. The plaintiff sued in 1903 alleging that the defendant was liable to pay assessment as enhanced by the Survey Settlement, but had failed to do so; that he was a tenant-at-will and not a permanent tenant; that plaintiff had given him notice to quit and that he had not given up possession. Plaintiff, therefore, prayed for two reliefs: (1) to recover possession of the land and (2) to recover arrears of assessment at the enhanced rate.

Defendant in his written statement replied that he was not liable to pay enhanced assessment; that he was a permanent tenant; and that plaintiff was not entitled to recover possession.

The following issues were raised:—

(1) Whether it is proved that the defendant is a permanent tenant of the land in dispute or he is a tenant thereof at the pleasure of the plaintiff (*i. e.*, as long as the plaintiff chooses to keep him as such)?

(2) Has the plaintiff a right to take the land in dispute from the defendant (possession of the land in dispute)?

(3) Is the assessment of the land in dispute enhanced on a resurvey thereof? and should the defendant be given a notice thereof under the Land Revenue Code? and has such a notice been given to the defendant? If not, is not the defendant bound to pay the enhanced assessment under the Land Revenue Code? and

(5) Has the plaintiff given to the defendant a notice requiring him to deliver up possession of the land in dispute and intimating to him that he is no longer willing to retain him as his tenant?

The Court decided on the first issue that the defendant was a tenant from year to year, and not a permanent tenant; on the fifth issue that a legal notice to

quit had not been given; and, therefore, on the second issue plaintiff was not entitled to recover possession; and on the third issue the plaintiff was entitled to recover arrears of assessment at the enhanced rate. The suit for possession was, therefore, dismissed and a decree was made for arrears of assessment at the enhanced rate.

Plaintiff has now given notice to quit and files this suit for possession. He claims that the nature of defendant's tenure is *res judicata*.

The question for decision is whether the defendant is bound by the finding in the first suit that he is not the permanent tenant. The solution of that question depends upon whether that issue was substantially in issue in the former suit and whether it was heard and finally decided

The question whether an issue was substantially raised and decided is a matter of fact to be decided upon the circumstances of each particular case: *Girdhar Manordas* v. *Dayabhai Kalabhai* (1). And although no rule of general application can be laid down, this proposition is well-established, that when a decree of the Court is not based upon a finding but was made in spite of it, that finding cannot be *res judicata*: *Run Bahadur Singh* v. *Lucho Koer* (2), *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (3), *Thakur Mogundeo* v. *Thakur Mahadeo Singh* (4), *Ghela Ichharam* v. *Sankalchand Jetha* (5) and *Parbatty Debya* v. *Mathura Nath Banerjee* (6). The dismissal of the claim for possession, therefore, prevents the finding that defendant was not a permanent tenant from operating as *res judicata*.

But it is claimed that the decree for enhanced assessment is based on this finding and gives it the effect of *res judicata*. I think it clear, however, that the issue as to the character of the tenure was a matter collateral to the liability to pay enhanced assessment. The frame of issue No. 3 shows that the liability was attributed not to the tenure, but to the fact of the Survey Settlement. The finding is indeed consistent with the defendant being a permanent tenant, and, therefore, the decree for enhanced assessment was in no sense based upon the finding that defendant was not the permanent tenant.

Mr. Coyajee relied upon the two cases, *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (7) and *Krishna Behari Roy* v. *Bunwari Lall Roy* (8). In the first case the former suit was dismissed on the grounds of want of notice and of non-liability of defendants. In the second suit filed after notice the question of liability was held to be *res judicata* against the plaintiff. Here after the decision of the first issue, the second issue was not necessary for the disposal of the suit. But as both had been heard and determined against the plaintiff, he was held to be bound by both. The decision is in conflict with certain observations in the case of *Shib Charan Lal* v. *Raghu Nath* (9). But, however that may be, it has no bearing on the present case. For the decree was based on both findings, whilst here it is made in spite of one finding and the other finding on which it is based was a collateral one. In *Krishna Behari Roy* v. *Bunwari Lall Roy* (8) an adopted son sued a Putneedar for a declaration that the lease granted to him by his adoptive mother was in excess of her authority. The reversioner intervened disputing the validity of the adoption and the right of the plaintiff to sue. The first Court found that the adoption was valid but dismissed the suit as the Putnee lease could not be set aside. The reversioner appealed, and the Court of appeal affirmed the decision of the lower Court. The validity of the adoption was held by the Privy Council to be *res judicata* in a subsequent suit by the reversioner to set aside the adoption. Mr. Coyajee contends that the finding of the adoption was as much involved in the main purpose of the suit, the setting aside of the Putnee lease, as here the finding as to the nature of the tenancy is to the claim for enhanced assessment. The answer, I think, is that the reversioner intervened not to support the suit to set aside the Putnee, but to dispute

(1) 8 B. 174 at p. 180 (F. B.); 4 Ind. Dec. (N. S.) 489.
(2) 12 I. A. 24; 11 C. 301 (P. C.); 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960.
(3) 13 C. 17; 6 Ind. Dec. (N. S.) 508.
(4) 18 C. 647; 9 Ind. Dec. (N. S.) 432.
(5) 18 B. 597; 9 Ind. Dec. (N. S.) 907.
(6) 15 Ind. Cas. 453; 40 C. 29; 16 C. W. N. 877; 16 C. L. J. 9.
(7) 24 C. 900; 12 Ind Dec. (N. S.) 1269.
(8) 2 I. A. 283; 1 C. 144 (P.C.); 25 W. R. 1; 3 Sar. P. C. J. 559; 3 Suth. P. C. J. 213; 1 Ind. Dec. (N. S.) 93.
(9) 17 A. 174; A. W. N. (1895), 47; 8 Ind. Dec. (N. S.) 437.

the title of the adopted son. In his appeal he raised the issue of the adoption which was decided against him. As regards the reversioner the validity of the adoption was the substantial issue.

The two cases quoted by Mr. Coyajee do not, therefore, affect the conclusion I have come to on the authority of *Run Bahadur Singh* v. *Lucho Koer* (2) and the Indian cases that follow it in regard to the first issue and in regard to the third issue that the finding as to the nature of the tenancy was only collateral to the decree for enhanced assessment.

The case of *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (3) is a case on facts which are almost identical and the issue was there held not to be *res judicata*.

I would, therefore, confirm the decree of the lower Court and dismiss this appeal with costs.

HEATON, J.—I agree in the order proposed. I need not re-state the facts of the case. The law as to *res judicata* is contained in section 11 of the Civil Procedure Code. I always find myself in troubled waters when I am asked to deal with decided cases on this point which do not proceed on the precise words of the section. To my understanding the section itself gives us a solution in this particular case. The issue as to the nature of the tenancy was, I think, undoubtedly directly and substantially in issue in the earlier case. For it was as to the nature of the tenancy that the parties were disputing and it was to get that dispute settled that they went to Court, though they also went about the amount of rent or assessment. But I do not think that it can be said that the issue as to tenancy was finally decided in the earlier suit. It is perfectly true it was decided, that is to say, the Court expressed a perfectly definite opinion about it. But the operative part of the decree was that the tenant should not be ejected though he had to pay a certain amount of rent. That is precisely the decree which would follow if the Court had held that the tenant was a permanent tenant and not a yearly tenant, though in fact it held that he was a yearly tenant. I cannot think that the Legislature intended the words 'finally decided' to apply to a finding not followed by anything peculiarly appropriate to itself. Where a finding is followed, as in this case, by a result which would equally follow from something essentially different, then I think it cannot be supposed that that finding is a final decision. It seems to me to be merely an expression of opinion and nothing more.

Therefore, I think that this appeal should be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 54 OF 1918.

April 7, 1919.

Present:—Sir John Wallis, KT., Chief Justice, Justice Sir William Ayling, KT., and Mr. Justice Sadasiva Aiyar.

AMRUTAM VENKATAPPA AND OTHERS —PLAINTIFFS—APPELLANTS

versus

VAVILALA JALAYYA—DEFENDANT —RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 66—Execution of decree—Sale—Agreement by purchaser to convey property purchased—Suit to enforce agreement, maintainability of—Benami *purchase, allegation of, in plaint, effect of.*

Section 66, Civil Procedure Code, does not debar a person from maintaining a suit for specific performance of an agreement by the auction-purchaser subsequent to the purchase to convey the property to him. The transaction is not *benami* and the mere allegation in the plaint that it was a *benami* transaction does not bring it within the mischief of the section. [p. 112, col. 2; p. 113, col. 1.]

Second appeal against the decree of the District Court, Guntur, in Appeal Suit No. 396 of 1916, preferred against the decree of the Court of the District Munsif, Ongole, in Original Suit No. 337 of 1915.

This second appeal coming on for hearing on the 2nd December 1918, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance, and the material papers in the suit, and upon hearing the arguments of Mr. *P. Chenchiah* for Mr. *T. Prakasam*, for the Appellants, and of Mr. *V. Nageswara Aiyar* for Mr. *V. Lakshminarayana*, for the Respondent, the Court (Seshagiri Aiyar and Phillips, JJ.) made the following

AMRUTAM VENKATAPPA v. VAVILALA JALAYYA.

ORDER OF REFERENCE TO A FULL BENCH.

The facts found are: Plaintiff and the defendant agreed that at the Court auction the property in suit should be purchased in the name of the defendant and that one-half of it should be conveyed to the plaintiff after obtaining the certificate of sale: some money was paid before the Court auction, and apparently plaintiff was put in possession of the half share. In September 1907 a promissory note for the balance of the purchase money due from plaintiff was executed. Nearly 5 years afterwards, the promissory-note was discharged, and Exhibit A was executed to the plaintiff in which it was provided that the defendant should execute a conveyance for the half share whenever plaintiff demanded it. This suit is to enforce that agreement. In the plaint it is stated that the half share intended to be conveyed was purchased in the name of the defendant *benami* for the plaintiff. The question for consideration is whether the suit is within the mischief of section 66 of the Code of Civil Procedure.

There is some difference between the language of section 317 of the old Code and that of section 66 of the new Code: but we do not think there is any material alteration in the principle of the section. In this Court, the decisions have not been uniform on the question. In *Kumara* v. *Srinivasa* (1), *Sankunni Nayar* v. *Narayanan Nambudri* (2) and *Kumbalinga Pillai* v. *Ariaputra Padiachi* (3) suits under similar circumstances were held not barred by section 317. On the other hand in *Subramania Pillai* v. *Gopalarama Subramaniam* (4) the decision was the other way. Recently, Coutts Trotter and Srinivasa Iyengar, JJ., had to consider the question in Appeal Suits Nos. 167 and 215 of 1914 [*Chidambaram Chettier* v. *Subramania Aiyar* (5)]. Apparently, in the view taken by Coutts Trotter, J., such a suit would not be affected by section 66 of the Code. There is also the dictum of the Judicial Committee in *Ganga Sahai* v. *Kesri* (6) that the object of the section is to prevent judgment-debtors from getting property purchased in the names of third parties *benami* for themselves. The language of the section seems to be wider: However, as the question is one of some importance, we have resolved to ask the opinion of a Full Bench on the following question:—

"When the plaintiff alleges that the auction-purchaser is a *benamidar* for him and sues to enforce specifically a subsequent agreement executed by the certified purchaser to convey the property, is section 66 a bar to such a suit?"

This second appeal came on for hearing in pursuance of the above Order of Reference to a Full Bench.

Mr. *P. Chenchiah* for Mr. *T. Prakasam*, for the Appellants.—The suit is maintainable and does not come within the mischief of section 66, Civil Procedure Code. On the finding of the lower Court the transaction is not *benami*. The agreement was that the defendant should purchase the property in his own name and convey a moiety to the plaintiff after the issue of the sale certificate. And the agreement by the auction-purchaser to convey to plaintiff was after the auction purchase. The mere allegation in the plaint that the purchaser was a *benamidar* will not debar plaintiff's right of suit.

Mr. *V. Lakshminarayana*, for the Respondent.—Plaintiff states distinctly that the purchase by the defendant at the Court sale was *benami* for him. On his own admission he is barred under section 66, Civil Procedure Code. The object of the section is to prevent persons claiming under certified auction-purchasers.

OPINION.—We do not think that this is a suit against the auction-purchaser on the ground that the purchase was made on behalf of the plaintiff within the meaning of section 66, Civil Procedure Code. The finding is that the defendant agreed that the property should be purchased in the name of the defendant and that one-half of it should be conveyed by the defendant to the plaintiff after the sale certificate had been obtained. This, in our opinion, is not a *benami* transaction at all. The mere fact

(1) 11 M. 213; 12 Ind. Jur. 217 & 384; 4 Ind. Dec. (N. S.) 148.

(2) 17 M. 282; 4 M. L. J. 64; 6 Ind. Dec. (N. S.) 195.

(3) 18 M. 436; 5 M. L. J. 200; 6 Ind. Dec. (N. S.) 653.

(4) 29 Ind. Cas. 138.

(5) 32 Ind. Cas. 434; 3 L. W. 86; (1916) 1 M. W. N. 220.

(6) 30 Ind. Cas. 265; 37 A. 545; 13 A. L. J. 999; 29 M. L. J. 329; 18 M. L. T. 203; 19 C. W. N. 1175; 22 C. L. J. 508; (1915) M. W. N. 713; 2 L. W. 837; 17 Bom. L.R. 998; 42 I. A. 177 (P.C.).

that the plaintiff alleges in the plaint that the auction-purchaser was a *benamidar* for him has not, in our opinion, the effect of debarring the plaintiff under section 66, Civil Procedure Code, from maintaining his suit for specific performance of an agreement by the auction-purchaser subsequent to the purchase to convey the property to the plaintiff. Such an agreement is not inconsistent with the auction-purchaser's own title, but rather the reverse. We answer the question in the negative.

M C P.

Answered in the negative.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 198 OF 1918.

May 1, 1919.

Present:—Mr. Justice Rafique and Mr. Justice Walsh.

BHAIRO PRASAD AND ANOTHER—PETITIONERS—APPELLANTS

versus

Mr. S. P. C. DASS, VAKIL, OFFICIAL RECEIVER OF INSOLVENT—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 22—Trespass on property of stranger—Remedy—Order of Insolvency Court on application under s. 22, finality of.

Where in proceedings in insolvency a trespass is committed, whether by the Official Receiver or by anybody else, upon the property of a stranger to the proceedings, he has the ordinary right to seek redress in the ordinary Civil Court, and is not bound to apply to the Insolvency Court. If, however, he does so apply under section 22 of the Provincial Insolvency Act, he must comply with the terms of that section, and if he obtains a decision upon the merits the decision is final.

First appeal from the order of the District Judge, Benares, dated the 15th November 1918.

Messrs. *U. S. Bajpai* and *Haribans Sahai*, for the Appellants.

Messrs. *P. L. Banerji* and *Bhagwati Shankar*, for the Respondent.

JUDGMENT.—This appeal must be dismissed. It was clearly an application under section 22 of the Provincial Insolvency Act. A stranger to the insolvency is not bound to go to the Insolvency Court at all. He has the ordinary right, which every individual has, to seek redress in the ordinary Civil Courts for any grievance or trespass to his property, whether committed by an Official Receiver or anybody else, but he can if he pleases, if he complains against the act of the Receiver, apply under section 22 to the Insolvency Court itself, and a Bench of this Court has held that if he does so and obtains a decision upon the merits, that decision is final. But similarly if he applies under section 22, he must comply with the terms of section 22. In this case he applied after the expiration of 21 days of the act of attachment of which he complains. We are inclined to think, though we do not decide, that section 4 of the Limitation Act would have enabled him to apply as soon as the Court opened, it being sent at the time of the attachment, but even after the Court opened he delayed for a further ten days. The learned Judge was, therefore, right in dismissing the application, not upon the merits but as an application which, under the Provincial Insolvency Act, he had no jurisdiction to entertain.

The applicant, very foolishly in our view, added an alternative prayer to the District Judge asking him, in the event of his application being dismissed, to grant him permission to sue in a Civil Court. As a matter of law such permission could be neither given nor refused. It was in fact refused. We think in order to remove any possible misunderstanding that that refusal being nugatory must be struck out of the order, but holding as we do that the application was properly dismissed as one which had been made beyond time, this appeal, except to the extent already indicated by what we have said, is dismissed with costs, including in this Court fees on the higher scale.

Appeal dismissed.

MARIMUTHU NAICKEN *v.* RAMASAMI PADAYACHI.

MADRAS HIGH COURT.

CIVIL APPEAL AGAINST ORDER No. 129 OF 1918.

February 20, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

MARIMUTHU NAICKEN—PETITIONER—APPELLANT

versus

RAMASAMI PADAYACHI AND OTHERS—RESPONDENTS Nos. 1, 5 AND 22—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution application not mentioning uncertified payment out of Court, whether 'in accordance with law'—Civil Procedure Code (Act V of 1908), O. XXI, rr. 1 (1), 2 (3).

An execution application which omits to mention an uncertified payment towards the decree out of Court is, notwithstanding such omission, an application 'in accordance with law' within the meaning of Article 182 of Schedule I of the Limitation Act.

Appeal against the order of the District Court, South Arcot, in Execution Petition No. 1, in E. P. R. No. 44 of 1917, in Original Suit No. 7 of 1907.

Mr. *E. Venayaka Row*, for the Appellant.

Mr. *N. S. Rangasawmi Iyengar*, for the Respondents.

JUDGMENT.—The case lies in a small compass. The petitioner-appellant did not mention in a previous execution application an alleged payment towards the decree, which had not been certified to the Court. The question is whether in this respect the application was in accordance with law with reference to Article 182, Schedule I, Limitation Act. Reading Order XXI, rule 1 (1), of the Code of Civil Procedure with Order XXI, rule 2 (3), we must answer the question in the affirmative. The result is that the appeal against order is allowed and the application remanded to the lower Court for disposal according to law. Costs to date will follow the result and be provided for in the order to be passed.

M. C. P.

Appeal allowed.

MOHAMMAD ABDUL KARIM *v.* MOHAMED YUSUF.

PATNA HIGH CCURT.

APPEAL FROM ORDER No. 205 OF 1918.

April 29, 1919.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

Sheikh MOHAMMAD ABDUL KARIM—PLAINTIFF—APPELLANT

versus

Sheikh MOHAMMAD YUSUF AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Appellate Court, order of, rejecting memorandum of appeal for non-payment of deficit Court-fee—Court-fee, error in calculating amount of—Appeal, whether lies.

An order made by an Appellate Court rejecting a memorandum of appeal for non-payment of deficit Court-fee is appealable to the High Court, where such order proceeds upon an error in calculating the amount of the Court-fee payable. [p. 115, col. 1.]

Appeal from a decision of the District Judge, Saran.

Mr. *Ganesh Dutt Singh*, for the Appellant.

Mr. *Parmeshwar Dayal*, for Mr. *Khurshed Husnain*, for the Respondents.

JUDGMENT.—In this case the plaintiff-appellant sued for a declaration of his title in one half of property valued at Rs. 2,100 and that upon an adjudication of his title he should be put in possession of his share after a partition by metes and bounds. The Court of first instance found as a fact that he was out of possession at the time of the institution of his suit. The Court-fee on the suit having been Rs. 10 only, the Court of first instance thereupon recorded an opinion that the Court-fee payable was *ad valorem* on Rs. 2,100. On appeal to the District Court a Court-fee of Rs. 10 only was paid. The Sheristadar of the Court, therefore, recorded a note to the effect that the deficit Court-fee payable was Rs. 130 in the lower Court and Rs. 130 in the Judge's Court, in all Rs. 260, whereupon the learned District Judge recorded an order that he should pay Rs. 240 within a week. This order was brought to contest on the 23rd January 1918 but affirmed and an order made rejecting the appeal on the ground that the deficit Court-fee had not been filed. On the 27th February 1918 conditional order was made restoring the appeal if Rs. 240 be paid within a week. Rs. 120 was paid on the 14th March

and nothing more having been paid by the 5th April, the appeal was dismissed. On the authority of the case of *Chandramani Koer* v. *Basdeo Narain Singh* (1) an appeal lies to this Court from an order rejecting a memorandum of the appeal if the Court below has made an error with regard to the category within which the suit falls. Clearly in this case an error has been made, for though in view of the prayer for a partition of the property in execution the subject-matter of the suit might be for the purposes of jurisdiction Rs. 2,100, yet the actual relief sought was valued at only Rs. 1,050 and therefore the Court fee payable in both the Courts below was Rs. 80 only. The deficit, therefore, in the learned Subordinate Judge's Court was Rs. 70 and in the District Court the proper Court fee had been filed by the 14th March and accepted. It remained only under section 12 of the Court Fees Act to call upon the appellant to pay the deficit then due, which would according to our calculation amount to Rs. 20, before the suit should be proceeded with. No opportunity was given to the appellant to make this deposit and it seems to us he has been seriously prejudiced by the errors made in the calculation of the Court-fee due. We would, therefore, decree this appeal and in lieu of the order of the District Court, direct that the appeal be registered with discretion to the District Court to fix a date on which the deficit Court-fee of Rs. 20 shall be paid and if upon that date the Court-fee is not paid, to refuse to proceed with the appeal and dismiss it. We would make no order as to costs.

Appeal decreed.

(1) 49 Ind. Cas. 442; 4 P. L. J. 57.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 2 OF 1915.

January 4, 1918.

Present:—Justice Sir Ernest Fletcher, KT., Mr. Justice Greaves and Justice Sir Syed Shamsul Huda, KT.

GAJADHAR PRASAD SINGH AND ANOTHER —DEFENDANTS—APPELLANTS

versus

SHEO NANDAN PROSAD SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Record of Rights, entry in, value of—Presumption—Burden of proof—Suit for joint possession of khudkasht *land—Defendant alleging occupation by tenants—Land entered as* khudkasht *in Record of Rights, effect of.*

In a suit instituted by the plaintiffs asking for a declaration of their right to joint possession, with the defendants second party, of some lands on the allegation that the same formed part of the *khudkasht* lands of the *maliks*, the defendants second party, who alone contested the suit, denied that the lands in suit were *khudkasht* and alleged that the same were held by tenants. The *mouzah* within which the lands in suit were situate belonged to the plaintiffs and the defendants second party in equal shares, and the defendants second party held a lease of the share of the plaintiffs and were in possession of the whole of the *mouzah*. The Record of Rights published in 1898 showed that these lands were *khudkahst* lands.

Held, that the onus was upon the defendants second party to show that the entry in the Record of Rights was wrong. [p. 118, col. 2.]

Appeal against the decree of Mr. Justice Sharfuddin, differing in opinion from Mr. Justice Coxe, dated the 11th March 1915, in Appeal from Original Decree No. 435 of 1911.

FACTS appear from the following judgment of

SHARFUDDIN, J.—The suit which has given rise to the present appeal was instituted by the plaintiffs for a declaration of their right to joint possession over 41 *bighas* and 4 *dhurs* of land with the defendant second party, on the ground that the lands in question are the *khudkasht* lands of the *maliks*; the plaintiffs also prayed alternatively for a partition of the lands in question between them and the defendant second party.

The defendant second party, who only contested the suit, alleged that the lands in suit are the holdings of two tenants, namely, Awadh Behari and Isri Pershad. The lower Court gave a decree to the plaintiffs, holding that the lands in suit are the *khudkasht* lands of the *maliks*. The

defendant second party has, therefore, appealed to this Court.

It is admitted that Mouza Amari where these lands are situated belongs to the plaintiffs and the second party defendant in equal shares, that is to say, 8 annas belong to the plaintiffs and the other 8 annas to the second party defendant. It is also admitted that the defendant second party further held a lease of the 8 annas of the plaintiffs and was, therefore, in possession of the entire 16 annas of Amari up to 1312 F., and similarly, if there are *khudkasht* lands, was in possession of such lands as well. The plaintiffs allege that on the expiry of the term of lease, the defendant should have put the plaintiffs in joint possession of the *khudkasht* lands and as he refused to do so the present suit was instituted.

The defendant denies that the lands in suit are *khudkasht* lands and in his deposition says that there is no *zerait* land of the *maliks* in village Amari and alleges that the land in suit consists of two holdings, one in possession and cultivation of Awadh Behari and the other in possession of Isri Pershad.

It appears that prior to the lease of the defendant, the plaintiffs' share was the lease of the Doulatpur Factory. It is alleged by the defendant that these two tenants were in possession of their respective holdings even during the lease to the Factory.

The present dispute resolves itself into a simple question, namely, whether the lands in suit are the *khudkasht* lands of the *maliks* as alleged by the plaintiffs or the tenants' lands in occupation of Awadh Behari and Isri Pershad as alleged by the defendants.

It appears that the Record of Rights of this village was published on the 8th April 1898. The Factory was in possession till 1305 F. From the record, however, it is not clear what was the precise date on which the lease to the Factory terminated. Referring to the Record of Rights we find that about half the land in suit is recorded "*bakasht* of the Factory" and the other half "*bakasht* defendant." There can be no doubt, therefore, that at the time when the term of the lease to the Factory expired and the term of the lease to the defendant began, these lands were recorded as *bakasht* of the lessee and the *malik* of 8-annas share and not as any holding of a tenant. The present suit was instituted in September 1910. During the whole of this period, no objection was ever raised against the correctness of the entry. For the first time in the present suit, the accuracy of the entry is disputed by the defendant. An entry in the Record of Rights is presumed to be correct until rebutted. We have, therefore, to see whether that presumption has been rebutted by the defendant.

The plaintiffs have in their favour the entry in the Record of Rights and it is for the defendant to prove that the entry is inaccurate and for the above reasons I think we should, in the first instance, examine the defendant's case and evidence for and against him and then come to the conclusion whether the defendant has succeeded in proving that the entry is incorrect. For this purpose let us see if there is any evidence to show that in the village Amari there are or are not *khudkasht* lands of the *maliks*. Exhibit 3 is a *kabuliyat*, dated the 26th August 1898, executed by Ramanugrah Singh, father of the defendant, in favour of Munni Singh, ancestor of the plaintiffs, with regard to the 8-annas share of Amari belonging to Munni Singh. On a perusal of this document, it is clear that there were *khudkasht* lands in this village and these were also let out to the father of the defendant. This I think settles the question that there were *khudkasht* lands when the lease was given to the defendant's father in 1898. The defendant has been examined in the case and in his deposition he says "there were never *zerait* lands in one *patti*." Badri Lal (defendant's witness No. 4) is a *patwari* of Amari. He says "there were no *khudkasht* lands when we got possession from the *kothi* (Factory)."

In view of what is stated in Exhibit 3, the natural question is what became of the *khudkasht* lands of the village. It seems to me that without the knowledge of the plaintiffs the *khudkasht* lands may have been settled with some tenants of the Factory during the term of its lease and hence if the statement of Badri is true, he did not find any *khudkasht* lands when

he took possession on behalf of his employer on the expiration of the Factory's lease. Exhibits A, A 1 to A-3 are rent receipts produced on behalf of the defendant. They have been proved by Achu Lal (defendant's witness No. 3), who was a *patwari* of the Doulatpur Factory from 1301 to 1304 F. He says that these receipts were given to Awadh Behari and these were signed by him and the *saheb*. In cross-examination, he admits that he was not summoned and that he had come to Court on his own business. Let us now examine these receipts. Exhibit A is a receipt granted to Awadh Behari in 1301 F. The area of the holding given in this is 18 *bighas* 10 *cottas* and 8 *dhurs* and the rent inclusive of the cess is Rs. 57-7-0. Exhibits A-1, A 2 and A-3 are also Awadh Behari's receipts. The area is 18 *bighas* and 10 *cottas* and the rent inclusive of cess is Rs. 57-7-0. Exhibit A-4 purports to be a receipt granted by Munni Singh to Awadh Behari in 1305. In 1305, however, according to both parties, Munni Singh's 8 annas share was in lease of either the Factory or the defendant. The area, however, is 21 *bighas* 9 *cottas* 12 *dhurs*. The account of the rent given in this receipt is as follows :—

	B.	C.	D.	Rent. Rs.	As.	P.
Area of Nakdi land ...	21	9	12	55	7	0
Deduct share of others to the extent of half				27	11	6
				27	11	6

We, therefore, find a great discrepancy between Exhibits A, A-1 to A-3 on the one side and A-4 on the other. Then follow extracts from the counterfoil book. They are similar to Exhibit A-4. The defendant also relies on Exhibit B, which is an extract from the annual *jamabandi wasil-baki* account. All the above documents and some other receipts given to Isri at best only show that these two men were tenants holding lands in the Mouza during the period of the two leases, but they do not show that the lands they were in cultivating possession of were the lands in suit.

The witnesses' statements examined on behalf of the plaintiffs are as stereotyped as those on behalf of the defendant. I am of opinion that no reliance can be placed on the statements of witnesses on either side. For the above reasons, I am not convinced that the defendant had discharged the onus and has not, therefore, rebutted the presumption that the entry in the Record of Rights is correct.

I, therefore, dismiss the appeal with costs.

In conclusion I desire to observe that my learned brother is not in full agreement with me. As my judgment confirms the judgment of the lower Court, under section 78 (2) the appeal is dismissed with costs.

Coxe, J.—I regret that I am unable to agree with my learned brother's view of the evidence so far as regards Awadh Behari's holding. The plaintiff's share was leased to the defendants at the end of 1305 (September 1898). The Factory was in possession till 1305, but unfortunately it is not clear whether up to the beginning or up to the end of that year, that is to say, up to September 1897 or September 1898. The Record of Rights was finally published in April 1898, but was presumably prepared long before that. About half the land in suit is recorded as in the *bakasht* of the Factory and half as in the *bakasht* of the defendant. This is nobody's case and the fact shows that the record was not carefully prepared and weakens its probative force. The defence is that the land was always in the tenancy of Awadh Behari and Isri Singh. This, of course, has to be proved by the defence. Awadh Behari appears and produces several receipts, some of which are signed by the Manager of the Factory prior to 1898. They can hardly be forged and they are apparently accepted by the Subordinate Judge. I do not attach any importance to the variation in area. It is, I think, ordinary experience that on a scientific survey being made the real area of a holding is often found to be greater than its nominal area. Awadh Behari goes into the box and swears that the holding for which he produces receipts is within the disputed land. It is not the plaintiff's case that he has any other holding in the village, or that he ever relinquished or lost any holding. These facts seem to me to justify a finding that about half of the

land in dispute is in the tenancy of Awadh Behari, unless they are rebutted by the plaintiff.

On the other hand, the plaintiff's evidence seems to me untrustworthy. It is to the effect that the land has always been in the possession of the landlord and never in that of Awadh Behari. Most of the witnesses pretend not to know Awadh Behari though, if the receipts are genuine, he must have held land in the village within their experience. Three of the witnesses are litigating with the defendant. Finally, the evidence that Awadh Behari has any real connection with the defendant seems to me of the most meagre character. I would, therefore, decree the appeal and dismiss the suit with respect to the area of 21 *bighas* 9 *cottas* 12 *dhurs* said to be in the tenancy of Awadh Behari. The evidence as regards Isri Singh's alleged tenancy is much weaker and I agree to the appeal being dismissed so far as it concerns that land.

Babus *Jogesh Chunder Roy* and *Hara Dhan Chatteree*, for the Appellants.

Dr. *Dwarka Nath Mitter* and Babu *Panchanan Ghose*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This appeal has been preferred by the defendants 2nd party under the provisions of clause 15 of the Letters Patent.

The suit was instituted by the plaintiffs asking for a declaration of their right to joint possession with the defendants 2nd party of 41 *bighas* and 4 *dhurs* of land, on the allegation that the same formed part of the *khudkasht* lands of the *maliks*. Alternatively the plaintiffs asked for a partition of such lands.

The defendants 2nd party, who alone contested the suit, denied that the land in suit was *khudkasht* and alleged that the same was held by two tenants, Awadh Behari and Isri Prasad. The learned Subordinate Judge at the trial decided the suit in favour of the plaintiffs. Against that decision the defendants 2nd party preferred an appeal to this Court. The appeal came on for hearing before Sharfuddin and Coxe, JJ.

As regards the portion of the land in suit alleged to be held by Ieri Singh, the learned Judges were both of opinion that the judgment of the Subordinate Judge must be affirmed. But with regard to the land said to be held by Awadh Behari the learned Judges were divided in their opinions. Sharfuddin, J., was of opinion that the view of the learned Subordinate Judge should prevail whilst Coxe, J., was of the contrary opinion. Hence the present appeal by the defendants 2nd party.

Now it is an admitted fact that the Mouza within which the lands in suit are situate belongs to the plaintiffs and defendants 2nd party in equal shares. Further that the defendants 2nd party held a lease of the share of the plaintiffs and were in possession of the whole of the Mouza until 1312 F.

Prior to the lease of the 8 annas of the plaintiffs to the defendants 2nd party, the plaintiffs' share was let out in lease to the Daulatpur Factory. The Record of Rights published in April 1898 shows clearly that these lands were *khudkasht* lands, although it does not show when the lease to the Factory terminated.

Having regard to the entry in the Record of Rights the onus is on the defendants 2nd party to show that the entry is wrong. It is most material that from the date of the publication of the record on the 8th of April 1898 down to the institution of the suit in September 1910, it was never alleged by any party that the entry in the Record of Rights was incorrect. Against the entry in the record the defendants 2nd party called certain witnesses and produced certain rent receipts. Both the learned Judges appear to have discarded the oral evidence called on behalf of the defendants and I am not disposed to disagree with the view they took. With regard to the rent receipts and other documents produced on behalf of the defendants 2nd party as pointed out by Sharfuddin, J., even if all these documents be taken as genuine, they do not establish the fact that Awadh Behari and Isri Prasad were in possession of and cultivating the lands in suit.

Moreover, I think that on the view that Coxe, J., took, namely, that the plaintiffs had established their case, as regards the lands alleged to be in the possession of Isri Prasad, it is impossible to come to the conclusion that the story put forward by the defendants 2nd party can be true

as regards the lands said to be in the possession of Awadh Behari. I am clearly of opinion that the conclusion arrived at by Sharfuddin, J., was right. The present appeal, therefore, fails, and must be dismissed with costs. Hearing fee one hundred rupees.

GREAVES, J.—I agree.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 181 OF 1916.

March 11, 1919.

Present:—Mr. Justice Rafique and Mr. Justice Lindsay.

RAM SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHET RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation by father—Antecedent debt, what is—Pious obligation of sons to pay off father's debts, extent of.

Where a Hindu father borrows money on the security of the joint estate and there is nothing to show that the money is advanced to him on his personal credit, the debt does not fall within the definition of antecedent debt and is not binding upon his sons. An obligation incurred by a father in order to be binding upon his sons must be one incurred antecedently to the transaction in suit and one incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be made available by such joint estate. [p. 120, col. 2.]

The doctrine of pious obligation of Hindu sons to pay off their father's debts is based on spiritual considerations apart from the ownership of any property and comes into operation only against the sons, or in case of their death, against the grandsons. Where the sons are alive, the pious obligation to pay the debts of their father lies upon them and not upon their sons. [p. 121, col. 1.]

First appeal against the decision of the Subordinate Judge, Meerut, dated the 31st March 1916.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *N. P. Singh*, for the Appellants.

Mr. *Baldeo Ram Dave*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the grandsons of one Amar Singh to recover possession of property conveyed by him by a sale deed, dated the 16th of July 1907. Amar Singh, it seems, had two sons, Bharat Singh and Kehar Singh, both of whom are alive. Bharat Singh has one son called Ram Singh, and Kehar Singh has two sons, named Mahabir Singh and Gajraj Singh. On the 23rd of March 1904 Amar Singh executed a deed of mortgage of the property in suit for Rs. 8,000 in favour of Chet Ram and Himmat. Three years after, that is on the 16th of July 1907, Amar Singh executed a deed of sale in respect of the mortgaged property in lieu of Rs. 13,500 in favour of the mortgagees, *i. e.*, Himmat and Chet Ram. Rs. 8,000 were set off towards the payment of the mortgage of the 23rd of March 1904, and Rs. 5,500 were paid in cash before the Sub-Registrar to Amar Singh. One Dalip Singh brought a suit to recover a portion of the property sold on the ground of pre-emption. He obtained a decree and subsequently sold the property to Jawahir Singh. The sale-deed of 1907 was attested among others by the two sons of Amar Singh. The latter died in 1909. On the 24th of July 1915 the suit out of which this appeal has arisen was brought by his grandsons against Chet Ram, Jawahir Singh, Dalip Singh and the sons of Himmat. The plaintiffs impleaded their fathers as *pro forma* defendants in the case. The claim was brought on the allegation that Amar Singh was a man of immoral character; that the property sold on the 16th of July 1907 was joint ancestral property; that it was sold for no legal necessity; that full consideration had not passed either on the sale deed or on the mortgage; that the signatures of the sons of Amar Singh were obtained under coercion, and that the property was sold for an inadequate price. The defendants resisted the suit by traversing all the allegations made in the plaint and further adding that they had made reasonable enquiry before entering into the transaction of sale and were satisfied that the property was sold for necessity and that they were *bona fide* purchasers for value. The learned Judge of the lower Court held that the description of Amar Singh's character had been considerably exaggerated on both sides and that the most that could be said on the evidence in the case was that he had not led a moral life. Further the learned Judge held that full consideration had passed

both on the mortgage and the sale-deed; that the allegation of coercion as to the signatures of the plaintiffs' fathers was not proved; that the value of the property was Rs. 13,500 and that the sum of Rs. 8,000, that is the mortgage money, fell under the definition of an antecedent debt and that the sale was good to that extent; as to the balance of Rs. 5,500 he found that it was the pious duty of the plaintiffs to discharge the debt of their grandfather and hence they were bound to pay it. He accordingly decreed the claim of the plaintiffs for the recovery of 11/27ths of the property in suit on the payment of Rs. 5,500. The money was to be paid within three months or the suit of the plaintiffs was to stand dismissed.

In appeal to this Court it is contended on behalf of the plaintiffs that in view of the pronouncement of their Lordships of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) the mortgage of 1904 does not fall within the definition of an antecedent debt. As to the liability of the plaintiffs to pay Rs. 5,500 before recovering the proportionate amount of the property, it is contended that as their fathers, that is the sons of Amar Singh, are still alive, there is no pious obligation on the plaintiffs to discharge the debt of Amar Singh. To take up the question of antecedent debt first. In the Privy Council case already referred to their Lordships observe as follows:—"In their Lordships' opinion, these expressions, which have been the subject of so much difference of legal opinion do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply only, to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property." It is apparent from this expression of opinion that the obligation incurred by a father which would be binding upon his sons must have two attributes, namely, *first*, that it must have been incurred antecedently to the transaction in suit, and *secondly*, it must have been incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. In the present case the sum of Rs. 8,000 was borrowed by Amar Singh on the security of the joint estate. There is nothing to show that the money was advanced to him on his personal credit. In fact on the contrary it appears that the mortgage was a usufructuary mortgage under which Amar Singh the mortgagor incurred no personal liability. Applying, therefore, the test laid down in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1), we find that the mortgage of 1904 cannot be considered to be an antecedent debt as defined in the said case. The point was again considered by their Lordships of the Privy Council in the case of *Jogi Das* v. *Ganga Ram* (2), where Lord Haldane interpreted the judgment in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) as follows:—"In that case it was laid down in effect that joint property could not be alienated as against co-sharers by way of mortgage, or otherwise, except for necessity or for payment of an actual antecedent debt, quite distinct from the debt incurred in the mortgage itself, and that in consequence the transaction in that case could not stand, and it was added that the mere circumstance of a pious obligation does not validate the mortgage." A similar point arose in the case of *Brij Narain Rai* v. *Mangla Prasad* (3) decided by a Bench of this Court to which one of us was a party. It was held in that case that the mortgage in suit, having been ostensibly created in order to pay off two prior mortgages, that is, debts which had been incurred *prima facie* on the security of the joint family property, would

(1) 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L R. 498; 26 C. L J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437 (P. C.).

(2) 42 Ind. Cas. 791; 21 C. W. N. 957; (1917) M. W. N. 739 (P. C.).

(3) 50 Ind. Cas. 101; 17 A, L. J. 249; 1 U. P. L. R. 49

not in view of the decision in *Sahu Ram Chandra* v. *Bhup Singh* (1) be one created to pay off antecedent debts."

The next pcint to be considered in the appeal is the obligation of the plaintiffs to pay the sum of Rs. 5,500 before recovering any portion of the property. The lower Court has found on the evidence in the case that the plaintiffs have failed to prove that the sum in question was borrowed by Amar Singh for immoral purposes and on the other hand the contesting defendants have not proved that the money was taken for any legal and valid necessity. But as the money actually passed the lower Court, in view of some of the authorities cited before it, held that the plaintiffs were under a pious obligation to pay the said sum. In connection with this point we would here refer to an argument urged on behalf of the defendants-respondents by their learned Counsel to the effect that even if Rs. 8,000 secured by the mortgage of 1904 were not payable because the loan did not fall under the definition of an antecedent debt, the plaintiffs were liable for the amount as the personal debt of their grandfather, for the same reasons that they were liable to pay the sum of Rs. 5,500. As to this argument one of the objections is, as we have already pointed out, that the mortgage was an usufructuary mortgage and there was no personal obligation under which the mortgagor was liable to pay the money. Moreover, the doctrine of pious obligation comes into operation only against the sons or in case of their death, against the grandsons. The doctrine is based on spiritual considerations apart from the ownership of any property. Even in the case of a Hindu pauper it is the pious duty of his sons to pay off his debts in order to secure him a passage to heaven. The sons of Amar Singh are still alive. The pious obligation to pay the debts of Amar Singh lies upon his sons and not upon his grandsons. Vignaneswara, commenting on the Sloka bearing on the point now under discussion, says as follows :—"If the father not having paid the debt due has died or has gone to a distant country or is overpowered by incurable disease, etc., then the debts contracted by him must be paid by his son or grandson even in the absence of the father's property. Thereon this is the order—on the father's default it is the son, on the son's default it is the grandson (who should pay). Therefore, by a son born giving up his self-interest should the father be carefully released from debt so that he may not go to hell." We, therefore, find that there is no pious obligation on the plaintiffs to pay the sum of Rs. 5,500 before recovering the property. It is, however, conceded before us that a portion of the mortgage money, that is, Rs. 1,000 was applied towards the payment of a personal debt of Amar Singh owing to a Bank at Meerut. The sum of Rs. 1,000, therefore, paid to the Bank at Meerut may be considered to come under the definition of an antecedent debt. We, therefore, hold accordingly. It represents a small portion of the sale consideration. The plaintiffs are, therefore, bound to pay that amount and they cannot have the sale set aside and recover the property without paying it. We accordingly decree the claim of the plaintiffs for the recovery of the property in suit on the payment of Rs. 1,000 *plus* interest at 12 per cent. per annum from the 25th of March 1904 to the date of the institution of the suit. After the date of the suit the sum of Rs. 1,000 to carry 6 per cent. per annum interest till the date of payment. The money to be paid by the plaintiffs within 6 months from the date of the decree of this Court, or in default their claim shall stand dismissed. Proportionate costs here and hitherto are allowed to the parties, including fees in this Court on the higher scale.

Appeal partly allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 441 OF 1917.

June 11, 1918.

Present :—Mr. Justice Martineau.

MUHARRAM ALI CHISHTI—DEFENDANT—APPELLANT

versus

BANSI LAL AND OTHERS—PLAINTIFFS AND ANOTHER DEFENDANT—RESPONDENTS.

Hindu Law—Joint family—Notice to quit given

MUHARRAM ALI *v.* BANSI LAL.

by some members of family, validity of—Landlord and tenant—Sub-tenant, whether liable to pay rent to landlord—Lease for eleven months—Tenant holding over—Notice, term of—Transfer of Property Act (IV of 1882), s. 116.

A house belonging to one *H.*, a Hindu, was leased by his son *B.* to defendant No 1 on the 20th October 1904 for eleven months. Defendant No. 1 sub-let the house to defendant No. 2. and on the 13th March 1915 a notice was sent on behalf of *B.* and his brother *G.* to defendant No. 2 asking him to vacate the house by 1st April, and stating that if he failed to do so he would be charged rent at an enhanced rate. The house not being vacated, *B.* and *G.* brought a suit for ejectment and arrears of rent, their sons being afterwards added as plaintiffs:

Held, (1) that *B.* being the sole lessor of the house, it was not necessary for his sons to join in the notice of ejectment; [p. 122, col. 2.]

(2) that even if it could be said that the sons of *B.* and *G.* were co-parceners with their fathers, still *B.* and *G.* were competent as leading members of the family to give the notice of ejectment, especially as the sons, with the exception of one, were all minors; [p. 122, col. 2; p. 123, col. 1.]

(3) that the addition of a clause informing the defendant that if he did not vacate the house by the date mentioned he would have to pay enhanced rent, did not alter the fact that the notice was a notice to quit; [p. 123, col. 1.]

(4) that the lease being for eleven months only, on the expiry of that term the tenancy became a monthly tenancy, and the notice given was, therefore, sufficient; [p. 123, col. 1.]

(5) that the defendant No. 2 having recognised the plaintiffs as his landlords by paying rent to them, he was liable for the rent due to them. [p. 123, col. 1.]

Second appeal from the order of the District Judge, Lahore, dated the 8th November 1916.

Bakshi *Tek Chand*, for the Appellant.

Dr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—A house belonging to Diwan Hari Singh was leased by his son Diwan Bansi Lal on the 20th October 1904 to Fakir Said-ud-din, defendant No. 1, for eleven months at Rs. 18 a month. Defendant No. 1 sub let the house to Muhrrram Ali Chishti, defendant No. 2. On the 13th March 1915 a notice was sent on behalf of Bansi Lal and his brother Gopal Lal to defendant No. 2, asking him to vacate the house by 1st April 1915, and stating that if he failed to do so he would be charged rent at the rate of Rs. 36 a month. The house not being vacated, Bansi Lal and Gopal Lal brought the present suit for ejectment and arrears of rent. Their sons were afterwards added as plaintiffs.

The first Court held that the notice to quit was not a valid notice; that the suit was bad for misjoinder of causes of action, because it included a claim for compensation for unlawful occupation of the premises after the date mentioned in the notice, and such a claim could not, in addition to the claim for rent, be joined with one for possession of the house; and that the plaintiffs were not entitled to recover rent from the second defendant, with whom there was no privity of contract. It accordingly dismissed the suit. On appeal the District Judge remanded the case for decision on the merits, holding that the notice was valid; that although the plaintiffs could not include in one suit a claim for ejectment, for arrears of rent, and for enhanced rent after the date of the notice the suit was not liable to be dismissed on that account, and that the plaintiffs are entitled to recover rent from defendant No. 2.

The latter appeals from the order of remand.

The first contention is that the notice sent to the appellant on the 13th March 1915 ought to have been given by all the plaintiffs, as it is urged that they are members of a joint Hindu family and became the owners of the house after the death of Hari Singh, and as the notice was sent by Bansi Lal and Gopal Lal only it is not a valid notice. Various rulings have been cited to the effect that where there are several joint lessors the lessee can only be ejected at the instance of all.

I agree with the learned District Judge that the rulings relied upon are not applicable to the present case, since Bansi Lal was the sole lessor. He may have given the lease on behalf of his father, to whom the house belonged, but this would not make it necessary for all the members of the family to join in giving the notice. The true joint Hindu family of the Mitakshara is almost unknown in the Punjab [see *Rupchand* v. *Basanta Mal* (1)], and after the death of Hari Singh his sons Bansi Lal and Gopal Lal would become the owners of the house. Even if it be said that the sons of Bansi Lal

(1) 102 P. R. 1889.

and Gopal Lal were co-parceners with their fathers, still Bansi Lal and Gopal Lal would be competent, as the leading members of the family, to give the notice of ejectment, especially as the sons are, with the exception of one, all minors.

The next contention is that the notice was not a clear notice to quit as required by law. I cannot agree with the contention. The notice asks the appellant to vacate by the 1st April 1915. This is perfectly clear, and the addition of a clause informing the appellant that if he did not vacate by the date mentioned he would have to pay an enhanced rent does not alter the fact that the notice was a notice to quit by the 1st April. The rulings *Bradley* v. *Atkinson* (2) and *Shakhi Chand* v. *Ram Chandra Marwari* (3), cited on behalf of the appellant, are not in point.

The third contention is that the tenancy was for periods of eleven months running one after another, and that, therefore, the notice given on the 13th March to vacate by the 1st April was insufficient. This contention is also wrong. The lease was for eleven months only. On the expiry of that term the tenancy became a monthly tenancy, in accordance with section 116 of the Transfer of Property Act. I agree with the learned District Judge that the notice given was sufficient and that it was a valid notice.

Lastly it is argued that the claim for rent against the appellant is not maintainable because there was no privity of contract between him and the plaintiffs, and *Abdul Kadir* v. *Nur-ud-Din* (4) is cited in support of this argument. But, as pointed out by the lower Appellate Court, the appellant has himself recognised the plaintiffs as his landlords and has been paying them the rent. I agree, therefore, with that Court that the present case is distinguishable from the ruling relied upon, and that the appellant is liable for the rent due to the plaintiffs.

Nothing has been said in support of the 7th and 8th grounds of appeal.

The lower Appellate Court's decision is correct, and I dismiss the appeal with costs.

Appeal dismissed.

(2) 7 A. 596; A. W. N. (1885), 147; 4 Ind. Dec. (N. S.) 558.
(3) 15 Ind. Cas. 906; 16 C. L. J. 561.
(4) 14 P. R. 1893.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 674 OF 1911.

May 1, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

CHINTAMANI PRAMANIK—PLAINTIFF—APPELLANT

versus

HRIDAY NATH KAMILA—DEFENDANT—RESPONDENT.

Vendor and purchaser—Declaration of title, suit for, by purchaser—Title admitted by vendor, whether can be questioned by stranger—Adverse possession of joint owner—Question of fact and law—Limitation Act (IX of 1908), Sch. I, Art. 136—Possession, meaning of.

Plaintiff brought a suit for a declaration of title to and for recovery of possession of certain property on the allegation that he had purchased the same from its owner. The vendor, who was made a party defendant, acknowledged the validity of the conveyance in a written statement and when examined in Court, not only did not repudiate the transaction but explicitly supported the case of the plaintiff:

Held, that the question of the validity of the sale could not be raised by the other defendants. [p. 124, col. 1.]

The expression "out of possession," as used in Article 136 of Schedule I of the Limitation Act, implies that some person is in possession adversely to the vendor—some person holding in a character incompatible with the idea that the ownership remained vested in the vendor. The possession contemplated in the Article includes not merely actual possession but also such possession as a member of a joint family is presumed to have in the family property until excluded therefrom. [p. 124, col. 2; p. 125, col. 1.]

The possession of one of several joint owners is in law the possession of all, unless it is proved that the joint owner in actual possession set up a hostile title and excluded the other owners who were not in actual possession [p. 124, col. 2.]

The question whether there has been such adverse possession on the part of one joint owner as would extinguish the title of the other owners is a mixed question of fact and law. [p. 125, col. 1.]

Appeal against the decision of the Subordinate Judge, Midnapore, dated the 3rd January 1911, affirming that of the Munsif, Ghatal, dated the 23rd March 1910.

Babu *Mohini Mohan Chatterjee*, for the Appellant.

Babu *Jogesh Chunder Dey*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiffs for declaration of title to a share in two tanks and for recovery of joint possession thereof. The case for the plaintiffs was that the disputed tanks originally belonged to one Nityanand Kamila, and after his death, were held in equal halves by his two

sons. The plaintiffs claimed to have purchased one-thirtieth share in the tanks from Nirupama Dasi, wife of Dinanath Kamila, who was a great-grandson of the original proprietor by one of the five sons of his second son. The defendants are the representatives of the first son of the original proprietor. Their defence was twofold; namely, first, that they had acquired title to this share by purchase; and, secondly, that the claim was barred by limitation. Upon the question of limitation, the Courts below have concurrently held against the plaintiffs. Upon the question of title, the Subordinate Judge has held that the defendants have failed to prove the alleged sale by Dinanath to his uncle Kishore. But he has not decided the question, whether the purchase by the plaintiffs from Nirupama is or is not *bona fide*, although he is of opinion that there are circumstances which throw great suspicion upon the transaction. On behalf of the plaintiffs, the decree of the Subordinate Judge has been assailed on two grounds; namely, *first*, that the question of the *bona fides* of their purchase from Nirupama does not arise in these proceedings; and, *secondly*, that the findings of the lower Appellate Court do not show that the title of their vendor was extinguished by adverse possession on the part of her co sharers. In our opinion, both these contentions are well founded.

In so far as the first ground is concerned, the vendor of the plaintiffs is a party to this litigation. In her written statement she acknowledged the validity of her conveyance. She was examined in the lower Court; not only did she not repudiate the transaction, she explicitly supported the case of the plaintiffs. Under these circumstances, it is obvious upon the decision of their Lordships of the Judicial Committee in *Achal Ram* v. *Kazim Husain Khan* (1) that the question of the validity of the sale cannot be raised by the other defendants. This position is in no way affected by the late decision in *Basant Singh* v. *Mahabir Pershad* (2).

In so far as the second ground is concerned, it has been argued on behalf of the respondents that Article 136 of the Second Schedule of the Limitation Act is applicable to this case. That Article provides that a suit by a purchaser at a private sale for possession of immoveable property sold, when the vendor was out of possession at the date of sale, must be commenced within 12 years from the time when the vendor is entitled to possession. It has been argued that the vendor of the plaintiff was not in possession at the date of the sale, because the Subordinate Judge has found that she did not enjoy the profits of the disputed property. The contention of the respondents in substance is that it is necessary for the plaintiffs to establish that their vendor was in actual occupation of the disputed property at the date of the sale. In our opinion, there is no foundation for this contention. The expression 'out of possession' as used in Article 136 implies that some person is in possession adversely to the vendors—some person holding in a character incompatible with the idea that the ownership remained vested in the vendor: *Taylor* v. *Harde* (3). In the case before us, Nirupama was *prima facie* in possession of the tanks through her co-sharers; in other words, the possession of the joint owners was her possession in law. It is clearly incumbent upon the defendants to establish that the co-owners had set up a hostile title and had excluded her from possession. Of this there is no evidence. It has been found that on two occasions within the last 12 years, the defendants caught fish from the tanks and appropriated the same entirely for themselves. This does not constitute exclusion of the plaintiffs or their vendor, nor does this amount to adverse possession on the part of the defendants. It is not proved that the vendor of the plaintiffs claimed a share in the fish and that her title was repudiated. It is not shown that she ever attempted to catch fish and was successfuly prevented. Stress is laid by the defendants-respondents on the circumstance that within 12 years before the commencement of the suit, they had exclusively received rent from a tenant on the bank of the tanks. This also does not in law amount to exclusion of the vendor of the plaintiff. The case before us is very

(1) 32 I. A. 113; 27 A. 271; 9 C. W. N. 477 (P. C.); 8 O. C. 155; 15 M. L. J. 197; 8 Sar. P. C. J. 772.

(2) 19 Ind. Cas. 340; 40 I. A. 86 (P C.); 35 A. 273; 17 C. L. J. 566; 17 C. W. N. 669; (1913) M. W. N. 481; 11 A. L. J. 469; 15 Bom. L. R. 525; 16 O. C. 136; 14 M. L. T. 64; 25 M. L. J. 301.

(3) (1757) 2 Sm. L. C. 575 at p. 635; (12th Ed. p. 592); 1 Burr. 60; 97 E. R. 190.

similar to that of *Bhogavalli Venkayya* v. *Bhogavalli Ramakrishnamma* (4). There the plaintiffs sued on the basis of a purchase from a co-sharer in the joint property, who, it was found, had left the village more than 40 years before suit. It was contended on behalf of the defendants that Article 136 was applicable, and that it was obligatory upon the plaintiffs to establish that their vendor had been in actual occupation within 12 years of the institution of the suit. This contention was negatived. It was held that the possession contemplated in Article 136 includes not merely actual possession but also such possession as a member of a joint family is presumed to have in the family property, until excluded therefrom. The learned Judges thereupon directed an inquiry into the question—Whether the vendor of the plaintiffs was ever excluded from the joint family property, and, if so, for what period before the suit. The Subordinate Court found upon the evidence that such exclusion had not been established and the result was that the plaintiffs succeeded. In the case before us, as already explained, there is no evidence on the record to show that the vendor of the plaintiffs had ever been excluded or that her title had been denied. We may add that it has been argued by the learned Vakil for the respondents that the question at issue is one of fact, and, that consequently it is not competent to this Court to interfere in second appeal. This contention is opposed to the decision of their Lordships of the Judicial Committee in the cases of *Lachmeswar Singh* v. *Manowar Hossein* (5), *Ramgopal* v. *Shamskhaton* (6). The question whether there has been such adverse possession on the part of the defendants as would extinguish the title of the vendor of the plaintiffs is a mixed question of fact and law. Whether the defendants did act in a particular manner is a question of fact, but when the Court is called upon to decide the true legal effect of that act upon the title of the plaintiffs, the Court has plainly to determine a question of law. As already stated, upon the facts found, it is plain that the title of the vendor of the plaintiffs was not extinguished by adverse possession on the part of the defendants or their predecessors-in-interest.

The result is that this appeal is allowed, the decrees of the Courts below discharged and the suit decreed with costs in all the Courts.

Appeal allowed.

(4) 9 Ind. Cas. 495; 9 M. L. T. 397; (1911) 2 M. W. N. 175.
(5) 19 I. A. 48 (P. C.); 19 C. 253; 6 Sar. P. C. J. 133; 9 Ind. Dec. (N. S.) 614.
(6) 19 I. A. 228; 20 C. 93 (P. C.); 6 Sar. P. C. J. 247; 17 Ind. Jur. 38; 10 Ind. Dec. (N. S.) 63.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 7 OF 1919.

May 7, 1919.

Present:— Mr. Justice Walsh and Mr. Justice Stuart.

JHUMAK RAI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BINDESHRI RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 233 (k)—Jurisdiction of Civil and Revenue Courts—Partition proceedings—Fraud committed by one party—Remedy of other party.

An action will lie in the Civil Court to provide a remedy where a person's rights have been infringed by some fraudulent act of the defendant, even although the fraud was one practised upon a Revenue Court and would affect the result of partition proceedings which are the business of the Revenue Court. [p. 126, col. 2.]

The question of the remedies open to a plaintiff where he has been deprived of his rights owing to the fraud of the defendant discussed and the remedy indicated.

First appeal from the order of the Subordinate Judge, Ghazipur, dated the 23rd of November 1918.

Mr. *U. S. Baipai*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.

WALSH, J.—This is an appeal from an order of remand. The plaintiffs' case is that they have been deprived of their rights by the fraud of the defendants.

The question arises out of partition proceedings in the Revenue Court. The allegation is not that the partition proceedings were wrongly decided but that by an improper entry in the papers made through the dishonest intervention of the defendants by a clerk or some official in the administrative department, the effect of the partition has been injuriously to affect the rights of the plaintiffs. The fraud as stated is a remarkably simple and yet an ingenious one. The

question was as to the destination of certain trees. If the trees were to go with the land allotted to any particular party, no entry was made in the column provided for remarks, but if the trees were reserved or allotted to some party other than the party who took the land, then an entry was made appropriating the trees to him. The plaintiffs' case is that that entry was made not by the act of the Revenue Court but by the act of the defendants assisted by a dishonest, official. Of course, if that were made out nobody would contend that it ought not to be rectified and it is to be hoped that there is some remedy somewhere to correct faults of that kind. There is clear authority in this Court, namely, the cases reported as *Mahadeo Prasad* v. *Takia Bibi* (1) and *Raghunandan Ahir* v. *Sheo Nandan Ahir* (2), that an action will lie in the Civil Court to provide a remedy where a person's rights have been infringed by some fraudulent act of the defendant, even although the fraud was one practised upon the Revenue Court, and would affect the result of partition proceedings which are the business of the Revenue Court. On the other hand, there is a Full Bench authority of this Court in *Muhammad Sadiq* v. *Laute Ram* (3) to the effect that Civil Courts have no jurisdiction to entertain a claim to re-open a partition made in the Revenue Courts. What is the appropriate remedy of a person making such complaint? We think he is not necessarily confined to one remedy. It appears that he might succeed in an application by way of review or some similar application to the Revenue Court itself, although, so far as we can see, it has never been decided by the Revenue Court that it will entertain an application for review, to review its own orders on such matters, and it is no doubt true that the Revenue Courts are neither accustomed to nor are they the most appropriate places for an investigation of a serious matter of that kind. In this particular case the plaintiffs did in fact apply to the Revenue Court and the Revenue Court declined to interfere and with considerable circumspection referred them to another Court, taking care not to inform them what Court it had in its mind. Thereupon the plaintiffs went to another Court, perhaps not unnaturally under the circumstances a criminal one on this occasion, and were there met by the objection that they had not obtained a sanction. It hardly lies in the mouth of the defendants under these circumstances, when the plaintiffs have arrived at last by a process of elimination at the last Court to which they can possibly go, to contend that that Court has no right to entertain the complaint. We think there is nothing to oust the jurisdiction of the Civil Court in this case and that really we are bound by the authorities, it being clearly understood that the charge of fraud made in the plaint must be proved against the defendants.

The Court which decided this question in 25 Allahabad [*Mahadeo Prasad* v. *Takia Bibi* (1)] took the somewhat narrow view of refusing to say what the nature of the redress would be. They seemed to think that it would be premature to express any opinion upon that question. We do not share that view. The matter is before us as a matter of principle and there seems no reason why we should not have the courage of our opinions and indicate what the real remedy which the plaintiffs seek is and to which they are entitled, if they establish the facts in their favour. The plaint as drafted no doubt fell somewhat short of what was required when it came to the prayer for relief. We do not think that in a matter which in itself is clearly within the jurisdiction of the Revenue Court, unless the plaintiffs' claim is established, that a mere claim for possession is the appropriate relief, and the first Court itself took that view pointing out that what they wanted was a declaration that certain papers of the Revenue Department had been tampered with and wrong entries surreptitiously made therein. We think the plaintiffs would be well advised to apply to the Trial Court to amend the prayer for the relief from the somewhat general terms contained in clause B to a definite claim for a declaration that they are entitled (assuming always of course that they establish their case in fact) to have the improper entry in the revenue papers removed, and to be restored to the position in which they were

(1) 25 A. 19; A. W. N. (1902) 182.
(2) 49 Ind. Cas. 306; 17 A. L. J. 97.
(3) 23 A. 291 (F. B.); A. W. N. (1901) 86.

before the entry was made. And further if they be so entitled on the facts to a declaration that they are entitled to possession of the trees which they claim. Assuming that they succeed, armed with these declarations passed in their favour by a competent Court deciding the matter upon the merits, this could go to the Revenue Officer and, we have no doubt that the Revenue Court over whom of course this Court has no jurisdiction whatever to alter any entry contained in its records, will respect the decree of the Civil Court and act accordingly. The appeal must be dismissed with costs on the higher scale.

STUART, J.—I concur in the order proposed.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1882 OF 1909.

May 8, 1912.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

BEHARY LAL PANDIT—PLAINTIFF—APPELLANT

versus

NARAIN MISRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Revenue Court, decision of, whether res judicata in civil suit—Bengal Tenancy Act (VIII B. C. of 1885), as amended by Act III B. C. of 1898, s. 104 G—Board of Revenue, power of, to alter record published before Act III of 1898 came into force—Fraud committed with plaintiff's connivance, effect of.

A decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit, unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself, in which the issue is subsequently raised. [p. 128, col. 1.]

It was not the intention of the Legislature to apply section 104G of the Bengal Tenancy Act to records finally published before Act III of 1898 B. C. came into force. Therefore, the Board of Revenue has no authority under section 104G of the Bengal Tenancy Act to alter a record finally published on the 6th of April 1898. [p. 128, col. 2.]

Where a fraud has been committed with the connivance of the plaintiff, he is not entitled to invite a Court of justice to interpose actively in his favour with a view to extricate him from the difficulty in which he has placed himself. [p. 129, col. 1.]

Appeal against the decision of the District Judge, Cuttack, dated the 14th June 1909, affirming that of the Subordinate Judge, Cuttack, dated the 4th May 1907.

Babu *Bepin Chandra Mallik*, for the Appellant.

Babus *Provas Chandrah Mitter* and *Hira Lal Sanyal*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a declaratory suit. The plaintiff alleges that on the 6th April 1898, a Record of Rights was finally published in which the rent payable by the tenant-defendant was stated to be Rs. 80-12-6, that subsequently the entry was altered on the 9th September 1899 to Rs. 258-2 0, and, that, later on, when he brought a suit for rent against the tenant with a view to recover rent at the higher figure mentioned, his claim was disallowed by the District Judge and finally by this Court on the 1st February 1904. It was held on that occasion that the alteration of the record had been made without authority, and that consequently the plaintiff was not entitled to realise rent at any rate higher than what was admitted by the defendant, namely, the rate as entered in the Record of Rights finally published on the 6th of April 1898. The plaintiff, therefore, commenced this action on the 29th May 1906 for a two-fold declaration, namely, first, that the alteration of the Record of Rights was made with jurisdiction and that the entry as it now stands is binding upon both the landlord and the tenant, and, secondly, that the original entry of Rs. 80-12-6 was obtained by fraud and does not bind the landlord. The Courts below have concurrently dismissed the suit. The District Judge has held in substance that, as in the suit for rent, the Record of Rights was found to have been altered without authority, that decision is binding upon the parties to this litigation; in this view, he has declined to determine, whether the alteration was really unauthorised. As regards the question of fraud, the District Judge has held that the plaintiff had failed to prove the allegation; but there is indication in the judgments of the Courts below that if there was any fraud, the fraud was committed with the connivance of the appellant.

The decision of the District Judge has been assailed before us on the ground that

the matter is not *res judicata* and that the question, whether the record was altered without authority, is still open for consideration. In our opinion, this contention is well founded. As was explained by this Court in the case of *Shibo Raut* v. *Baban Raut* (1), in order to establish the plea of *res judicata* the Court which decided the former suit must have been such a Court as would have been competent to try and decide not only the particular matter in issue, in the later suit but also the later suit itself in which the issue is subsequently raised. It was also pointed out by the Judicial Committee in the case of *Gokul Mandar* v. *Pudmanund Singh* (2), "that under section 13 of the Civil Procedure Code of 1882, a decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit, unless the Judge, by whom it was made, had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit itself, in which the issue is subsequently raised." Now, in the case before us, the suit for rent was tried by a Revenue Court. That Court was not competent to try the present declaratory suit. It is clear, therefore, that the decision in the suit for rent does not operate as *res judicata*. This view is in accordance with the decision in the case of *Gomti Kunwar* v. *Gudri* (3). The question, whether the alteration was or was not unauthorised, is, therefore, still open for consideration.

It appears that the alteration in the Record of Rights, though not initialled, was made by a duly qualified officer and was based upon an order of the Board of Revenue. The Board appears to have acted under section 104G, which was introduced into the Bengal Tenancy Act by Act III of 1898 B. C.; the new section came into force on the 2nd November 1898, and was shortly afterwards extended to Orissa. The real question in controversy between the parties is, whether under section 104G, the Board of Revenue had authority to alter the record finally published on the 6th April 1898. It has been argued for the respondent that as the record had been finally published before Act III of 1898 B. C. came into force, no proceedings could be taken under section 104G for the alteration of such record. In our opinion this contention is well founded. Section 104G provides that "the Board of Revenue may, in any case under this part, on application or of its own motion, direct the revision of any Record of Rights or any portion of a Record of Rights, at any time within two years from the date of the certificate of final publication." It is clear that the case in which such an action may be taken by the Board of Revenue must be a case under Part II of Chapter X as it was remodelled by Act III of 1898 B. C. Now, section 7 of the Act lays down that Chapter X of the Bengal Tenancy Act as it stood in 1885 was completely repealed, and in lieu thereof, a new chapter was substituted. In the original Chapter X, there was no such division into parts, and it is impossible to say that the Record of Rights finally published on the 6th of April 1898 was a record under Part II of Chapter X of the Bengal Tenancy Act as altered by Act III of 1898 B. C. It is further plain from section 9 of Act III of 1898 B. C. that "every settlement of rent or decision of a dispute by a Revenue Officer under section 104 or section 106 of the Bengal Tenancy Act, 1885, before the commencement of this Act in respect of which no appeal has, before the commencement of this Act, been preferred to the Special Judge appointed under section 108 of that Act, shall have the force and effect of a decree of a Civil Court in a suit between the parties, and shall be final." Now in the case before us, no appeal had been preferred as contemplated by section 9. Consequently, the effect to be attributed to the entry of the rent as settled in the Record of Rights published on the 6th April 1898 is that of a decree of a Civil Court in a suit between the parties. In view of this circumstance, it is impossible for us to hold that the Board of Revenue could proceed under section 104G to alter an entry of this description. We are clearly of opinion that it was not the intention of the Legislature to apply section 104G to records finally published before Act III of 1898 B. C. came into force. The alteration made on the 9th September 1899 was consequently unauthorised. In view of this conclusion,

(1) 35 C. 353 at p. 359; 7 C. L. J. 470; 12 C. W. N. 359.

(2) 29 C. 707 at p. 717 (P. C.); 29 I. A. 196; 6 C. W. N. 825; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323.

(3) 25 A. 138; A. W. N. (1902) 220.

the prayer for the first declaration must be refused.

In so far as the prayer for the second declaration is concerned, the plaintiff is obviously not entitled to any relief. If we adopt the view of the District Judge that the alleged fraud has not been established, the plaintiff is not entitled to challenge the Record of Rights. If, on the other hand, a fraud has been committed with the connivance of the plaintiff, he is undoubtedly not entitled to invite a Court of justice to interpose actively in his favour with a view to extricate him from the difficulty in which he has placed himself.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 34 OF 1916.

November 30, 1916.

Present :—Mr. Mittra, A. J. C.

BHAIYALAL—JUDGMENT DEBTOR—APPELLANT

versus

D. B. BALLABHADASS—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60—Attachment—House occupied by agriculturist, whether liable to be attached—Protection, extent of.

The protection from attachment afforded by section 60 (c) of the Code of Civil Procedure to the house and other buildings occupied by an agriculturist is not confined to his actual dwelling-house, and would extend to any house occupied or used for agricultural purposes, such as for keeping bullocks, or storing grain or for the residence of an agent to supervise the cultivation. [p. 130, col. 1.]

The requirements of an agriculturist under section 60 (c) of the Civil Procedure Code ought not to be judged with reference to the number of bullocks he keeps, but with reference to the possibility of his cultivating the whole of the area he possesses. [p. 129, col. 2.]

Appeal against the order of the District Judge, Jubbulpore, passed on 15th January 1916, in Objection Case No. 150 of 1915.

Mr. *A. C. Roy*, for the Appellant.

Mr. *M. R. Bobde*, for the Respondent.

JUDGMENT.—The respondent in execution of a decree attached a portion of the premises belonging to the appellant, whose plea that the house was exempted from attachment under the provisions of section 60, clause (*c*) of the Civil Procedure Code, has been disallowed. It would appear from the plan put in by the decree-holder that there are four rooms, all being in one enclosure. The decree-holder's witnesses prove that one of the rooms is used for keeping bullocks, one for the accommodation of the Havildar. These two rooms had not been attached; but the other two rooms in a separate building together with a part of the compound have been attached. Of these two rooms, one according to the same witnesses is used for storing grain before putting it into grain pits; and the other is used by the appellant's *munim* who supervises his cultivation and who used to reside in the village up to within a week of the date when evidence was given in the month of January 1916. The appellant was originally the *malguzar* of the village, but is now only an occupancy tenant of his *sir* land of 87 acres. The lower Court has held that two rooms are quite enough for his requirements and has ordered the sale of the portion of the premises of which the decree-holder applied for an attachment. It seems to me that the order of the lower Court is wrong for several reasons. Apparently the appellant when a a *malguzar* had only a home farm of 87 acres and these buildings were used for agricultural purposes. The mere fact of his being reduced to the status of an occupancy tenant of the same area of land does not show that his present requirements are less. He may have been subletting a portion of the land in recent years, but he is not bound to do so and his habitually doing so might entail the consequences prescribed by section 61 of the Tenancy Act. His requirements must, therefore, be judged not with reference to the number of bullocks he has kept in recent years, but with reference to the possibility of his cultivating the whole of the area himself. Section 60 of the Civil Procedure Code, 1908, exempts houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him. The houses certainly are occupied by him as

an agriculturist. It is not suggested that the land in his possession appertaining to them can be separately attached or sold on the ground that so much is not necessary for the enjoyment of the buildings. All the rooms seem to be in actual use for agricultural purposes. It is contended for the respondent that the burden of proof lies on the appellant to show that the houses are exempted from attachment. This may be conceded, but it is, *prima facie*, proved that the houses belong to an agriculturist and are occupied by him as such. They seem to be all in one enclosure and the land appertaining to the buildings is no more than what is necessary for the enjoyment of the buildings.

The respondent's Pleader argues that the appellant himself lives in Jubbulpore and not in this village of Raipura, it is not, therefore, occupied by him as an agriculturist and in support of this relies on a passage of the judgment of West, J., in *Radhakisan Hakumji* v. *Balvant Ramji* (1). The wording of section 266 of the Code of 1882 was slightly different. It exempted materials of houses and other buildings belonging to agriculturists. The Bombay case does not decide the point whether there can be an occupation by an agriculturist through an agent. It was a case where there were several houses belonging to an agriculturist and it was decided that only the dwelling house and the farm buildings were exempted from attachment. It is not necessary that the house protected from attachment and sale should be the dwelling-house of an agriculturist provided it is occupied by him for agricultural purposes.

It is argued that as section 60, clause (*b*), only exempts such cattle and seed grain as may in the opinion of the Court be necessary to enable an agriculturist to earn his livelihood as such, buildings which are claimed to be exempted under clause (*c*) must not exceed in size the building necessary for storing so much cattle and seed-grain as is protected by clause (*b*). I am unable to agree with this view, as there is no connection between clause (*b*) and clause (*c*). Clause (*b*) partially exempts cattle and seed-grain from attachment: clause (*c*) is not worded so as to limit the buildings which are exempted by any reference to the provisions of clause (*b*).

The order of the lower Court is set aside and the application for attachment of the portion of the premises in Raipura belonging to the appellant is dismissed with costs. I fix Rs. 15 as legal practitioner's fee in this Court.

Order set aside.

(1) 7 B. 530; 8 Ind. Jur. 146; 4 Ind. Dec. (N. S.) 357.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1603 OF 1916.

May 11, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

April 22, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

BHAGWANT AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TURSI RAM—DEFENDANT—RESPONDENT.

Hindu Law—Debt of father—Son, liability of—Burden of proof—Decree against father, whether evidence against son.

To render a son liable for his father's debt, the creditor must prove the existence of a debt due by the father; the fact that there is a decree against the father, obtained in a suit to which the son was not a party, is not evidence against the son. [p. 131, col. 1.]

Second appeal from the decree of the District Judge, Agra, dated the 9th September 1916.

Dr. *S. N. Sen* and Mr. *Narayan Prasad Asthana*, for the Appellants.

Mr. *S. K. Dar*, for the Respondent.

JUDGMENT.

RICHARDS, C. J., AND BANERJI, J.—This appeal arises out of a suit in which the plaintiffs sought a declaration that this property was not liable to be sold in execution of a simple money-decree against their father. They alleged that their father was never indebted and there was no necessity for incurring the loan. The Court of first instance held that the debt was not proved and decreed the claim. The lower Appellate Court has reversed the decree, holding that the onus of showing that there was no debt lay upon the sons. Lengthy arguments have been addressed to us, in which it has been urged that having regard to the recent decision of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup*

P. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar

Singh (1) the property of the sons could not be sold in execution of a decree against the father unless the plaintiffs showed that there was legal necessity and that the doctrine of "pious obligation to pay the father's debts" could not be invoked during the lifetime of the father. We think that in any event it lay upon the decree-holder defendant to show that there was a debt due by the father and that he was wrong in saying that the onus of proving that there was no debt lay upon the sons. True it is, there was a decree against the father, but this is not evidence against the sons whom the creditor did not choose to make parties to the suit, athough they appear to have been of full age. Before finally deciding the appeal we think it desirable to refer two issues to the Court below, namely, (1) was there a debt by Bhika the father of the plaintiffs to the defendant Tulshi Ram? (2) Was the debt for family necessity or family purposes?

The onus in the first instance of showing that this debt was due will lie on the defendant. Ten days will be allowed for filing objections. Put up on return, after the ten days allowed for objections.

On receipt of the findings the following judgment was delivered by

BANERJI AND PIGGOTT, JJ.—Upon the issues referred the finding of the Court below is that there was a debt due by the father and that this debt was incurred for family necessity. Objections have been taken to the findings but they are without force. It is urged that the plaintiffs' claim ought to be decreed, at least, as regards the shares of the sons. This contention is, in our opinion, untenable inasmuch as it has been found that the debt was incurred by the father for legal family necessity. Had the father alienated the family property for the payment of the debt, the alienation would, undoubtedly, have been valid. The Court will only do that which the father could have done; therefore the plaintiffs' claim cannot be sustained. The result is that we dismiss the appeal with costs, including fees in this Court on the higher scale.

Appeal dismissed.

(1) 39 Ind. Cas. 280, 15 A. L. J. 437; 19 Bom. L. R. 495; 21 C. W. N. 693; 1 P. L. W. 557; 26 C. L. J. 1. 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 16 L. W. 218; 39 A. 437; 44 I. A. 126 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1725 TO 1869 OF 1913

AND

MEMORANDUM OF OBJECTION IN SECOND APPEAL NO. 1908 OF 1913.

January 12, 1915.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Phillips.

PYDI APPALA SURYANARAYANA KURMADASU NAIDU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

INUGANTI RAJAGOPALA RAO GARU—DEFENDANT—RESPONDENT.

Madras Estates Land Act (*I of* 1908), *s.* 40 (2), (3), *scope of—Rent, commutation of, principles governing—* Maramat *charges, whether 'rent in kind or otherwise.'*

The 'commutation' of rent referred to in section 40 of the Madras Estates Land Act is not commutation in its narrowest sense. It was intended to cover something more than a mere arithmetical calculation of averages or application of a market price to commute grain into money. [p. 132, col. 1.]

In determining the rent to be paid, the Collector cannot exclude from consideration the question whether the rents actually collected during the decennial period before suit were in excess of what was legally due to the landlord. [p. 132, col. 2.]

Maramat charges are not 'rent in kind or otherwise' within the purview of section 40 of the Act and they lie outside the scope of the Collector's determination. [p. 133, col. 1.]

Second appeals against the decrees of the District Court, Vizagapatam, in appeal suits preferred against those of the Court of the Suits Deputy Collector, Vizianagaram, and Memorandum of Objections in Second Appeal No. 1908 of 1913, preferred against the decree of the said District Court, Vizagapatam, in Appeal Suit No. 808 of 1911, preferred against the decree of the Suits Deputy Collector, Vizianagaram, in Suit No. 245 of 1908.

These second appeals and the memorandum of objections coming on for hearing on the 12th January 1915, the Court (Ayling and Tyabji, JJ.) delivered the following

JUDGMENT.—The only important question raised in this appeal is whether the learned District Judge has correctly appreciated the scope of section 40 of the Madras Estates Land Act; and in particular whether he was right in excluding from consideration the question of whether the rents actually collected during the decennial period before suit were in excess of what was legally due.

The Deputy Collector found that the proper rent payable was a Varam of half the

gross produce, which gross produce he calculated to be $17\frac{1}{2}$ *pattis* per acre. Applying to this the average market value which he calculated to be Rs. 57-3-2 per *garce* of paddy, he arrived at a rate of rent of Rs. 12 and Rs. 13 per acre (for different villages) or Rs. 36 and Rs. 39 per *garce*, a *garce*, as regards area, being taken to be equal to 3 acres.

The District Judge, on the other hand, has declined to hear arguments as to whether the rent has been illegally or, as the Deputy Collector puts it, "whimsically" enhanced, and has simply applied an average market value of Rs. 65 per *garce* of paddy to the grain rents actually collected in the course of the ten years preceding the suit.

With the question of whether Rs. 57-3-2 or Rs. 66 is the proper commutation rate (using the term in the strict sense) we are not now concerned. The only question is whether the District Judge was right in declining to consider whether the grain rent actually paid exceeded what was legally due: and this depends on the interpretation of section 40 of the Madras Estates Land Act.

The section is headed "commutation of rent" and the narrower interpretation (to which the learned District Judge is inclined) is that it provides for nothing more than the conversion, practically by an arithmetical process, into a fixed annual cash payment of grain rents or rents varying with the crop. The District Judge says: "Section 40 does not, in my opinion, contemplate anything in the nature of a settlement of new rates of rent, but merely the ascertainment of new rates of rent fairly and reasonably equivalent to the grain rents actually in force."

The word "commutation" read by itself is certainly suggestive of this meaning: and we are bound to say that the section does not appear to have been happily worded or to be altogether free from doubt. There seems, moreover, to be no authority on the point. But on reading the section as a whole, we are forced to the conclusion that it was intended to cover something more than a mere arithmetical calculation of averages or application of a market price to commute grain into money. The term "settlement of new rates of rent" used by the District Judge rather lends itself to misinterpretation in the other directions: and we are not to be understood as saying that the method adopted by the Deputy Collector was proper. But the mere presence of clauses 3 (*b*) and 3 (*c*) is sufficient indication that something more than commutation in the narrowest sense was contemplated. The learned District Judge himself clearly feels the difficulty. He says clause (*b*) of sub-section (*c*) provides *data* for purpose of comparison. But the existence of such a standard of comparison indicates that it should be capable of being acted on. The section directs the attention of the Collector to clause (*b*) equally with clause (*a*) and the District Judge is driven to allow that the two clauses may "provide two limits within which the Courts are at liberty in the exercise of reasonable and judicial discretion to fix the definite money rental required to be determined."

Clause (*c*) is equally significant. It directs the Collector to have regard to "improvements effected by the land-holder or the *ryot* in respect of the holding and the rules laid down by section 32."

Now improvements effected by the *ryot* cannot affect the rent: and the only possible meaning of the reference to them is that, where a higher rent has actually been collected on account of them, matters should be set right by the Collector "in making the determination." Similarly with improvements effected by the land-holder, the meaning can only be that effect is to be given to the provisions of section 32, if these would entitle him to a higher rent than the average ascertained under clause (2).

It seems clear to us that the Collector in determining the rent to be paid is not intended to confine his attention simply to ascertaining the rent actually paid year by year and the proper market value of grain at the time of each harvest; but is authorized and directed to have regard to other considerations.

It is argued in support of this narrower interpretation of section 40 that Chapter XI sufficiently provides for the determination of anything more than a mere commutation of grain into money. But that chapter provides no remedy for an individual *ryot*: and even where a sufficiently large proportion of land-holders or *ryots* apply, it is optional with Government to take action.

In the present case, there are no improvements to be considered under clause (*c*) and we must accept the finding of the District Judge that the *data* available are not sufficiently reliable to render it possible to compare the rates arrived at under clause (*a*) with the rates paid for similar lands in the same or neighbouring villages under clause (*b*).

But it seems to us he was bound to consider the *ryots'* plea that the rents actually levied during the decennial period were in excess of what was legally due. It is argued that section 40 makes no provision for this. But as we have seen, sub-section (3) must be understood as conferring a wide discretion and it is to be observed that clause (*a*) does not speak of rent actually collected but of rent accrued due, a somewhat notable variation from the language of the corresponding section of the Bengal Tenancy Act, which is otherwise closely followed. The plaint clearly states that the rent has been illegally enhanced and the enhanced rents forcibly levied and paragraph 10 of the written statement shows that this plea was well understood by the defendant. The Deputy Collector found as a fact that the rent had been arbitrarily or, as he puts it, "whimsically" enhanced from time to time.

The District Judge acting on his interpretation of the section has declined to hear arguments on the question of enhancement; and herein we think he was wrong. His refusal goes to the root of the whole determination and we must accordingly call for a finding in the light of the above remarks on the evidence on record on the following issue:—

What was the average value of the rent actually accrued due under clause (*a*), adopting the District Judge's figure of Rs. 66 per *garce*?

The finding should be submitted within two months and seven days will be allowed for filing objections.

The only other point argued relates to the *maramat* charges. We think appellants' contention that these are not "rent in kind or otherwise" within the purview of the section is correct and that they lie outside the scope of the Collector's determination.

[The District Judge submitted a finding on the above issue, which was accepted by the High Court and the decree appealed against varied accordingly.]

SECOND APPEALS NOS. 1726 TO 1853 AND THE MEMORANDUM OF OBJECTIONS IN SECOND APPEAL NO. 1908 OF 1913.

These appeals and the memorandum of objections follow the decision in Second Appeal No. 1725 of 1913.

M. C. P.

Decree modified.

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL NO. 1569 OF 1915.

February 24, 1919.

Present:—Sir Henry Richards, KT., Chief Justice, Mr. Justice Rafique and Mr. Justice Lindsay.

CHHAGGAN LAL MINOR, THROUGH *Musammat* LACHHI DEFENDANT—APPELLANT

versus

MUHAMMAD HUSSAIN KHAN AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS

Mortgage—Merger of mortgage in decree, effect of—Decree-holder taking fresh mortgage—Priority—Prior mortgage paid off—Mortgagee, position of.

Where a mortgage merges in a decree in favour of the mortgagee, his remedy is no longer that of a mortgagee, but is that of a person who holds a decree under which he is entitled to bring certain property to sale, and if he wishes to retain this position he should execute the decree, and not take a fresh mortgage the consideration for which is the decree. [p. 135, col. 2.]

A prior mortgagee who obtains a decree upon his mortgage and after that decree is made absolute takes a fresh mortgage - a part consideration of which is the decretal amount, it being distinctly stated that the decree is discharged—cannot claim priority over intermediate mortgagees. [p. 136, col. 1: p. 137, col. 2.]

A person who pays off a prior incumbrance without taking a deed of transfer is in no higher position than the prior incumbrancer. [p. 135, col. 2; p. 136, col. 1.]

Where a decree is obtained upon a mortgage, the decree, upon the making of an order absolute, extinguishes the mortgage security as well as the defendant's right to redeem, by substituting for that security a right to sell conferred by the decree, and thenceforward the mortgagee's remedy is under the decree. [p. 136, col. 1.]

Second appeal from the decree of the Subordinate Judge, Meerut, dated the 6th July 1915.

CHHAGGAN LAL v. MUHAMMAD HUSSAIN KHAN.

Mr. *Girdhari Lal Agarwala*, for the Appellants.

Messrs. *Hameed ullah* and *Sham Nath Mushran*, for the Respondents.

JUDGMENT.

RICHARDS, C. J.—The facts connected with this appeal are stated in my judgment delivered on the 1st of August 1916 and it is unnecessary to repeat them. It may, however, be well to summarise the result of the findings of the Court below upon the issues referred in conjunction with the statements made by the learned Counsel upon each side as to the mortgages. It appears that the principal property mortgaged in the mortgage of the 11th of July 1893 was a one third share in a certain Khata. The property hypothecated in the mortgage of the 29th of November 1893 was practically the same. In the mortgage of the 21st of August 1894 the same share in this Khata was mortgaged, and there was some additional property. In the mortgage of the 17th of May 1904 one sixth of this Khata (instead of one-third) is mortgaged and some additional property as well. The plaintiffs obtained a decree on foot of the mortgage of the 29th of November 1893, whereby they were ordered to redeem the mortgage of the 11th of July 1893 when they would be entitled to sell the property for the aggregate amount of these two mortgages. That decree duly was made absolute and was put into execution and the greater part of the mortgage debt was realised, leaving only a balance of Rs. 156. The property was, however, never brought to sale. The mortgage on foot of which the present suit is based is the mortgage of the 17th of May 1904. The consideration for that mortgage was the Rs. 156 which still remained unpaid on foot of the mortgage decree which the plaintiffs obtained on their previous mortgage plus an additional sum of Rs. 94. The question which the plaintiff sought to have decided in his favour as against the appellant here was that he should obtain priority in respect of this Rs. 156 against the defendant appellant and that he should be at liberty to sell a one-fourth share which the appellant had purchased to realise this Rs. 156 and interest. The circumstances under which the $\frac{1}{4}$th share was purchased are as follows: Amolak (the father of the appellant) obtained a decree on foot of the mortgage of the 21st of August 1894. The property was put up to sale and the defendant purchased one-fourth of the Khata (No. 27), being the Khata which is common to all four mortgages. Reading the mortgage of the 17th of May 1904 it is abundantly clear that it was intended that this mortgage should *discharge and be in satisfaction of the decree.* On the face of it it is stated that the decree is *discharged.* On a previous occasion when the case was before the Court, it was stated that the decree had been certified as discharged. Whether this was actually done or not, it is clear that in 1904 after the mortgage was executed it was never intended that the decree should be further executed and if the decree was not certified as satisfied, it should have been so certified. If it was necessary, I should hold that under the circumstances of the present case no presumption arises that the plaintiff intended to keep alive either the mortgage of the 11th of July 1893 or the mortgage of the 29th of November 1893. I think there is express evidence that the intention was that these mortgages and the decree were to be treated as discharged. It must be admitted that if the plaintiff's claim in the present suit is to date from the 17th of May 1904 when he took the new mortgage, the appellant has priority over him because the plaintiff's purchase and possession must be attributed to the mortgage of the 21st of August 1894. It is said, however, that as against the defendant-appellant the plaintiff has priority to the extent of Rs. 156 and interest as of July and November 1893. This contention is based upon the presumption that because it was for the interest of the plaintiffs to keep alive the securities of 1893 it must be presumed they intended to do so and in fact did so. I have already stated my opinion as to this matter. It seems to me, however, that in any event the two mortgages of 1893 merged in the decree which the plaintiff obtained on foot of the mortgage of the 29th of November 1893 and that those mortgages were discharged and extinguished. If the plaintiff bases his claim on either of these mortgages, he is at once met with a number of defences. In the first place, it can be said that a suit was brought on foot of these mortgages and a decree obtained for the sale of the

mortgaged property and that a second decree cannot be made. In the next place, if the plaintiffs were suing on foot of one or other or both these mortgages the suit would be barred by limitation. If the plaintiff bases his claim on the fact that he is a decree-holder, the answer is, that the present proceeding is not an application to execute a decree but a suit asking for a decree directing the sale of the property. In the present case it happens that the plaintiff was the decree-holder who obtained the mortgage decree on the mortgage of November 1893 but if he happened to be a third party who had paid off a prior incumbrance, I do not think that a third party has any higher right than the original mortgagee would have had I may quote here the words of Mr. Justice Warrington in the case of *Ellis* v. *Ellis* (1): "The plaintiffs then contend that George Ellis, having paid off the debt for the benefit of the estate, was entitled to stand in the place of the creditor, and that he transferred that right to James Ellis, who actually found the money. But, granting that such would be the right of George Ellis and that the plaintiffs could assert that right by subrogation, any claim founded on it would be barred by the Statute of Limitations. The debt is of course long since barred, and all claims under the original security are now barred also, for in this aspect of the case the payment of the interest was made by a stranger, and was not such a payment as would prevent the Statute from running." It is said that because the plaintiffs omitted to make the appellant a defendant to their suit on their mortgage, they can bring a second suit on their mortgage as against the appellant. I think this very doubtful. But even if they could the present suit is based on the mortgage of 1904, not on the mortgage of 1893. In my previous judgment I have pointed out the distinction between a plaintiff seeking to sell property simply by reason of his having discharged a prior incumbrance and a defendant defending his possession or position in a suit brought against him. The very metaphor of the shield indicates the distinction. A man does not attack with a shield, he defends with it. Reliance was placed on behalf of the respondents on certain remarks of Mr. Justice Mookerjee in the case of *Dhakeswar Prosad Singh* v. *Harihar Prosad Narain Singh* (2). At page 110* of the report that very learned Judge says: "This principle is obviously applicable to the case before us, although the mortgage debt was satisfied by a purchaser of a portion of the mortgaged property after a decree had been obtained on the mortgage. The purchaser who redeemed the mortgage was, for the purposes of the rule, in the same position as if he were one of two joint mortgagors. The fact that a decree had been obtained on the mortgage was also immaterial, because a decree obtained on a mortgage does not extinguish the security, though the security may be merged in the decree and the judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the judgment creditor.'

The facts of the case in which this judgment was delivered were different from the facts of the present case; but it seems to me that if it be taken that the mortgages of 1893 merged in the decree obtained by the plaintiff, then the plaintiff's remedy was no longer that of a mortgagee but that of a person who held a decree under which he was entitled to bring certain property to sale. If he wished to retain this position, he should not have taken a fresh mortgage the consideration for which was the decree—he should have executed his decree. It may be that where a person pays off a prior incumbrance before a decree has been made on foot of it and either expressly or by implication retains the benefit of that prior incumbrance, he can be treated as if he were the assignee of the prior incumbrance and if the prior incumbrance is not barred by limitation, he may be able to bring a suit just as the transferee of the prior incumbrance might have done. But it seems to me that the person paying off a prior incumbrance without taking a deed of

(1) (1905) 1 Ch. 613 at p. 619; 74 L. J. Ch. 296; 53 W. R. 617; 92 L. T. 727.

(2) 27 Ind. Cas. 780; 21 C. L. J. 104.

*Page of 21 C. L. J.—*Ed.*

transfer can be in no higher position than the prior incumbrancer would have been. If a decree has been obtained on foot of the prior incumbrance, then it seems to me that the prior incumbrance as such is discharged and from thenceforward the remedy is under the decree. I have pointed out that the question between the parties to this appeal was whether or not the plaintiff could insist on priority against the appellant. The plaintiffs have made no claim to redeem the appellant. I think, therefore, that the decree of the Court of first instance should be restored.

RAFIQUE, J.—I am also of opinion that this appeal should prevail. It appears that originally Mohar Singh (the father of Mamraj and the grandfather of Hoshiar, defendants Nos. 3 and 4 in the first Court) executed a mortgage on the 11th of July 1893 in favour of Chhaggan Khan (the father of Muhammad Hussain Khan) and Masitullah—Muhammad Hussain Khan and Masitullah are the plaintiffs in the present suit. By way of security he (Mohar Singh) hypothecated a Khata. About 4 months after he executed another hypothecation bond in favour of Chajju Khan in respect of the same Khata. On the 21st of August 1894 he gave a third mortgage-deed to Amolak (the father of the contesting defendant Chhaggan Lal). In the deed of 1894 the same property that was mortgaged in the deeds of 1893 was hypothecated together with some other property which need not be mentioned here. In 1898 Muhammad Hussain Khan (one of the plaintiffs in the present suit) sued on the mortgages of 1893 and obtained a decree for sale against both Mohar Singh and his son Mamraj. The decretal amount not having been paid an order absolute was made on the 13th of March 1899. Amolak subsequent to these proceedings brought a suit on the basis of his mortgage of 1894. Muhammad Hussain alleges that he applied to be brought on the record as a party but his application was rejected. The case proceeded to trial and a decree was passed in favour of Amolak for the sale of the hypothecated property. In execution of the decree part of the property was sold and purchased by Amolak, namely, one-fourth of Khata No. 27, that is, the property which was hypothecated in both the bonds of 1893 and 1894. On the 17th of May 1904 Mamraj executed a further deed of mortgage in favour of Muhammad Hussain Khan for Rs. 250. Out of the sum of Rs. 250 Rs. 156 were credited towards the decree of 1898 in full discharge as part of the decree had already been paid up. In the bond of 1904 a portion of Khata No. 27 was mortgaged by way of security together with property in other Khatas. On the 2nd of January 1904 the suit out of which this appeal has arisen was brought by Muhammad Hussain Khan and Masitullah Khan against Chhaggan Lal (the son of Amolak) and against Mamraj and his minor son Hoshiar for the recovery of the money due on the bond of the 17th of May 1904 by sale of the property hypothecated in the said bond. Chhaggan Lal resisted the claim on various pleas, one of which was that the property which his father had purchased in execution of his decree was not liable to sale under the decree if passed in favour of the plaintiffs on the bond of the 17th of May 1904. The plaintiffs in rejoinder contended that as part of the consideration of the bond of the 17th of May 1904 was the money due on the decree of 1898, and the latter decree was on the basis of the bonds of 1893, they (the plaintiffs) had priority over Amolak's mortgage of 1894. The Court of first instance accepted the contention for the defence and disallowed the claim of the plaintiffs for priority as against the defendant appellant. On appeal the learned Subordinate Judge disagreed with the first Court and following a ruling of this Court decreed the claim of the plaintiffs against the property that had been purchased by Amolak in execution of his decree. In second appeal to this Court the contention on behalf of Amolak's son is that the plaintiffs had no priority over him inasmuch as their mortgages of 1893 had merged into the decree of 1898. On the other hand the contention for the plaintiffs-respondents is that where a prior mortgagee obtains a decree upon his prior mortgage and in lieu of the amount of that decree he obtains a subsequent mortgage of the

same property from the mortgagor, the prior mortgage enures to his benefit and he can hold it up as a shield against the puisne mortgagee whose mortgage is of a date subsequent to that of the prior mortgage, and if it is to the benefit of the prior mortgagee to keep alive that mortgage, it would be presumed that he kept it alive. In support of this contention several cases have been cited by the learned Counsel for the plaintiffs-respondents. The principal case upon which reliance is placed is a case of this Court reported as *Kanhaiya Lal* v. *Ohhidhu Singh* (3). It is unnecessary to refer to the other cases cited on behalf of the respondents, as there is no doubt that there is authority in support of the contention. But I think as far as this case is concerned none of those cases is applicable. The facts of this case are quite different. If it be conceded that where a prior mortgagee obtains a decree upon his prior mortgage and in lieu of the decretal amount gets a subsequent mortgage of the same property from the mortgagor, the prior mortgage enures to his benefit and he can enforce it against the property in preference to the subsequent mortgagee, it has still to be seen whether in the present case there was an intention on the part of Chajju Khan or Mohammad Hussain Khan to keep alive the prior mortgage, or under the circumstances of the present case we can presume such intention. On reference to the deed of the 17th of May 1904 it is clear that there was no intention to keep the mortgages of 1893, or the decree of 1893, alive for the benefit of the mortgagee. In fact the wording is such that a contrary intention is expressed. It is distinctly stated there that the mortgage was taken partly in satisfaction of the decree of 1898 which had been put into execution, upon which payments had been made and which after the execution of the mortgage had been certified as discharged. In the deed of the 17th of May 1904 only a portion of the property that was mortgaged in the deeds of 1893 was taken by way of security (and other property of higher value was also taken by way of security). I would also note here that this case is to be governed by the provisions of Act IV of 1882.

(3) 7 Ind. Cas. 468; 7 A. L. J. 984.

Under section 89 of the said Act when the order absolute is made, the right to redeem and the security of the mortgage are both extinguished. I am aware of the fact that in spite of the language of section 89 the Courts have allowed redemption, and in the cases cited on behalf of the plaintiffs-respondents the mortgage security is said not to have been extinguished. With due deference to the learned Judges I would say that the language of the section is quite clear and distinct, and the mortgage security is extinguished when after a decree is passed on a mortgage an order absolute is made. The mortgagee instead of having the mortgage as a security on getting a decree has his right of sale under the decree. Their Lordships of the Privy Council in the case of *Het Ram* v. *Shadi Ram* (4) say: "The section then provides that the defendant's right to redeem and the security shall both be extinguished." The construction which their Lordships put on the language so used is that on the making of the order absolute the security as well as the defendant's right to redeem are both extinguished, and that for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree. After this expression of opinion it can hardly be contended that if a prior mortgagee obtains a decree and that decree is made absolute and then he takes a fresh mortgage, he can still fall back upon his first mortgage as against intermediate mortgagees. I would, therefore, hold that the plaintiffs-respondents have no priority over the defendant-appellant in respect of the property purchased by his father. I would, therefore, allow the appeal.

LINDSAY, J.—I agree that this appeal should be allowed. The suit out of which it has arisen has been brought by the plaintiffs-respondents for the purpose of recovering a debt secured by a mortgage executed in their favour in the year 1904. They are seeking to recover the mortgage money out of property which is in the possession of the defendant-appellant, under a title which runs back as far as the year 1894. It is

(4) 45 Ind. Cas. 798; 40 A. 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 45 I. A. 130 (P. C.).

admitted that the appellant's father got a mortgage of the property in 1894, and afterwards brought a suit for sale upon the mortgage and purchased the property himself. It is plain, therefore, that the mortgage upon which the present suit has been brought is posterior in date to the date of the mortgage under which the defendant-appellant has acquired his title. The case for the plaintiffs, however, is that by reason of certain previous mortgages with which they were concerned they have acquired priority over the defendant-appellant in respect of a sum of Rs. 156 which formed part of the consideration of the mortgage now in suit. Reference has already been made in the judgments of my learned colleagues to the history of the litigation prior to the year 1904. In the mortgage now in suit a reference is made to the suits brought by the present plaintiffs-respondents in respect of the two mortgages of 1893. It is stated in the document that a preliminary decree was obtained by the present plaintiffs in the year 1893 and that an order absolute was passed in their favour in March 1899. It may, therefore, be conceded that just before the mortgage of 1904 the plaintiffs-respondents had security for the previous mortgage debts. Whether or not that previous security was kept alive after the document of 1904 was written is a question of the intention of the parties. Where there is no evidence either way it is settled law that the presumption is that the parties act for their own benefit; and so it may be said in the present case that inasmuch as a sum of Rs. 156 was still owing to the plaintiffs-respondents under the decree obtained by them in the year 1899, it was to their benefit to keep the decree alive when they took the mortgage of 1904. On the other hand the presumption arising out of the assumed benefit may be overturned by direct evidence, and I agree with my colleagues that in the document of 1904 there is language which precludes the notion that it was the intention of the plaintiffs-respondents to keep the previous security alive. I fail to understand how in the face of the language which has been used in this document, where we have an express recital to the effect that the decree had been fully paid off, it is possible for the plaintiffs-respondents here to contend that it was in their minds at the time that the previous security should be maintained.

Even if it could be assumed in favour of the plaintiffs that there was any such intention on their part, the question remains, what was the prior security upon which they were entitled to rely. The nature of this security is determined by the fact that an order absolute under section 89 of the Transfer of Property Act was made in their favour in the year 1899. As my learned colleague, Mr. Justice Rafique, has pointed out, their Lordships of the Privy Council in the case to which he has referred have defined the nature of the security which is left to a mortgagee after he has obtained the order absolute described in section 89 of the Transfer of Property Act. The right of the mortgagee under the security is extinguished and there is substituted therefor a right to a sale conferred by the decree. In other words, the only right which is left to the mortgagee after such an order has been passed is the right to execute the decree. This being the nature of the security which was left to the plaintiffs-respondents after the order absolute was passed in their favour in 1899, if they now seek to maintain that that security is alive, then the only remedy for them is to take out execution of the decree. Instead of doing so they have resorted to the present suit which it was not competent for them to do. Mr. Hameedullah, who appears for the plaintiffs-respondents, has pointed out that unfortunately it would be impossible for his clients to take out execution of the decree of 1899 against the defendant-appellant, on the ground that neither he nor his father, was a party to the decree obtained by the plaintiffs on the mortgages of 1893. All that need be said in this connection is that if such is the case the plaintiffs have only themselves to blame. Under section 85 of the Transfer of Property Act they ought to have made Amolak (the subsequent mortgagee) a party to the suit which they brought on the mortgages and if they omitted to do so, they cannot now correct their error by trying to go behind the decree and instituting a suit upon a mortgage which has become extinguished. I think this is all that is necessary for me to say with re-

gard to the question of law which is before us. I would allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decree of the lower Appellate Court set aside and the decree of the Court of first instance restored with costs in all Courts. Costs in this Court will include fees on the higher scale.

Appeal allowed.

PATNA HIGH COURT.
CIRCUIT COURT, CUTTACK.
APPEAL FROM APPELLATE ORDER NO. 16 OF 1917.
April 3, 1918.
Present :—Mr. Justice Chapman and Mr. Justice Roe.
MADHU PADHAN—DECREE-HOLDER—APPELLANT
versus
JAGU JENA—PLAINTIFF—RESPONDENT.

Orissa Tenancy Act (II of 1913), s. 31 (4)—Occupancy holding, sale of, in execution of money decree—Objection that rights are not transferable, whether tenable.

It is open to an occupancy *raiyat* to object to the sale of his holding in execution of a decree for money, upon the ground that his rights are not transferable without the consent of the landlord.

Appeal from an order of the District Judge, Cuttack, dated the 25th August 1917, confirming that of the Munsif, Kendrapara, dated the 21st May 1917.

Mr. *Purna Chandra Palit*, for the Appellant.

Mr. *Sarat Chandra Mukherji*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Cuttack, dismissing an appeal from an order of the Munsif upholding an objection made by an occupancy *raiyat* to the sale of his holding in execution of a money decree upon the ground that it was not transferable. Sub-section (4) of section 31 of the Orissa Tenancy Act provides that save in certain cases of private sale, for which express provision is made in the earlier portion of the section, no transfer of an occupancy holding or portion thereof otherwise than by a succession or by sale in execution of a decree for arrears of rent shall be valid against the landlord of the holding unless and until he has consented thereto. It has been contended before us that the meaning of this sub-section is that such transfers shall be valid otherwise than against the landlord. On the other hand, the current of decisions up to the passing of the Orissa Tenancy Act and thereafter has been uniform, and it was long ago established that an occupancy *raiyat* can on his own behalf object to the sale of his holding in execution of a money decree. It is sufficient to refer to the decision in *MacPherson* v. *Debi Bhushan Lal*, (1). We are not satisfied that the Legislature, by the terms of sub section (4) of section 31 of the Orissa Tenancy Act, intended to make a change in that respect. Our attention has been then invited to the case of *Giridhari Naik* v. *Kashi Tindi* (2). That was a case in which a decree had been obtained upon a mortgage of the occupancy right. Two considerations arose in that case. The first consideration was that the tenant, having previously mortgaged the occupancy right, was estopped from subsequently pleading that the occupancy right is not transferable. The second consideration is with respect to the series of decisions in the Calcutta High Court, in which a sale in execution of a mortgage decree has been held to be in substance a private sale. We are of opinion that the decision in that case is no authority for holding that an occupancy *raiyat* cannot object to the sale of his holding in execution of a money decree upon the ground that his rights are not transferable without the consent of the landlord. We are of opinion that the learned District Judge was right, and the appeal is dismissed with costs.

Appeal dismissed.

(1) 42 Ind. Cas. 36; 2 P. L. J. 530.
(2) 41 Ind. Cas. 128; 2 P. L. J. 476.

GULUSAM BIVI *v.* AHMADSA ROWTHER.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 588 OF 1917.

October 17, 1918.

Present :—Justice Sir William Ayling, KT., and Mr. Justice Krishnan.

GULUSAM BIVI—DEFENDANT No. 10—APPELLANT

versus

AHMADSA ROWTHER AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 TO 7, 9 AND LEGAL REPRESENTATIVES OF DEFENDANT NOS 8 AND 1—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, rr. 12, 18—Partition suit—Preliminary decree, omitting directions for future mesne profits—Enquiry at time of passing final decree, whether permissible—'Further directions' in r. 18, meaning of.

In a partition suit directions for the ascertainment of and enquiry into mesne profits should be embodied n the preliminary decree. Where the preliminary decree is silent as to them, such directions cannot be given in the final decree. [p. 141, col. 1; p. 142, col. 1.]

Venkamamidi Mahalakshmamma v. *Venkamamidi Rajamma*, 43 Ind. Cas. 458, dissented from.

Maimod Rowther v. *Doraisami Naicker*, Appeal against Order No. 277 of 1917, (unreported), distinguished.

Doraisami Aiyar v. *Subramania Aiyar*, 42 Ind. Cas. 929; 41 M. 188; 22 M. L. T. 484; 33 M. L. J. 699; (1917) M. W. N. 847; 6 L. W. 784, explained.

Per *Ayling, J.*—The principle of Order XX, rule 12, Civil Procedure Code, should be applied to preliminary and final decrees in partition suits under rule 18. [p. 141, col. 1.]

The final decree in a partition suit should be passed as in the cases specifically dealt with by rule 12 of Order XX of the Civil Procedure Code. The further directions in rule 18 of the Code must be understood as relating to the further enquiry which is found necessary and the final decree, contemplated, though not specifically referred to, in rule 18, should be restricted in exactly the same way as the final decree referred to in rule 12. [p. 141, col. 1.]

Per *Krishnan, J.*—The words 'further directions' in Order XX, rule 18, Civil Procedure Code, are wide enough to include a direction for enquiry into mesne profits, but under the rule the direction should be in the preliminary decree. It is not necessary to pray in aid rule 12, which does not properly apply, by its own force, to a partition suit. However, in making an enquiry into profits ordered under rule 18 the provisions of rule 12 (1), clauses (*b*) and (*c*), and clause (2) will be kept in view as guiding the Court in such an enquiry. [p. 142, cols. 1 & 2.]

Where the preliminary decree is silent as to mesne profits, the proper remedy for the party aggrieved is to file a suit. [p. 143, col. 1.]

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 16 of 1916, preferred against the decree of the Court of the Subordinate Judge, Kumbakonam, in Original Suit No. 51 of 1907.

FACTS appear from the judgment.

Messrs. *T. Narasimha Aiyangar* and *K. R. Rangasawmi Aiyangar*, for the Appellant.—The appellant is entitled to ask for an enquiry into mesne profits before the final decree is passed, when the preliminary decree contains no directions for the same. The language of Order XX, rule 12, which must be read with rule 18, shows that the Court should await the passing of the final decree to enquire into the question of profits. Under rule 12 the Court should direct an enquiry into mesne profits when it decrees possession. In a partition suit the decree for possession is the final decree. There is nothing to prevent the Court from giving directions for mesne profits at the time of passing the final decree.

The decided cases also are in favour of the appellant's contention. *Vide Venkamamidi Mahalakshmammav. Venkamamidi Rajamma*(1) and *Maimod Rowther* v. *Doraisami Naicker*, Appeal against Order No. 277 of 1917.

Messrs. *C. V. Ananthakrishna Aiyar* and *C. R. Subramayya Aiyar*, for the Respondents.—The proper stage in which a Court could give directions for mesne profits in a partition suit is at the time of passing the preliminary decree. It is only where the preliminary decree has directed such enquiry that the final decree can provide for past or future mesne profits. If the preliminary decree has omitted all mention of mesne profits, the remedy of the aggrieved party is to go to a separate suit: *Doraisami Aiyar* v. *Subramania Aiyar* (2), or apply for amendment of the preliminary decree. The "further directions" referred to in rule 18 include an enquiry into the question of mesne profits.

In *Maimod Rowther* v. *Doraisami Naicker*, Appeal against Order No. 277 of 1917, there is only the *obiter* of a single Judge. It is not the considered judgment of a Bench.

The provisions of Order XX, rule 12, should be invoked in construing rule 18.

JUDGMENT.

AYLING, J.—This appeal relates to appellant's claim to future mesne profits on the property awarded to her by the decree in a partition suit in which she was 10th defendant. The preliminary decree in the suit is silent on

(1) 43 Ind. Cas. 458.

(2) 42 Ind. Cas. 929; 41 M. 188; 22 M. L. T. 484; 33 M. L. J. 699; (1917) M. W. N. 847; 6 L. W. 784.

the subject of future mesne profits on appellant's share and the question is whether she is entitled to ask that they should be determined and included in the final decree.

In my opinion she is not. We are not now concerned with the decision of the Full Bench in *Doraisami Aiyar* v. *Subramania Aiyar* (2) that where the decree in a suit for possession leaves a claim to mesne profits undecided, a fresh suit for the mesne profits will lie. What we have to determine is the extent to which the final decree in a partition suit can provide for matters which are not settled or directed to be enquired into by the preliminary decree. The relevant provisions of law are rules 12 and 18 of Order XX, which have to be read together, and in my opinion their effect is against appellant. A simple suit for possession of specific immoveable property, uncomplicated by any question of partition, is governed specifically by rule 12: and it seems clear to me that in such a suit the final decree could only provide for mesne profits, past or future, where an enquiry into the same had been directed by the preliminary decree. If, either intentionally or inadvertently, the Court had omitted to direct such an enquiry, the aggrieved party must get the preliminary decree amended; no application for mesne profits not provided for in the preliminary decree would be entertained in framing the final decree. This was not, in fact, contested by the learned Vakil for appellant.

I fail to see why the same principle should not be applied to preliminary and final decrees in partition suits. Rule 18 (2) says:—

"The Court may, if the partition or separation cannot be conveniently made without further enquiry, pass a preliminary decree declaring the rights of the several parties interested in the property, and giving such further directions as may be required."

As to what follows the rule is silent; but the law obviously intends that a final decree should be passed as in the cases specifically dealt with by rule 12: and I think the "further directions" must be understood as relating to the "further enquiry" which is found necessary and that the final decree, contemplated, though not specifically referred to, by rule 18, should be restricted in exactly the same way as the final decree referred to in rule 12 With all respect, I am unable to agree with the view expressed by Oldfield, J., in *Venkamamidi Mahalakshmamma* v. *Venkamamidi Rajamma* (1) that a direction for enquiry regarding future mesne profits should be made in the final decree and they should be the subject of a separate final decree after its conclusion. This involves three distinct stages of decree; whereas, as it seems to me, the law expressed in the rules above quoted contemplates only two [see *Bhartendu* v. *Yaqub Husain* (3) and *Kamini Debi* v. *Promotho Nath Mukerjee* (4)]. I respectfully agree in this connection with my Lord the Chief Justice, who says in *Doraisami Aiyar* v. *Subramania Aiyar* (2): "The change introduced by the new rule is that the award of mesne profits in all cases is to be by preliminary decree and that when ascertained they are to be embodied in a final decree, whereas under sections 211 and 212 they were to be ascertained in execution." We are referred to an unreported case, *Maimod Rowther* v. *Doraisami Naicker* (Appeal against Order No. 277 of 1917), in which the learned Judges remarked that unless there was an adjudication on plaintiff's rights to profits before the preliminary decree was passed, there was no reason why the Court should not provide in its final partition decree for an enquiry regarding it. Neither this decision nor that of the single Judge in *Venkamamidi Mahalakshamamma* v. *Venkamamidi Rajamma* (1) is, of course, binding on us, but I may remark that the circumstances of the unreported case were quite different. In that case a party was endeavouring to attack in execution the terms of a final decree which had already been passed, and had conclusively determined the right to the mesne profits in question. Even if the judgment had been directed to be reported, the remarks above quoted would be of an "obiter" nature in so far as they went beyond the facts of the case.

I would dismiss the appeal with costs of defendants-respondents.

KRISHNAN, J.—I agree with my learned brother that this second appeal fails.

The 10th defendant, who is the appellant before us, claimed past and future profits

(3) 18 Ind. Cas. 701; 35 A. 159; 11 A. L. J. 120.
(4) 27 Ind. Cas 317; 20 C. L. J. 476; 19 C. W. N. 755.

along with her share in the property in her written statement. But the preliminary decree, which was passed so long ago as 1909, said nothing about future profits while refusing the past profits, though it recognised her claim to a share in the property. She appealed against the decree and again claimed future profits, but the Appellate Court also did not deal with them or grant them. Though she filed a second appeal she did not again renew her claim for such profits.

The final decree was passed in 1915, in which the 10th defendant was given her share in the property. She again appealed to the District Court and there claimed future mesne profits once again. Apparently she did not claim them in the first Court when it was passing its final decree, as there is no reference to them in its judgment. The District Judge refused to allow the matter to be re-opened before him and I think he was right in doing so in the circumstances of this case.

The learned Judge may be wrong in saying that the appellant's claim to future profits has been "definitely, though not explicitly, decided against her", and it may be that it is still open to her to sue for them if so advised under the ruling of the Full Bench in *Doraisami Aiyar* v. *Subramania Aiyar* (2). I do not, however, think that that is any reason why the final decree should be any longer delayed by directing a fresh enquiry into mesne profits even if it is competent to the Court to do so now. Admittedly the claim for future mesne profits in a suit for possession of immoveable property is not one which a party can, as a matter of right, insist upon being adjudicated upon in the suit. I think, therefore, the Judge was right in refusing to consider the question of future profits in the appeal before him.

As the question when exactly the order directing an enquiry into mesne profits should be made in a partition suit has been argued at some length before us, I think it proper to state my view regarding it. I agree with my learned brother that the order should be passed at the time of the preliminary decree itself.

It is rule 18, clause (2), of Order XX of the First Schedule of the Code of Civil Procedure that provides for the passing of the preliminary decree in a partition suit. That rule gives power to the Court when passing such a decree to "give such further directions as may be required." These words, I think, are wide enough to include a direction for an enquiry into mesne profits; but under the rule the direction should be in the preliminary decree. It is not necessary to pray in aid rule 12.

The wording of rule 12 of Order XX is not such as would properly apply to a partition suit, for it contemplates a suit for possession in which a decree for possession can be passed at the very first stage; whereas in a suit for partition, though finally a decree for possession of specific immoveable property may be passed, it is not always convenient to do so without a preliminary decree and a further enquiry; and it may also happen that in such a suit directions as to several other matters such as payment of debts and collection of outstandings may become necessary. The rule does not, therefore, in my opinion properly apply, by its own force, to a partition suit. No doubt in making an enquiry into profits ordered under rule 18 the provisions of rule 12 (1), clauses (*b*) and (*c*), and clause (2) will be kept in view as guiding the Court in such an enquiry.

But even if we assume that we should read rule 18, clause (2), with rule 12 (1), clauses (*b*) and (*c*), and clause (2) to grant mesne profits in partition suits, I am of opinion that the preliminary decree which each rule contemplates is one and the same and it is not necessary to have two different preliminary decrees and two different final decrees at different stages. Neither rule contemplates more than one preliminary decree and one final decree in one suit. In fact the Code nowhere contemplates more than one preliminary decree and one final decree in one suit. To have two final decrees and to call the first one a "final" decree will be really a misnomer, as it will not be final. To hold the view taken in *Venkamamidi Mahalakshmamma* v. *Venkamamidi Rajamma* (1) and *Maimod Rowther* v. *Doraisami Naicker*, Appeal against Order No. 277 of 1917, is, it seems to me with all respect to the learned Judges, to unnecessarily lengthen out proceedings with a possibility of appeals and second appeals from at least three different decrees in the same suit.

Assuming that rule 12 should be read with rule 18 to give mesne profits in a partition suit, is there anything in the former

rule that compels the Court to wait till the passing of the final decree in partition, before it can order an enquiry into mesne profits? It is said that there is, because the rule speaks of passing a decree for possession in clause (*a*) when directing enquiry into profits under the following clauses and it is argued that in a partition suit the decree for possession is the final decree. In considering the wording of rule 12, as already pointed out, it must be borne in mind that it contemplates a suit where a decree for possession can be passed at the very first stage. In applying that rule to a case where such a decree cannot be passed as in a partition suit, we are, I think, not justified in reading it too strictly but we should make the necessary allowance to avoid unnecessary multiplicity of proceedings especially when clause (*a*) does not properly apply to such a suit. I can see no difficulty in holding that an enquiry into mesne profits should, if the Court thinks fit to order it, be directed in the preliminary decree itself and that, I believe, is in accordance with the prevailing practice of the Courts. I, therefore, consider that when the 10th defendant applied for mesne profits before the preliminary decree was passed, she acted properly but when they were not granted to her, her remedy, if any, was by a separate suit. It was too late for her to ask for them in the present appeal.

I agree the second appeal should be dismissed with costs of defendants (respondents.

M. C. P.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 642 OF 1917.

May 1, 1919.

Present :—Mr. Justice Rafique and Mr. Justice Walsh.

AJUDHIA PURI—PLAINTIFF—APPELLANT

versus

BRIJ BHUKHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 167—Landlord and tenant—Status of tenant declared by Revenue Court—Civil suit for declaration that relation does not exist, maintainability of—Jurisdiction of Civil and Revenue Courts.

A person who has been declared a tenant by the Revenue Court in a suit between the parties and the nature of his tenancy has also been determined, cannot subsequently ask the Civil Court for a declaration that he is not a tenant. Section 167 of the Agra Tenancy Act debars him from suing in the Civil Court. [p. 144, col. 2.]

Second appeal against the decision of the Subordinate Judge, Mainpuri, dated the 4th of April 1917.

Mr. *Gokal Prasad*, for the Appellant.

Mr. *N. C. Vaish*, for the Respondents.

JUDGMENT.—The facts which have given rise to this appeal are as follows:—The defendants-respondents are the Zemindars of the village Bidhuna. The plaintiff-appellant was, prior to 1313 Fasli, entered in the revenue papers as *muafidar* of plot No. 757. In the year 1313 Fasli when he was a minor, one Raghubarpuri entered into an agreement with the Zemindars on behalf of the plaintiff-appellant as his guardian, undertaking to pay rent in respect of plot No. 757. Ever since then the plaintiff's name has been shown in the revenue papers as that of a tenant in respect of plot No. 757. In 1915 the Zemindars distrained the crops of the plaintiff for arrears of rent. Thereupon the plaintiff contested the distraint under section 142 of the Tenancy Act and raised the question of his tenure with regard to plot No. 757. He stated that he was a *muafidar* of the plot and that Raghubarpuri was not his guardian and had no right to enter into an agreement with the Zemindars on the 24th of October 1905, giving up on behalf of the plaintiff the rights of a *maufidar* and undertaking to pay rent of plot No. 757. The Revenue Court went into the question of the validity of the agreement and held against the plaintiff. The application of the latter contesting the distraint was disallowed. After the decision of that case, the suit out of which this appeal has arisen was filed by the plaintiff on the 9th of August 1916 against the defendants-respondents, the Zemindars of the village, for a declaration that plot No. 757 was his *muafi* and that the defendants had no right to take any rent in respect of that plot. The plaintiff based his claim on the allegation that Raghubarpuri was not his guardian either appointed by a Court or under the

Hindu Law and had no right to enter into an agreement with the Zemindars on behalf of the plaintiff and to relinquish the *muafidari* rights. The defendants resisted the claim on various pleas. They maintained that Raghubarpuri was the guardian of the plaintiff and during the latter's minority did all the business for him and could enter into an agreement with the Zamindars, and that the agreement entered into by him was a valid agreement binding upon the plaintiff. They further pleaded limitation, *res judicata* and the want of jurisdiction in the Civil Court to try the suit. The Court of first instance dismissed the claim. On appeal its decree was confirmed. The lower Appellate Court did not refer to the question of jurisdiction. It decided the plea of limitation in favour of the plaintiff, but held that the claim was barred by *res judicata* inasmuch as the decision of the distraint case on appeal by the District Judge was a decision of a competent Court empowered to hear the present case. The learned Judge also decided in favour of the plaintiff the question of the validity of the agreement of Raghubarpuri. He held that Raghubarpuri was not the guardian of the plaintiff and was not authorised to come to terms with the defendant Zemindars and that the agreement was not binding upon the plaintiff. In second appeal to this Court it is contended that the claim of the plaintiff is not barred by *res judicata*.

We may at once concede the correctness of this contention. The learned Counsel for the respondents who has argued the case with great ability has, however, urged that he can support the decree of the lower Appellate Court on another ground, namely, that of want of jurisdiction in the Civil Court to try the present suit. He relies upon the provisions of section 167 of the Tenancy Act. He contends that the former suit of the plaintiff in the Revenue Court was brought under section 142 of the Tenancy Act; that is one of the suits mentioned in the 4th Schedule of the Act. In that case the very points that the plaintiff now seeks to raise were decided, namely, whether the agreement of 1904-05 given by Raghubarpuri was binding on the plaintiff and whether the plaintiff was a tenant of the respondents. He cannot by merely changing the form of his relief evade the provisions of section 167 of the Tenancy Act. In the present case he asks for a declaration that plot No. 757 is his *muafi* and that he is not liable to pay rent in respect of it. In other words, he wants to have his tenure of the plot No. 757 determined by the Civil Court. The same question was before the Revenue Court in the distraint case and was decided against the plaintiff. The learned Counsel also relies upon the provisions of section 95 of the Rent Act and on the case of *Ram Singh* v. *Girraj Singh* (1). For the plaintiff-appellant the reply is that he could not go to a Revenue Court to ask for a declaration that he was a *muafidar*. Section 95 of the Rent Act applies only to cases where the relationship of landlord and tenant is admitted. As to section 167, the answer is that the present suit is not of the nature of the suits mentioned in the 4th Schedule. The real question in the case is whether a party who has been declared by the Revenue Court to be a tenant can come to a Civil Court subsequently and ask for a declaration that he is not a tenant at all. In the present case the plaintiff has been declared a tenant by the Revenue Court in the litigation between the parties and the nature of his tenancy is determined and we think that section 167 does stand in the way of the plaintiff in the present litigation. We, therefore, hold that there is no substance in the appeal. We dismiss it with costs, including fees in this Court on the higher scale.

Appeal dismissed.

(1) 26 Ind. Cas 731; 12 A. L. J. 1252; 37 A. 41.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1183 OF 1916.

May 29, 1918.

Present :—Mr. Justice Fletcher and Mr. Justice Smither.

KALI PRASONNO MAITY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 102

(h), 104 *H—Rent, enhancement of, on ground of rise in prices of crops—Suit for revision of rent, maintainability of—Special conditions and incidents of tenancy—Rent, whether special incident.*

Section 104 H, clause (3), of the Bengal Tenancy Act does not contemplate a suit by a person who has been aggrieved by an enhancement of rent made on the ground that there has been a rise in the prices of staple food crops.

Section 104 H (3) (*g*) of the Bengal Tenancy Act does not apply to the incidents of a tenancy generally but to the special conditions and incidents mentioned in section 102 (*h*) of the Act.

Rent is not a special incident of a tenancy but a general incident, because all lands held from a landlord are generally liable to pay rent.

Appeal against the decree of the District Judge, Midnapur, dated the 23rd of March 1916, modifying that of the Subordinate Judge, 2nd Court of that district, dated the 30th of January 1914.

FACTS of the case will appear from the following extract from the judgment of the lower Appellate Court :—

"The rent of the respondent's holding was enhanced on the ground that there had been a rise in the prices of staple food crops. Now, that the rental has been enhanced on account of a rise in prices it is not a ground under which, under clause (3) of section 104 H of the Bengal Tenancy Act, a suit can be brought under the section. The learned Subordinate Judge, therefore, having dismissed the suit in so far as it proceeded on the ground that land had been wrongly omitted from the plaintiffs' tenancy, had no jurisdiction to consider whether the rent fixed by the Settlement Officer in respect of the holding was a just and proper rent or not.....I am of opinion, therefore, that the order of the learned Subordinate Judge revising the entry of rent was *ultra vires* and the rent fixed by the Settlement Officer must stand in the record....."

Babu *Sarada Charan Maity*, for the Appellants.

Babu *Ram Charan Mitter*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs against the decision of the learned District Judge of Midnapore, dated the 23rd March 1916, modifying the decision of the Subordinate Judge of the same place. The suit was brought under the terms of section 104 H of the Bengal Tenancy Act. The learned District Judge has held that the matter raised in the suit could not be raised under the terms of section 104H of the Bengal Tenancy Act. As against that, the learned Vakil, who has appeared in support of the appeal, states that the Record of Rights in this case was not published under sections 104A to 104F and that, therefore, he can, under the general law of the land, question this document as being a document prepared without any legal authority at all. It is quite clear that the evidence does not establish any such case. There is nothing to show that this document was prepared in direct disobedience to the orders of the Government or that the Government had ever made an order under the terms of the Act directing that the rent of this tenancy should not be settled. One cannot, on a mere surmise, state that the rent has not been settled. If, then, the rent has been settled, it is quite clear that, under the terms of section 104H, this question cannot be gone into in this suit. It was suggested that this case came under the definition of special conditions and incidents of the tenancy mentioned in section 104H (3) (*g*) of the Bengal Tenancy Act. But that clearly is not so. The special conditions and incidents refer to the special conditions and incidents, mentioned in section 102 (*h*) and the rent payable comes under section 102 (*e*). A point was made or attempted to be made that because the breviate to section 158 of the Act mentions 'application to determine incidents of tenancy,' therefore, the rent payable is an incident of the tenancy. There are two answers to that: section 104 H (3) (*g*) does not mention the incidents generally but refers to the special incidents, and the special incidents are mentioned in section 102 (*h*). Section 104H (3) (*g*) does not apply to incidents generally but to special incidents. Rent obviously is not a special incident, because all lands held from the landlord are generally liable to pay rent and that would be a general incident and not a special incident. In our opinion, the learned Judge was quite right when he came to the conclusion that this suit was not competent. In that view the present appeal fails and must be dismissed with costs.

Appeal dismissed.

MAHADEO MISIR *v.* DIRGPAL PANDE.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 80 OF 1918.

January 8, 1919.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

MAHADEO MISIR AND OTHERS—DEFENDANTS—APPELLANTS

versus

DIRGPAL PANDE—PLAINTIFF—RESPONDENT.

N. W. P. Rent Act (XII of 1881), s. 9, scope of—Occupancy holding—Will, transfer by, validity of.

The provisions of section 9 of the N. W. P. Rent Act, XII of 1881, rendered void the terms of any Will in existence on the date on which that Act was passed, if those terms contravened the prohibition against the transfer by Will of a right of occupancy which was thereby enacted.[p. 147, col. 2.]

First appeal from an order of the Additional Judge, Gorakhpur.

Mr. *Saila Nath Mukerji*, for the Appellants.

Dr. *Surendra Nath Sen*, for the Respondent.

JUDGMENT.—This is a first appeal against an order of remand passed by the District Judge of Gorakhpur in an appeal from a decision of the Munsif of Deoria. The suit in question arose in the following way. One Gayadat Pande was an occupancy tenant in the village of Kasia. He died in or about the year 18 4 A. D. and, in so far as the land in suit is concerned, it is an admitted fact that this land passed into the occupation of his widow, *Musammat* Rajpali, who was recorded as tenant of the same and remained ostensibly in possession as tenant for a long period of years. The said Rajpali died in 1915 and since her death conflicting claims to the possession of this land have been put forward by Drigpal Pande, a nephew of the deceased, on the one hand, and on the other hand by the defendants-appellants, who are the daughter and the daughter's sons of the aforesaid Gayadat Pande and *Musammat* Rajpali. The case set up in the plaint was essentially this, that Gayadat had died while a member of the same joint undivided Hindu family as the plaintiff Drigpal, that the land in suit had devolved by survivorship on the death of Gayadat upon the said plaintiff, as part of a larger area which formed the joint occupancy holding of the family. The plaintiff alleged that on the death of Gayadat he had obtained peaceable possession of the entire holding, including the land in suit, and had given the widow Rajpali nothing but what she was entitled to under the Hindu Law, namely, maintenance as a widow belonging to the joint family. The plaint goes on to assert that, some two years after the death of Gayadat Pande, there was a dispute between the plaintiff and *Musammat* Rajpali as to the maintenance to be enjoyed by the latter, and that the plaintiff then assigned the land in suit to *Musammat* Rajpali in lieu of the maintenance to which she was entitled. In effect, therefore, the plaintiff's case was that the land in suit had continued, as a matter of law, ever since the death of Gayadat Pande, to form part of an occupancy holding, including this and other land, of which the tenant was the plaintiff Drigpal. He admitted the fact of *Musammat* Rajpali's possession as regards the land in suit. He pleaded that her possession was permissive only and enjoyed by her in lieu of her right to maintenance. If so, of course, *Musammat* Rajpali had no rights as tenant of the land in suit which could devolve upon any one on her death and the plaintiff was entitled to resume possession of this land on the death of *Musammat* Rajpali, merely on the ground that *Musammat* Rajpali's right to maintenance was extinguished by her death and that the plaintiff continued to be, as he had been all along, the occupancy tenant of the land in suit. Unfortunately, as it has turned out, the plaintiff's case was complicated by a reference made in the third paragraph of the plaint to a Will which Gayadat Pande had left behind him. All that is really said about this Will is to the effect that Gayadat himself had made it clear in the said Will that the land in suit formed only part of the joint occupancy holding of the family and that, although *Musammat* Rajpali might after his death be entitled to maintenance out of the joint occupancy holding, she would not enjoy full rights of ownership over any portion of the same or have any power of alienation. When the case went to trial, it would seem as if the plaintiff was allowed more or less to shift his ground and to set up a right of succession under the Will, independently of, or as

an alternative to, the main case outlined in the plaint. The trial Court fixed two issues which it decided together. One of these dealt with the jointness or separation of the family and the other with the question whether, in any event, any claim which the plaintiff might have to the land in suit had or had not been extinguished by many years of adverse possession on the part of *Musammat* Rajpali. There was further a separate issue on the question of the Will. On the two issues which he tried together the learned Munsif found against the plaintiff. He held that the case of jointness set up in the plaint was not proved and that, in any event, *Musammat* Rajpali had held the land in suit adversely to the plaintiff from the date of her husband's death and had acquired, as against the plaintiff, a good title by adverse possession. With regard to the Will the finding was, in the first place, that it had not been proved; in the second place, that the evidence was not sufficient to show that the land in suit was included in, or formed any part of, the holding referred to in that Will, and, in the third place, that the Will had never been acted upon. This last finding seems to be a repetition in another form of the finding in favour of the adverse possession of *Musammat* Rajpali. The first Court having dismissed the suit, the plaintiff brought the matter before the District Judge in first appeal. In his memorandum of appeal he most distinctly challenged the finding of the trial Court on the question of jointness or separation between his uncle and himself. He further pleaded that the genuineness of the Will should have been presumed and that the Court below was in error in supposing that the terms of the Will had not been acted upon, inasmuch as the possession allowed to *Musammat* Rajpali over the land in suit had been merely the possession in lieu of maintenance which the Will admitted to be her right.

The learned District Judge began by presuming the genuineness of the Will. It was a document 70 years old produced from proper custody. We have not been asked to interfere with the presumption in favour of its genuineness drawn by the lower Appellate Court. That Court, however, was in error in supposing that it could find a short cut to a decision by basing the plaintiff's case only upon the Will. The learned Additional Judge says that, at the time when this Will was executed, there was no statutory prohibition to the transfer of an occupancy holding, by Will or otherwise He assumes in favour of the plaintiff that the Will does refer to the land in suit, and he interprets it as bequeathing this land to the plaintiff, subject to a right of maintenance in favour of *Musammat* Rajpali. Now, to go no further back than the Rent Act XVIII of 1873, it is beyond question that in that year the Legislature expressly prohibited the transfer of a right of occupancy, such as that with which we are concerned in this case, by grant, Will or otherwise, except as between persons who have become by inheritance co-sharers in such right. This prohibition was repeated in more general terms in section 9 of the N.-W. P. Rent Act (XII of 1881). We think it clear, as a question of law, that these Statutes rendered void the terms of any Will in existence on the date on which they were passed, if those terms contravened the prohibition against transfer by Will which was thereby enacted. It follows that the plaintiff cannot succeed in this case on the strength of the Will alone, apart from the case of jointness between himself and his uncle set up in the plaint. The lower Appellate Court, in spite of the opinion which it formed regarding the terms of the Will, has not decreed the plaintiff's claim, but has passed an order of remand, because it was of opinion that further enquiry was needed on a point raised by the defendants' pleadings, namely, whether the land in suit had actually formed part of the old occupancy holding as it existed in the lifetime of Gayadat Pande, or was land in which *Musammat* Rajpali had herself acquired occupancy rights by occupation of the same for the statutory period of 12 years. This is really stating in another form the question which the lower Appellate Court seemed in a previous portion of the judgment to have decided in favour of the plaintiff, when it assumed that the land in suit was part of the land referred to by the provisions of the Will. However this may be, we are satisfied, in the first place, that the order of remand cannot be

affirmed : in the second place, we are not of opinion that we are in a position to restore the decree of the first Court. The plaintiff is entitled to a finding of fact by a Court of first appeal on the question of jointness or separation, and on the question of the nature of *Musammat* Rajpali's possession as tenant of the land in suit, namely, whether the possession was adverse to the plaintiff or permissive on his part. These questions have not been considered at all by the lower Appellate Court in consequence of what was, in our opinion, an erroneous view taken by that Court as to the effect of the Will. Our order, therefore, is that we set aside the order of remand passed by the learned Additional Judge and remand the case to that Court to be re-admitted to his file of pending appeals and disposed of according to law, subject to the observations made by us in this judgment. Costs here and hitherto shall abide the event of the suit.

Case remanded.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

April 19, 1918.

Present:—Viscount Haldane, Lord Dunedin, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

Rani HEMANTA KUMARI DEBI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Maharajah JAGADINDRA NATH ROY BAHADUR—DEFENDANTS—RESPONDENTS.

Bengal Regulation VIII of 1793, *s.* 5—*Bengal Regulation I of* 1801, *ss.* 8, 14—*Declaration of independence of Taluk Balasuti Digar*—"*Actual produce*," *what is.*

The estate of Balasuti Digar, within the *zemindari* known as Parganna Pukhuria in the district of Mymensingh, was, on the application of the *talukdar*, declared in 1805 to be an independent *taluk* within the meaning of Bengal Regulations VIII of 1793 and I of 1801, and that independence has not been lost by any laches of the *talukdar* in affirming his rights to obtain the separation of his *taluk* or by any want of diligence on his part. [p. 151, col. 2.]

The expression "the actual produce" in section 8 of Bengal Regulation I of 1801 on which the assessment of the revenue of the aforesaid *taluk* was to be based, means "the actual produce" at the time when proceedings were instituted for the separation of the *taluk*, as the Legislature could not have intended to lay down an ambulatory standard which would vary according to the period or time when separation was being carried into effect. [p. 152, cols. 1 & 2]

Appeal from a judgment and decree of the High Court of Calcutta, dated the 2nd June 1913, reported as 22 Ind. Cas. 345, affirming a judgment and decree of the 3rd Subordinate Judge, Mymensingh, dated the 29th March 1910.

Mr. *Dunne*, for the Appellants.

Mr. *DeGruyther*, *K. C.*, and Sir *William Garth*, for the Respondents.

JUDGMENT.

MR. AMEER ALI.—This is an appeal from a judgment and decree of the High Court of Calcutta, dated the 2nd June 1913,* which, in affirmance of the order of the trial Judge, dismissed the plaintiffs' suit. The history of this litigation goes back to the end of the 18th century. The Pukhuria estate belonged about that time to the well-known Nattore family. Sometime prior to the Decennial Settlement of Bengal under Lord Cornwallis the then holder of the Zemindari, Rani Bhabani Debi, carved out of the estate in favour of her daughter a Taluk, now called Taluk or Taraf Balasuti Digar. The grantee subsequently made a gift of this property to a nephew, which was affirmed on the Rani's death by the full owner of the estate. Since then the Taluk has remained in the possession of people deriving title under the donee. In 1793 the Zemindari was sold for arrears of revenue, and was purchased by the predecessors-in-title of the present plaintiffs-appellants. Litigation at once commenced between the purchasers of the Zemindari and the owners of the Taluk, which has gone on with little interruption until now, when it is to be hoped it has reached its final stage. There was a number of proceedings between the parties between the years 1793 and 1805 the main endeavour on the part of the purchasers being to reduce Balasuti to the status of a "dependent" Taluk, which the Talukdar vigorously opposed on the ground that it was an "independent" Taluk. The distinction between these two classes of property is pointed out in Regulation VIII of 1793. The status of an independent Talukdar is defined in section 5, and such Talukdars are declared entitled to obtain by process of law separation of the lands "composing the Taluks" from the Zemindari within which they lay. By Regulation I of 1801, section 14, the right to apply for separation was limited to a year from the

*See 22 Ind. Cas. 345—*Ed.*

date of the passing of the Statute. It is not disputed that the Talukdar of Balasuti applied for separation within the period fixed by law.

In 1805 certain rent proceedings came up on "special" appeal to the Sudder Dewany Adaulat of Calcutta, which then occupied the position of the final Court of Appeal on all matters arising in all civil suits in Bengal outside the limits of Calcutta, and that Court, realising the undesirability of allowing a continuance of conditions which gave rise to constant litigation between the parties, made an order, the material part of which, so far as their Lordships' judgment is concerned, runs as follows:—

"But as this is a suit simply on account of the excess Jama of 1206, B. S., therefore, it is not proper to pass any order in the decision of this suit with respect to the payment of the balance of the aforesaid Jama. From the deeds of sale and documents filed by the respondent, Taluk Balasuti and others, the property of the respondent, is fit to be separated from the Zemindari of the appellant, according to the provisions of section 5, Regulation VIII of 1793. The respondent has, within the time prescribed by section 14, Regulation I of 1801, filed a petition for the separation before the Collector of the district, therefore it is necessary that, according to the order of the Collector of 2nd Magh 1208 B. S., the respondent do file before the Collector all the documents relating to his Taluk with a copy of this decision, so that the said Collector do in future deduct, according to the provisions of section 10, Regulation I of 1793, and section 8, Regulation I of 1801, the Sudder Jama of the Taluk of the respondent from the Sudder Jama of the Zemindari of the appellants, and separate the Taluks of the respondent from the Zemindari of the appellants."

The Talukdar appears to have continued his efforts to obtain a separation of his property from the Zemindari, for in 1808 an order was made by the Board of Revenue, bearing date the 30th of December, in the following terms: —

"The Board, having perused the decree passed by the Sudder Dewany Adaulat in a Pukhuria cause, observe that the substance, as stated in your letter, is correct. The Talukdar of Balasuti is entitled to have his Taluk separated from the entire estate of Pukhuria, and the Jama to be allotted on it must bear the same proportion to its actual produce as the Jama of the entire estate bears to the produce of the entire estate; and until this can be ascertained the Talukdar must pay to the Zemindar an annual Jama of Rs. 16,369-8-11."

The separation, however, was, as appears from the record, hung up by a series of proceedings, which lasted intermittently until 1853. In that year the Talukdar made a fresh attempt to get his Taluk separated from the Zemindari, but the Revenue Courts refused his application on the ground that certain suits in relation to the estate were still pending.

In 1882 the Zemindar started a suit in the Court of the Subordinate Judge of Mymensingh for the enhancement of the rent of the Taluk, which the Talukdar strenuously resisted.

The claim for enhancement was dismissed by the Trial Judge, whose decree was affirmed by the High Court, and on an appeal to Her Majesty in Council by the Judicial Committee on the 12th of June 1894.

This, however, did not put an end to the litigation between the parties, and it was only in 1903 that the defendant Talukdar presented a fresh application to the Collector of Mymensingh for giving effect to the order made in favour of his predecessor in the year 1805. This petition bears date the 23rd of March 1906, and recites at considerable length the history of the Taluk and the circumstances which conduced to delay its separation from the Zemindari for such a long period of time. The last paragraph of the petition deserves attention, as one of the contentions of the appellant Zemindar is based on an allegation of laches on the part of the Talukdar diligently to prosecute his claim. It states: —

"that all the resumption suits and all the suits for the enhancement of the rents of the Taluks are now finally disposed of and there remains none of the objections upon which the separation of his Taluk was postponed. And the result of these suits has not in any way affected the assets of the Taluk as found by the Bitwara Deputy Collector in 1874."

On the 8th of April 1908 the Collector recommended to the Board of Revenue "that the separation of the Taluk should be effected at once." His order contains a complete resume of the facts leading up to the application before him. After stating the object of the petition that it was "for the separation of an independent Taluk Taraf Balasuti Digar from the Zemindari of Pergunnah Pukhuria," he goes on to say:—

"It was established by a decree of the Sudder Dewany Adaulat in 1805 that it is an independent Taluk within the definition of section 5 of Regulation VIII of 1793, and the Collector was ordered to separate it from the Zemindari. But there had been an extraordinary delay of over 100 years in carrying that order into effect. Up to 1813 the Talukdar was pressing for the separation, and the Collector was doing his best to separate it. But in that year the Talukdar died, and from then to 1830 the right to the Taluk was disputed, and separation could not be made till one or other of the disputants was registered as proprietor. From 1834 to 1844 the Zemindari was under partition, and the Collector, who had become the proprietor of 4 annas of the estate on behalf of Government by an auction sale, tried to effect the separation simultaneously wi h the partition. But difficulties arose in ascertaining the assets of the Taluk, owing to some suits about enhancement of certain dependent Taluks and resumption of certain lands, and the separation was postponed by order of the Commissioner till those suits were decided. In 1853 the Talukdar again applied for separation, but his petition was dismissed on the ground that the suits were not yet decided. The suits then pending were finally decided in 1873, but in the meantime other suits of the same nature had been instituted which have lasted almost to the present day. And in 1882, while the Talukdar was still a minor, the Zemindar filed a suit denying that the Taluk was independent, and demanding increase i rent from it. This was dismissed by the Subordinate Judge in 1888. The Subordinate Judge held that the Taluk was an independent one, that the decree of the Sudder Dewany Adaulat was binding on the parties, and that the right of the Talukdar to obtain separation was not barred by limitation and still subsisted. The High Court affirmed this decree in 1890, and held that the petition for separation had been filed within the time allowed by Regulation I of 1801, that the Talukdar had been prevented by unusual objections from getting the benefit of the decree of 1805, and that no blame for the delay rested with him. The decision was confirmed by the Privy Council in 1894. In 1896 the Talukdar, after waiting for the disposal of certain title suits, renewed his petition for separation before this Court.

"The right of the Talukdar to separation was never denied by the Zemindar till 1844 (when the question of limitation was raised), was recognised by all Revenue Authorities, including the Board of Revenue, up to 1853, and has never been denied by them since, was affirmed by the Subordinate Judge, High Court and Privy Council up to 1894, and has again been recognised by the Commissioner in March of the present year in a case about Chur Gazali, an accretion to the Taluk. Yet in the face of all these decisions the objector still persists in denying that the Taluk is independent, on the ground that the petition for separation was not filed in time, that, if it was, it is barred by limitation, and that in any case the petitioner has forfeited his claim to relief by repeated laches."

And the Collector concludes his order by the following recommendation :—

"For these reasons I refer the case to the Board of Revenue with a strong recommendation that the separation of the Taluk from the Zemindari should be effected at once, and that the Jama of the two should be assessed at Rs. 17,460-13-8 and Rs. 57,784-11-4 respectively on the basis of the proportion between their assets ascertained in 1795, since, though the figures ascertained in 1808 and again in 1844 by detailed enquiry are much more in favour of the petitioner, the petitioner consents to the large Jama in order to end this scandalously protracted case and to avoid the expense of measurement of a whole Pergunnah."

From this order the Zemindar appealed to the Commissioner, who agreed with the Collector as to the propriety of effecting an immediate separation of the Taluk, but differed from him with regard to the basis on which the revenue was to be assessed,

The Talukdar thereupon appealed to the Board of Revenue, which approved and affirmed the view taken by the Collector respecting the question of assessment. The order of the Board, which bears date the 20th March 1909, is as follows:—

"The order of the Board on the reference is that the Collector do with effect from the 1st day of April in this year enter the Taluk as a separate estate on his Towzi, with a revenue of Rs. 17,460 13-8, and do from that date make a reduction to this amount in the revenue demand against the estates numbered on this Towzi as Nos. 122, 5513, 4803 and 6100, which represent respectively the 10, 2, 2, and 2-annas shares of the Zemindari Pukhuria Joyenshahi in proportion to these respective shares."

On the 11th May 1909, the appellants instituted this suit in the Court of the Subordinate Judge to have it declared that the order of the Board of Revenue was "*ultra vires*, illegal, and wholly injurious to the plaintiffs" for reasons set out at great length and with extraordinary circumlocution in the plaint. They also prayed for a declaration that the Taluk in suit had 'become a dependent Taluk by operation of law." The prayer Kha on which the main argument before this Board turned is in these terms:—

"That if the Court finds that the said Taluk Taraf Balasuti is fit to be separated, then for a declaration that the said Bajey Taluk cannot be separated from the plaintiffs' Zemindari at the Sudder Jama of Rs. 17,460-13 8, unless the Sudder Jama is assessed in the same proportion as the present produce and lands of the defendants' Bajey Taluk bear to those of the Zemindari possessed by the plaintiffs."

The Subordinate Judge in a well considered judgment held on all the points against the plaintiffs. He was of opinion that the order of the Board of Revenue was not *ultra vires*, even if the Civil Court had jurisdiction to determine that question; that the mode of assessing the Government revenue on the Taluk was in accordance with law; and that the Taluk had not ceased to be an independent Taluk by any act or laches on the part of the defendant or his predecessors. He accordingly dismissed the plaintiffs' suit, and his decree has been affirmed by the High Court of Calcutta.

The plaintiffs have appealed to His Majesty in Council, and the same arguments which were discussed in the Courts in India have been urged with great vigour before their Lordships. In whatever other respects the plaintiffs' case may be wanting, it cannot be said that it lacks pertinacity.

With regard to the status of the defendant and the character of the Taluk he holds, their Lordships are in complete agreement with the Courts in India and with the Revenue Courts which have had to deal with the question. There was an express declaration in 1805 that the defendant's estate was an independent Taluk within the meaning of the Regulations and that declaration was re-affirmed in the suit brought by the plaintiffs for enhancement of rent, by the Subordinate Judge, by the High Court, and finally by this Board in 1894.

This ought to have given the quietus to the persistent endeavour on the part of the plaintiffs and their predecessors to reduce the defendant's status to that of a dependent Talukdar. Their Lordships further agree with the Courts in India that he has not lost that status by any laches in the affirmation of his right to obtain the separation of his Taluk, or by any declaration of the Collector in 1854, or of any other Court. His application for separation was made in accordance with the provisions of Regulation I of 1801, within the year from the passing of the Act. There has been no want of diligence on his part in seeking the relief to which he is clearly entitled. His applications have always been hung up by the opposition of the Zemindar or by the action of the Revenue Authorities. Considerable stress is laid on the order of the Collector in 1854, which purported to "dismiss" the Talukdar's application. The same point was urged before the Courts in the enhancement suit, and was disposed of against the plaintiffs' contention; but it is repeated again in the present proceedings. Their Lordships desire to quote here a passage from the judgment of the High Court in the suit of 1882 (for enhancement of rent), with which they entirely agree. The learned

Judges, dealing with these very contentions, said as follows:—

"We think, further, that the whole course of those proceedings shows that the Talukdar, so far from abandoning his right, had made his petition within the time allowed him by Regulation I of 1801, and had been prevented, by what appear to us unusual objections, from getting the benefit of the relief given to him by the decree of 1805. Certainly, if blame there be attachable to either party for not carrying out that decree, none appears to rest with the Talukdar."

In their Lordships' opinion there is no substance in the plaintiffs' contentions, which are purely vexatious designed to prolong litigation.

The objection to the principle on which the revenue has been assessed rests on a better foundation. The Revenue Courts have accepted the assets of the estate about the time when the Regulation was passed for assessing the due proportion of the revenue respectively payable by the Zemindari and the Taluk. The plaintiffs contend that this principle is wrong, that the proper standard on which the Jama should be apportioned is to take into consideration the assets at the time when the separation is being effected.

Section 8 of Regulation I of 1801 provides:—

"The assessment upon the portion of the estate to be separated shall bear the same proportion to its actual produce as the fixed assessment upon the whole estate may bear to its actual produce . . . . and it is hereby explained that by the term 'actual produce' is to be understood the neat annual rent, or other neat produce receivable by the proprietor, after deducting from the gross rent, or other gross produce, the actual expense of collection and other usual charges of management, inclusive of Pulbundy, or the expense of embankments, and similar incidental expenses, where such may be paid by the proprietor from his gross receipts."

Their Lordships are of opinion that "the actual produce" on which the assessment of revenue was to be based was the "actual produce" at the time when proceedings were instituted for the separation of the Taluk. They think the Legislature could never have intended to lay down an ambulatory standard, which would vary according to the period or time when separation was being carried into effect. On the whole their Lordships are of opinion that the judgment of the High Court is right, and that this appeal should be dismissed with costs. And they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Messrs. *Watkins* and *Hunter*.

PATNA HIGH COURT.

CIVIL REVISIONS NOS. 226 TO 229 OF 1918.

March 14, 1919.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

RAMGULAM SINGH—PLAINTIFF—PETITIONER

versus

SHEO DEONARAIN SINGH—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 9—Dismissal in default—Application to set aside, dismissal of—Application to restore application, whether lies.

Where an order is made under Order IX, rule 9, of the Code of Civil Procedure, and an application to set aside that order is also dismissed in default, a further application under Order IX to set aside the dismissal of the first application will not lie. [p. 153, col. 1.]

Civil revisions against an order of the Subordinate Judge, Muzaffarpur, dated the 19th August 1918.

Mr. *Lachmi Narain Singh*, for the Petitioner.

Mr. *Khurshed Husnain*, for the Opposite Party.

JUDGMENT.—The facts of this case are that a suit was decreed on contest against certain defendants and *ex parte* against certain other defendants, who it appears were minors. The minors applied to have the *ex parte* decree made against them set aside. They made default in appearance, and their application under

Order IX was rejected. Thereupon they made a further application under Order IX, asking that the dismissal of their former application under Order IX for default should be set aside.

The lower Court has made that order after going into the merits of the case. In appeal it is contended that the order was made without jurisdiction, inasmuch as Order IX has no application to applications under Order IX. Having regard to the Full Bench decision in the case of *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (1), we must hold in this Court at least no applications under Order IX will lie against an order made under Order IX. The order made by the lower Court is, therefore, set aside. We are asked to regard the order as made under Order XLVII. That we cannot do, for it was an order made by an officer other than the officer who made the original order, nor can we say that section 153 has any application to the matter. The dismissal of order was not an error or defect in the proceedings. It may have been an erroneous order as made on the merits. The only remedy open to the aggrieved minors is to appeal against the original order made under Order IX.

This application is, therefore, allowed with costs, and the order restoring the original application under Order IX is set aside. The original applications will stand dismissed for default subject to any appeal that may be made against them. This order will govern the analogous cases.

Applications allowed.

(1) 49 Ind. Cas. 617; 4 P. L. J. 135; (1919) Pat. 75.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 86 OF 1918.

February 17, 1919.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

SHEORAJ SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NAIK SAHAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption, suit for—Plaintiff joining with him persons having different rights inter se, *effect of.*

In a suit for pre-emption against a stranger vendee, the plaintiff does not lose his right by joining with him persons who have different rights *inter se* but whose rights are superior to those of the vendee. [p. 154, col. 1.]

Second appeal from a decree of the District Judge, Budaun.

Mr. *Sheodihal Sinha*, for the Appellants.

Mr. *S. A. Haidar*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption. It appears that there were two suits brought by rival pre-emptors, one by Munna Lal alone and the other by four other persons. In the second suit (where there were four plaintiffs) two of the plaintiffs withdrew the day after the plaint was filed. The two suits then continued, one in which Munna Lal alone was plaintiff and the other in which the remaining two plaintiffs were Sheoraj Singh and Ram Ghulam. During the trial the rival pre-emptors came to terms by which two-thirds of the property was given to Munna Lal and one-third to the other two plaintiffs out of the half of the property sold belonging to the defendants Nos. 1 to 3. As to the other half of the property sold belonging to Badri Prasad (defendant No. 4), the claim for pre-emption was not pressed. The first Court decreed the claim in the terms of the compromise. The vendees-defendants Nos. 1 to 3 appealed to the Judge. As against the two plaintiffs Sheoraj Singh and Ram Ghulam, the contention was that by joining the other two plaintiffs (who, as we have mentioned above, withdrew immediately after the filing of the plaint) they had forfeited their rights. This contention found favour with the lower Appellate Court and it accordingly made a decree, the effect of which was that Munna Lal got all the property which had been sold to defendants Nos. 1 to 3. The plaintiffs Sheoraj Singh and Ram Ghulam have come here in second appeal, contending, first, that they did not forfeit their rights by joining with them the two plaintiffs because they also were co sharers and secondly, that in any event the amendment of the plaint cured the defect. Munna Lal is amongst the respondents, and he is the only respondent who appears. He is represented by Mr. Haidar, who says that his client has

no objection to the decree of the first Court being restored, provided that the decree of this Court provides that he shall be at liberty to withdraw all money which he paid in respect of any property that were given to the plaintiffs-appellants under the terms of the compromise, and also that he should not be saddled with the costs. The question we have to decide is whether or not the plaintiffs lost their right of pre emption under the circumstances of the present case. If we assume that the two plaintiffs whose names were withdrawn after the filing of the suit were persons who must be regarded as strangers, then the case of *Bhupal Singh* v. *Mohan Singh* (1) is an authority that the mere joining of unauthorised persons in a suit for pre-emption is fatal and that the difficulty is not got over by subsequent amendment of the plaint by striking out of these persons' names. It is quite unnecessary for us to express any opinion as to the ruling in this case, because we think that even if all four plaintiffs had remained on the record, that fact under the circumstances of this case would not have deprived the appellants here of their right of pre emption. It appears that all four plaintiffs were co-sharers and that the vendees were absolute strangers, having no share in the village and having no right of pre-emption. True it may be that two of the original plaintiffs had an inferior right to Sheoraj Singh and Ram Ghulam, but we think that where the suit is a suit against strangers the plaintiffs by joining persons who have different rights *inter se* do not thereby forfeit their right. The learned Judge has referred to the case of *Gupteshwar Ram* v. *Rate Krishna Ram* (2). In that case it was held that where the vendees had joined with them in their purchase a person who had an inferior right to the plaintiff they must be deemed to have forfeited their right as against the plaintiff. The distinction between the facts of that case and the facts in the case before us is that one set of vendees in the case quoted had equal right with the plaintiff while another set had inferior right with the plaintiff. In the present case all the plaintiffs have a right of pre-emption and the vendee had no right at all. We cannot agree with the view taken by the learned Judge. The result is that we allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance, with this modification that the plaintiffs will have one-third of the property conditional upon their paying the amount of the consideration within three months from this date. Munna Lal will be at liberty to withdraw any money which he has paid in excess of his share as a consequence of the decree of the lower Appellate Court. Sheoraj Singh and Ram Ghulam will have their costs of this Court and of the Court below against defendants Nos. 1 to 3. If the money is not paid by Sheoraj Singh and Ram Ghulam within the three months allowed, their suit will stand dismissed with costs in all Courts. As between Munna Lal and Sheoraj Singh and Ram Ghulam each party will pay his own costs in this Court and in the Court below.

Appeal allowed.

(1) 19 A. 324; A. W. N. (1897) 72; 9 Ind. Dec. (N. S.) 212.

(2) 15 Ind Cas. 174; 10 A. L. J. 70; 34 A. 542.

CALCUTTA HIGH COURT.
CIVIL RULE No. 71 OF 1919.
March 14, 1919.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Walmsley.

NASIR MANDAL AND OTHERS—DEFENDANTS—PETITIONERS

versus

SATISH CHANDRA GHOSH—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. VII, r. 11 (c)—Period fixed for payment of deficit Court-fee, extension of—Court, power of.

Under Order VII, rule 11 (c), Civil Procedure Code, a Court has power to extend the period originally fixed by it for the payment of deficit Court-fees. Such extension may be granted by the Court even more than once. [p. 155, col. 2.]

Rule against the order of the Sub-Judge, 2nd Court, Pabna, in Suit No. 45/31 of 1918.

FACTS appear from the judgment.

Babu *Bansory Lal Sarkar*, for the Petitioners.—The main point to be considered in this case is a point of limitation. There

has been grave laches by the plaintiff in presenting his plaint. In the first place, the plaintiff instituted the suit on the very last day of limitation. Then the plaint which he filed in the suit was insufficiently stamped. The Court below has illegally shown considerable indulgence to the plaintiff, who was thrice granted extensions of time to put in the deficit Court-fee. The learned Munsif clearly acted without jurisdiction in extending the time and so the Rule should be made absolute.

Babu *Dinesh Chandra Roy*, for the Opposite Party.—The learned Munsif acted quite legally in extending the time to enable the plaintiff to supply the deficit Court-fee and the plaintiff complied with the order within the time granted. The wording of Order VII, rule 11 (*c*), is clear on the point. It says "...but the plaint is written upon paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court..." So the Court can fix the time, and fixing the time includes extending the time.

Babu *Bansory Lal Sarkar*, in reply.—If the Court had power to grant time to supply the requisite Court fee, it must be a time within limitation. The Court could not extend the period of limitation, which it did in the present case. That power is not given by Order VII, rule 11 (*c*).

JUDGMENT.—We think that this Rule must be discharged. The only question is whether the suit was within time. The suit was filed on a bond which was payable on the last day of Chait 1321 B. S. (=12th April 1915). The plaint was presented to the Court on 15th April 1918, and it appears from the calendar that 13th and 14th April were close holidays. It was, therefore, on the last day of limitation. When presented the plaint was insufficiently stamped. The plaintiff was given three periods in succession of seven days, seven days and five days to put in the deficit Court-fee. This he eventually put in on 3rd May 1918 within the last extension of five days granted to him on 29th April. It is suggested that the Munsif had no power to extend the time for payment of the deficit Court-fee, but it is clear that the Court has such power. That will appear from the wording of Order VII, rule 11 (*c*), Civil Procedure Code. It has been further suggested that under that rule, the Court had power to extend the period once only, but there is nothing in that rule to justify such a limited interpretation. We think that the suit was within time. The Rule must be discharged with costs, hearing fee one gold *mohur*.

Rule discharged.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 112 OF 1918.

January 23, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

POLITA PAVANA PANDA AND OTHERS—DEFENDANTS NOS. 2, 3, 4, 6, 7 AND 11—PETITIONERS

versus

NARASINGA PANDA AND OTHERS—PLAINTIFFS NOS. 1 AND 2 AND DEFENDANTS NOS. 5, 8 AND 10—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, para. 1—Arbitration, reference to—Ex parte *defendant, whether 'party interested'—Reference, application for, without exonerating* ex parte *defendant—Jurisdiction of Court to refer—Award, validity of.*

An *ex parte* defendant is a 'party interested' within the meaning of paragraph 1 of Schedule II, Civil Procedure Code. [p. 157, col. 2]

Ishar Das v. *Keshab Deo*, 7 Ind. Cas. 68; 32 A. 657; 7 A. L. J. 507, *Ajodhya Prasad* v. *Badarul Husain*, 41 Ind. Cas. 357; 39 A. 489; 15 A. L. J. 427 and *Vythinatha Aiyar* v. *Vaithilinga Mudaliar*, 31 Ind. Cas. 205; 18 M. L. T. 374; 2 L. W. 960; (1915) M. W. N. 847, dissented from.

Sivalinga Pillai v. *Marutha Pillai*, 14 Ind. Cas. 562, distinguished.

Girijanath Roy Chowdhury v. *Kanai Lal Mitra*, 43 Ind. Cas. 169; 27 C. L. J. 339 and *Dooly Chand* v. *Mamuji Musaji*, 41 Ind. Cas. 295; 25 C. L. J. 339; 21 C. W. N. 387, approved.

A Court has, therefore, no jurisdiction to refer the subject-matter of a suit to arbitration on the application of some of the parties where one of the defendants, who is interested in the subject-matter and who is *ex parte*, has not been exonerated and an award passed on such reference is void. [p. 138, col. 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree and the judgment of the Court of the Temporary Subordinate Judge, Ganjam,

at Berhampore, in Original Suit No. 22 of 1915.

FACTS appear from the judgment.

Mr. *C. V. Ananthakrishna Aiyar* for the Hon'ble the Advocate-General (with him Mr. *C. S. Venkatachariar*), for the Petitioners.—The award is not valid as it was passed on a reference by the Court which was made without jurisdiction. The 23rd defendant, who was *ex parte*, was a party interested in the suit.

The parties who applied for the reference to arbitration did not specifically exonerate him, as they did some of the other defendants. They treated the alienation in favour of the 23rd defendant as not binding on them. By remaining *ex parte* the 23rd defendant had some advantages, which he cannot avail of it the award is to be upheld. If the Court had passed a decree adverse to him he could have appealed against it; he could have impeached the Court's finding in appeal on a point of law. If the award of the arbitrators is to be treated as binding on him, he is distinctly in a worse position. See also *Girijanath Roy Chowdhury* v. *Kannai Lal Mitra* (1) and *Dooly Chand* v. *Mamuji Musaji* (2).

Mr. *P. Narayanamurthi* (with him Mr. *N. C. Vijiaraghavachariar*), for the Respondents.—A defendant who is *ex parte* is not a 'person interested' within the meaning of section 1 of Schedule II of the Civil Procedure Code. By being *ex parte* he leaves the conduct of the suit in the hands of the Court. He does not choose to contest the suit and it makes no difference whether the decree is passed by Court or is in conformity with an award of arbitrators. See *Vythinatha Aiyar* v. *Vaithilinga Mudaliar* (3). The Allahabad High Court has taken the same view. *Ishar Das* v. *Keshab Deo* (4) and *Ajodhya Prasad* v. *Badarul Husain* (5).

Like a partial compromise a partial reference to arbitration is valid. Some of the parties to a suit may settle their differences by arbitration.

JUDGMENT.

OLDFIELD, J.—I have had the advantage of reading the judgment to be delivered by my learned brother and, as I agree with it, I propose to deal with one aspect of defendants' case.

Stated at its strongest, their case was that their dispute with plaintiff and 23rd defendant involved adjudication on two distinct matters, firstly, their right and plaintiffs' to recover the property in 23rd defendant's possession from him, secondly, their rights as against plaintiffs to a particular share in it, if it is in fact recoverable. On the first point, for the reasons given by my learned brother, there could be no valid submission to arbitration without 23rd defendant's concurrence and, although the record does not indicate what method of decision, if any, was really in the parties' minds, the wording of paragraph 2, Exhibit I, is in fact inconsistent with any intention on their part to submit this part of the case. But, it is argued, the absence of any valid submission on this point does not affect the validity of the submission on the other above referred to, in which 23rd defendant had and could have no interest, since, if he was to surrender the property, the shares in which it was afterwards to be divided would not be his concern. It is possible that there is nothing in section 1, Schedule II, of the Civil Procedure Code irreconcilable with this statement of the defendants' case and that the interest of the parties contemplated therein is in the question referred, not in the case as a whole. But it is unnecessary at present to decide whether that is so, because the assumption in defendants' argument, as stated above, that 23rd defendant had no interest in the result of the submission to arbitration is incorrect in two respects. For, firstly, the submission included the question of the validity of an adoption, on which plaintiffs' right to sue at all depended; and secondly, 23rd defendant, if he purchased in good faith, may be entitled to have his items assigned to his alienor in order that his transfer might, so far as possible, remain effective. In these circumstances the submission cannot be accepted as valid; and I, therefore, concur in the decree proposed by my learned brother.

SESHAGIRI AIYAR, J.—Plaintiffs and defendants Nos. 1 to 10 claim to be the nearest heirs of the deceased owner of the plaint properties. The suit was brought for a

(1) 43 Ind. Cas. 169; 27 C. L. J. 339.
(2) 41 Ind. Cas. 295; 25 C. L. J. 339; 21 C. W. N. 387.
(3) 31 Ind. Cas 206; 18 M. L. T. 374; 2 L. W. 960; (1915) M. W. N. 817.
(4) 7 Ind. Cas. 68; 32 A. 657; 7 A. L. J. 807.
(5) 41 Ind. Cas. 357; 39 A. 489; 15 A. L. J. 427.

division of the properties and for setting aside certain alienations in favour of the other defendants. There was a dispute among the heirs as to whether the adoptions set up by the defendants Nos. 1 to 7 were true and valid. After the settlement of the issues, on the 25th September 1916 plaintiffs and defendants Nos. 1 to 11 agreed that the matter in dispute should be referred to the decision of three arbitrators. Paragraph 3 of the agreement says: "They have further agreed that the rest of the defendants, except the 23rd defendant who was declared *ex parte*, be exonerated from the suit with the respective properties in their possession as per schedule attached hereto." That is to say, these heirs agreed that the alienations in favour of defendants other than 23rd should not be contested. Apparently as the 23rd defendant was *ex parte*, they did not exonerate his property from the suit. It was suggested by Mr. Narayanamurthi that in fact the claim against the 23rd defendant was withdrawn. There is nothing on record to justify such an assumption. On the other hand the express language of the agreement to refer shows that the alienation in favour of the 23rd defendant was not accepted as binding. Subsequent to the agreement, on the 17th of April 1917, the plaintiffs and the defendants Nos. 1 to 7 settled the shares to which they were entitled and asked the arbitrators to determine after examining the parties themselves the following issues: "1st part of the 2nd issue, 8th issue, 9th issue, 10th issue, 11th issue, 12th issue and 18th issue." The arbitrators by a majority decreed the claim in a particular manner. There was a minority decision also. The Court accepted the award of the majority and passed a decree in accordance therewith. Against that decree the present petition has been presented.

The main objection argued by Mr. Ananthakrishna Aiyar related to a point not specifically put forward in the Court below. But as that relates to jurisdiction, I fail to see how we can refuse to adjudicate upon it. The short point is this. The 23rd defendant was a party against whom relief was claimed in the original plaint. He was *ex parte*. In the agreement to refer, the parties to the reference did not exonerate him from liability. In these circumstances, is the reference a valid one and had the Court jurisdiction to accept the reference and to act on it? I am constrained to hold that the Court had no jurisdiction to refer the dispute to arbitration. It is to be regretted that the legal advisers should not have taken steps either to include the 23rd defendant in the reference or to exonerate him in terms from liability.

The question turns upon the interpretation to be placed upon the words "parties interested" in section 1 of the Second Schedule to the Civil Procedure Code. In the old Code, 1882, section 506 provided "if all the parties to a suit desire" and so on. In the place of those words we have in the present section these words, "where in any suit all the parties interested agree." It was strenuously argued by Mr. Narayanamurthi that if a person is *ex parte* he is not an interested party. He is supported by some authorities, which with all deference I am unable to follow. It has been consistently held in Allahabad that if a person is *ex parte* he is not a party interested. *Ishar Das* v. *Keshab Deo* (4) and the earlier cases have taken this view. Reference may also be made to *Ajodhya Prasad* v. *Badarul Husain* (5). In *Vythianatha Aiyar* v. *Vaithilinga Mudaliar* (3) a Bench of this Court took the same view. Phillips, J., says: "Further in the present case the appellant has no equitable claim to set aside the decree, for by remaining *ex parte* he left the conduct of the suit in the hands of the Court, and it is really immaterial to him whether the suit was decreed upon examination of witnesses in Court or upon an award made by arbitrators. By not contesting the suit he submitted to whatever decree might be passed, provided that it was not in excess of the relief claimed." With all reference I am unable to accept this conclusion. A person may remain *ex parte* for various reasons. He may be too poor to defend the suit. He may think that his co-defendants would fight his case and that it is not necessary for him to put in a separate defence. He may trust to some obvious defect in the case of the plaintiff which should attract the attention of the Judge. He might also have kept away from the Court because he had confidence in the judicial capacity of the presiding officer. These considerations do not apply to a reference to arbitrators. The

ex parte defendant knows nothing about their capacity, character or antecedents. Simply because a defendant is *ex parte* it does not follow that he consented to his case being decided by arbitrators. Further if a person is *ex parte*, he has got a right of appeal if the decision goes against him. He may satisfy the Appellate Court that on the materials placed before the Judge, his conclusion was wrong or that the Judge had taken a wrong view of the law, or that the procedure had been irregular. In the case of an award all these rights could not be exercised. Therefore, by remaining *ex parte*, a defendant cannot be said to have consented to the arbitrators disposing of his case and to giving up all rights of appeal against the decision that may be passed against him. After giving my best consideration to the cases which have been cited, I am unable to accept the view taken in them that a defendant who is *ex parte* is not interested in the dispute. As regards *Sivalinga Pillai* v. *Marutha Pillai* (6), it is enough to say that in that case it was held that the *ex parte* defendant had no interest in the suit. On the other hand, in *Girijanath Roy Chowdhury* v. *Kanai Lal Mitra* (1) and the earlier case in *Dooly Chand* v. *Mamuji Musaji* (2) it was held that the *ex parte* defendant does not cease to be an interested party.

The next argument was that there is nothing to prevent a few among the parties to the suit adjusting their differences by submitting them to the decision of arbitrators. Granting for a moment without deciding that a partial reference is possible because a partial compromise is allowed by law and also a partial adjustment, it is not clear whether a partial award is within the rights of the parties. I am, however, not prepared to hold that in this case the 23rd defendant was not interested in the decision of the questions which plaintiffs and defendants Nos. 1 to 11 submitted for the consideration of the arbitrators. For example, the extent of the impeachability of the alienation in his favour will depend upon whether the adoption in dispute was really made or not and some of the other questions covered by the issues which the arbitrators were called upon to try also relate to matters in which the 23rd defendant was to some extent interested. Therefore, this is not a case in which the subject-matter of the reference was one in which the 23rd defendant had no interest. It follows that the 23rd defendant was a person interested in the whole suit as well as in the particular subject-matter of the reference and that as he was not a party to the reference, the order referring the matter to the arbitrators was *ultra vires* and without jurisdiction. In this view all subsequent proceedings must be regarded as infructuous and must be set aside. The decree of the lower Court must be reversed and the Subordinate Judge must be directed to deal with the suit on the merits. Costs will abide the result.

M. C. P.

Petition allowed.

(6) 14 Ind Cas. 562.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 156 OF 1917.

February 7, 1919.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

CHIRANJI LAL—PLAINTIFF—APPELLANT

versus

NARAINI AND OTHERS—DEFENDANTS—RESPONDENTS.

Indemnity bond, suit on—Cause of action, when arises—Decree passed but not satisfied, whether entitles defendant to sue on bond—Mortgage decree.

A executed a mortgage in favour of *B*. *B* died. *A* paid the mortgage-money to *C*, who claimed to be the heir of *B* and obtained from him an indemnity bond that in the event of any other person coming forward and claiming the money as *B*'s heir, *A* would be indemnified for any payment that he might be compelled to make. Subsequently certain other persons, alleging themselves to be the heirs of *B*, brought a suit against *A* claiming half the mortgage-money, and obtained a decree. *A* without discharging this decree, sued *C* on the indemnity bond, and obtained a decree which provided that execution should not issue unless and until *A* had discharged the decree made against him. On appeal the Appellate Court dismissed *A*'s suit as being premature:

Held, that inasmuch as the decree which *A* had failed to discharge was a mortgage decree against his property, it was equivalent to payment and that, consequently, the suit was not premature, and *A* was entitled to the relief sought by him. [p 159, col. 2.]

Appeal under section 10 of the Letters Patent from a judgment of Sir George Knox,

Acting Chief Justice, reversing a decree of the Second Additional Judge, Aligarh,

Mr. *Peary Lal Banerji*, for the Appellant.

Dr. *S. M. Sulaiman* (for Mr. *Panna Lal*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought on foot of a bond, which has been called, not inappropriately, an indemnity bond. It appears that there was a mortgage executed by the plaintiff in favour of one *Musammat* Maharani. On her death there were two sets of persons claiming to be entitled to the property held hy her. One claimant was a man of the name of Kanhaia Ram. He alleged to have received payment of the entire mortgage money from the plaintiff, and there was given in evidence a receipt he executed for the fuil amount and the bond which is the basis of the present suit. In that bond Kanhaia Ram covenanted that if any one else put forward a claim to the money secured by the deed of mortgage and if he failed to prove his power to give a discharge and if the plaintiff should be obliged to pay any one else, then he would indemnify the plaintiff against such payment. Certain property was hypothecated to secure this covenant. In course of time a rival claimant brought a suit against the plaintiff and Kanhaia Ram based on the original mortgage, alleging that the then plaintiffs were entitled to half the property in possession of which *Musammat* Maharani had been and that the receipt and discharge by Kanhaia Ram was only effectual to the extent of half of the mortgage debt. This suit was successful and a decree for sale of the mortgaged property was made and as already stated, the plaintiff and Kanhaia Ram were defendants to that suit. The Court of first instance decreed the plaintiff's claim, but put a proviso to the decree that it could not be executed unless and until the plaintiff was obliged to discharge the decree which had been made against him. The Court of first appeal confirmed this decree. A learned Judge of this Court set aside the decrees of the Courts below and dismissed the plaintiff's suit as premature.

It seems to us that the view taken by the learned Judge of this Court was not correct. It is true that at the time the suit was brought the decree had not actually been discharged; but it was a mortgage-decree against the plaintiff's property and it seems to us that it was highly technical to hold that the suit was, therefore, premature. Furthermore, the proviso which the Courts below had put upon the decree prevented the possibility of any injustice being done to the respondent. On behalf of the appellant the case of the *British Union & National Insurance Co.* v. *Rawson* (1) is an authority that the suit could not be dismissed as being premature. We think also the case of *Tota Das* v. *Babu Ganesh Prasad*, Civil Revisicn No. 79 of 1909, decided on January 31st, 1910, unreported, is an authority in the plaintiff's favour. Dr. Sulaiman, on behalf of the respondent, has tried to support the decision of the learned Judge of this Court upon the ground that the plaintiff may not have paid the full amount stated in the receipt to Kanhaia Ram. It appears that there was a finding in the previous litigatior, in which the plaintiff and Kanhaia Ram were co-defendants, that the plaintiff had not paid the full amount due upon the mortgage. As pointed out by the lower Appellate Court, this decision was certainly not necessary for the purposes of that suit and, furthermore, that the plaintiff and Kanhaia Ram were arrayed on the same side. Admittedly there was some consideration for the bond sued upon in the present suit and the terms of the bond were that if a claim should be put forward and the discharge which Kanhaia Ram there was purporting to give should prove not sufficient, then Kanhaia Ram would indemnify the plaintiff from any further money he had to pay. We have already held that under the circumstances of the present case the granting of a mortgage-decree against the plaintiff was equivalent to payment. We may mention here that the appellant has produced before us a certified copy of the certificate recording payment of the amount of the mortgage-decree. We allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the

(1) (1916) 2 Ch. 476; 85 L. J. Ch. 769; 115 L. T. 331; 60 S. J. 679; 32 T. L. R. 665.

lower Appellate Court. The appellant will have his costs of both hearings in this Court.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2541 AND 2600 OF 1916.

February 3, 1919.

Present:—Justice Sir Ernest Fletcher, KT.

Raja KRISTA DAS LAW AND OTHERS —PLAINTIFFS—APPELLANTS

versus

KUMAR KHIRADA KANTA ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Suit against dead person, maintainability of—Legal representatives, substitution of.

If a defendant is dead at the time of the institution of the suit, the plaintiff cannot go on with the suit by applying for the substitution of the heirs of the deceased defendant.

Appeal against the decrees of the Subordinate Judge, 1st Court, Jessore, dated the 12th August 1916, reversing those of the Munsif, 1st Court at that place, dated the 23rd March 1915.

FACTS appear from the judgment.

Babu *Narendra Chandra Bose* (with him Babu *Satyendra Nath Mitter*), for the Appellants.—These appeals arise out of suits instituted by the plaintiffs for realisation of rent from 1317 to 1320 B. S. The first Court decreed the suits. The lower Appellate Court dismissed the suits altogether, on the ground that the suits were instituted against a dead man. I submit that the suits may be taken to be instituted on the day on which the heirs of the deceased were brought on the records. In support of my contention I rely upon the case reported as *Raj Kishoree Dossee* v. *Buddun Chunder Shaha* (1). In that case it has been held that when a person is substituted or added as defendant under section 73 of Act VIII of 1859, the suit is commenced against that person at the time he is made a defendant, and not before.

Babu *Biraj Mohan Mazumdar*, for the Respondents.—The suits are not maintainable as they were suits against a dead man. I rely upon a case reported as *Veerappa Chetty* v. *Tindal Ponen* (2). In that case it has been laid down that there is nothing in the Code of Civil Procedure to authorise the institution of a suit against a deceased person and the Courts have no jurisdiction to allow the plaint in such a case to be amended by substituting the names of the representatives of the deceased, even when the suit is instituted *bona fide* and in ignorance of the death of the defendant. This case also follows the case reported as *Mohun Chunder Koondoo* v. *Azeem Gazee Chowkeedar* (3). Therefore, the suits are not maintainable. The case reported as *Raj Kishoree Dossee* v. *Buddun Chundur Shaha* (1) is not applicable here.

Babu *Narendra Chandra Bose*, in reply.—The case reported as *Mohan Chunder Koondoo* v. *Azeem Gazee Chowkeedar* (3) is distinguishable from the case reported as *Raj Kishoree Dossee* v. *Buddun Chunder Shaha* (1). The present case is on all fours with that reported as *Raj Kishoree Dossee* v. *Buddun Chunder Shaha* (1).

JUDGMENT.—These appeals are preferred against a decision of the learned Subordinate Judge of Jessore, dated 12th August 1916, reversing a decision of the Munsif of the same place. The plaintiffs brought these suits for rent. What has been found is this that the defendant was dead at the date of the institution of the suits. The plaintiffs, however, have deliberately gone on with the cases, applying for the substitution of the heirs of the defendant who was dead at the time of the institution of the suits. The decisions of the Courts show that the plaintiffs were not entitled to do so. The decision in this Court of a Bench consisting of Sir Barnes Peacock and Mr. Justice D. N. Mitter in the case of *Mohun Chunder Koondoo* v. *Azeem Gazee Chowkeedar* (3) and the decision of the High Court of Madras in the case of *Veerappa Chetty* v. *Tindal Ponen* (2) show quite clearly that the course adopted by the plaintiffs was wrong.

That being so, the present appeals fail and are dismissed with costs.

Appeals dismissed.

(1) 6 W. R. 298.

(2) 31 M. 56; 17 M. L. J. 551; 3 M. L. T. 12.

(3) 12 W. R. 45; 3 B. L. R. A. C. J. 233.

GHULAM JILANI *v.* EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION NO. 407 OF 1918.
September 4, 1918.
Present:—Mr. Justice Tudball.
GHULAM JILANI AND OTHERS—
APPLICANTS
versus
EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 109—Security for good behaviour from vagrants and suspected persons—Suspicion, whether enough—Order based on suspicion, legality of.

The only persons to whom the provisions of section 109 of the Criminal Procedure Code apply are those who take precautions to conceal their presence within the local limits of a Magistrate's jurisdiction or persons who have no ostensible means of subsistence and who cannot give a satisfactory account of themselves To justify an order under that section there must be a good basis of fact; mere suspicion is not enough.

Three respectable citizens of Delhi were met at night by the Police between Meerut City and Meerut Railway Station and a burglar's jemmy was also found somewhere near on the ground:

Held, that these facts did not justify the passing of an order under section 109 of the Criminal Procedure Code.

Criminal revision from an order of the District Magistrate, Meerut.

Mr. *Satya Chandra Mukerji*, for the Applicants.

JUDGMENT.—This is an application in revision in respect to an order passed by the District Magistrate of Meerut on an appeal preferred from an order of a Magistrate of the First Class calling upon the applicants to provide security to be of good behaviour in a matter which arose under section 109 of the Criminal Procedure Code. As the judgments of the Joint Magistrate and the District Magistrate show, the three present appellants were met at night time in the company of two other persons on the road at Meerut between Meerut City and the railway station. It appears that the Police had received certain information to the effect that men of bad character were about to commit a raid upon the town. They made preparations to counteract this and on the night in question they received information that the proposed raid had been postponed. The three present applicants were met by a party of Police that same night on the road as mentioned above. Apparently on the ground somewhere close to them a burglar's jemmy was found. The applicants gave an explanation of themselves and as a matter of fact, it has been established that they are well to-do and respectable residents of the City of Delhi. The other two persons who also were met are also reported by the Police at Delhi to be persons of decent character. In spite of this information the District Magistrate has upheld the order of the Joint Magistrate. Section 109 enables the Magistrates mentioned therein to call upon certain persons to show cause why they should not be ordered to furnish security for good behaviour. The persons contemplated in the section are persons taking precautions to conceal their presence within the local limits of such Magistrate's jurisdiction or persons who have no ostensible means of subsistence and who cannot give a satisfactory account of themselves. The present applicants clearly do not come within clause (*a*), as it was not alleged that they were taking precautions to conceal their presence with a view to committing an offence. They could only have come in under clause (*b*) as persons who could not give a satisfactory account of themselves. But as the District Magistrate's judgment on appeal shows, the account they gave of themselves was correct and the Police of Delhi have reported that these three present applicants are persons who are well-to do and of good character. In these circumstances I do not think that section 109 can apply to them and that the order passed has been passed more on suspicion than on any good basis of fact. I, therefore, allow the application and set aside the order of the Joint Magistrate, dated the 31st of January 1918. The security bonds, if furnished, will be discharged.

Application allowed.

GHULAM MOHIUDDIN *v.* EMPEROR.

PATNA HIGH COURT.

MISCELLANEOUS REVISION No. 14 OF 1919.

April 14, 1919.

Present:—Mr. Justice Atkinson and Mr. Justice Coutts.

GHULAM MOHIUDDIN AND OTHERS —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 528—Transfer—Magistrate having little time to dispose of case, whether good ground for transfer.

Although a District Magistrate has very wide powers of transfer conferred upon him by section 528 of the Code of Criminal Procedure, he must in the exercise of these powers act in a judicial manner and not capriciously or arbitrarily. [p. 163, col. 1.]

The fact that a Magistrate before whom a case is pending is also the Treasury Officer and has very little time at his disposal by virtue of his duties as a Treasury Officer is not a sufficient reason for directing a transfer of the case from his Court. [p. 163, col. 1.]

Appeal from an order of the District Magistrate, Bhagalpore, dated the 22nd March 1919.

Messrs. *Manuk* and *Athar Hussain*, for the Petitioners.

Mr. *Sultan Ahmad*, for the Crown.

JUDGMENT.—The petitioners in this application apply to us to set aside an order of transfer made by the District Magistrate of Bhagalpore, dated the 22nd March 1919, transferring the trial of this case from the file of Mr. Lane to the file of Mr. Beal, a Joint Magistrate now stationed at Bhagalpore.

The petitioners are charged with the offence of having directed that an assault should be committed on a convict and whereby the convict died as a result of the injuries that he received.

The charge was preferred against the accused by a Deputy Magistrate by the name of Mr. Girish Chandra Datta on the 4th of March of the present year. The case was transferred from the file of Mr. Datta to the file of Mr. Lane at the request of the accused by the District Magistrate of Bhagalpore, Mr. Johnston.

At the time the transfer was made from the file of Mr. Datta to the file of Mr. Lane, there was no other available Magistrate in the District of Bhagalpore except Mr. Lane who was capable of trying the case; accordingly Mr. Lane was selected as the proper officer to try the case by Mr. Johnston, even though his duties were primarily connected with the treasury, Mr. Lane being Treasury Officer.

Mr. Lane accordingly under the order of the District Magistrate was seised of the case on the 6th of March. Mr. Beal joined as a new Joint Magistrate in Bhagalpore on the 6th of March or immediately after the 6th of March. The presence of Mr. Beal in Bhagalpore in no way induced Mr. Johnston to make any transfer to Mr. Beal of the case of the petitioners from the file of Mr. Lane on the ground of general public convenience.

The case proceeded before Mr. Lane, and two witnesses were examined for the prosecution. Mr. Lane made two orders both of which were objected to by the Public Prosecutor; the first was an order to the Superintendent of the Bhagalpore Jail directing that the prisoners, namely, the petitioners and their Counsel should be allowed to inspect the Jail for the purpose of enabling them to appreciate the nature of the defence which they would have to make, by an inspection of the Jail precincts and surroundings. Secondly, the Public Prosecutor objected very strongly to the ruling of Mr. Lane that the accused's Counsel was not bound to cross-examine the Crown witnesses immediately on the conclusion of their examination-in-chief. In our opinion the order of Mr. Lane to the Superintendent of the Jail was an improper order and one that should not have been made.

It would appear that these two rulings of Mr. Lane perturbed somewhat the equanimity of the Public Prosecutor; who forthwith on the 10th of March applied to the District Magistrate by a petition seeking to have this case transferred from the file of Mr. Lane to the file of some other Magistrate and urging these two objections as the grounds in support of his petition.

The learned District Magistrate made an order transferring the case, not directly on the two grounds taken by the Public Prosecutor in his petition, but stating generally that in his opinion in the interest of public convenience it was desirable that the transfer should in fact be made, inasmuch as Mr. Lane as Treasury Officer could not devote his entire time to the disposal of the case and it would be a hardship both upon the

Crown and the prisoners to have the proceedings unnecessarily delayed, and accordingly Mr. Johnston transferred the case.

Application was made to us to have the order of transfer set aside; and we came to the conclusion that it was desirable that a Rule should be issued to enable us to see what was the real reason operating in the mind of the District Magistrate for granting the transfer. Was it the reason suggested by the Public Prosecutor?

No doubt a District Magistrate has very wide powers of transfer conferred upon him by section 528 of the Code of Criminal Procedure, but in the exercise of these powers he must act in a judicial manner and not capriciously or arbitrarily.

Neither the District Magistrate nor the learned Government Advocate appearing on behalf of the Crown suggests that Mr. Lane is incapable either legally or physically from discharging his duties and continuing to try this case; and the only ground put forward, why he should not do so, is that he has very little time at his disposal by virtue of his duties as a Treasury Officer. That objection can be easily overcome; because it is open to the District Magistrate to allow Mr. Lane to discontinue his treasury duties for a short time to enable him to dispose of the case of which he now has seisin under the order of the District Magistrate himself, dated the 4th of March. No ground that we can see has been urged by Mr. Johnston in his explanation by way of cause shown that would properly justify us in holding that his order of transfer, dated the 22nd March 1919 was made and based on an exercise of sound and reasoned judicial discretion.

Mr. Manuk endeavoured to attach an importance to this application by asserting that a grave question of principle was involved. Certainly his argument did not impress us. Mr. Manuk suggests that the vice of the method of the procedure adopted by the Public Prosecutor in this case to secure a transfer was that it was virtually a proceeding which enabled the District Magistrate as prosecutor to secure and nominate his own forum for the trial of the accused which might prejudicially affect the accused's right of fair trial. There is no ground whatsoever for this assertion, nor do the facts disclosed remotely justify the making of such an allegation.

We are satisfied that the learned Magistrate ought not to have transferred this case from the file of Mr. Lane on the ground relied on by him for doing so. There is no impeachment of Mr. Lane's willingness and ability to discharge his duties in trying this case and his impartiality has not been impugned.

Accordingly we set aside the order of Mr. Johnston, dated the 22nd March 1919, and we direct that the case be restored to the file of Mr. Lane for disposal and the trial do proceed *de die in diem* until it is concluded.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 223 OF 1919.

May 21, 1919.

Present :—Mr. Justice Rafique.

PARMESHWARI DAS—APPLICANT

versus

JAGAN NATH AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 403 applicability of—Discharge of accused—Re-trial, whether permissible.

Section 403 of the Criminal Procedure Code applies only to cases of acquittal or conviction, and has no application to a case in which an accused person has been *discharged*. [p. 164, col. 1.]

Criminal revision from an order of the Honorary Magistrate, Bareilly, dated the 10th of February 1919.

Mr. *E. A. Howard*, for the Applicant.

Mr. *P. N. Banerji*, for the Opposite Parties.

JUDGMENT.—The applicant in this case is one Parmeshwari Das, who prosecuted the opposite party on charges of rioting and illegal confinement. The case was made over to a Bench of Honorary Magistrates who after taking the evidence made an order on the 18th of January 1919 discharging the opposite party of the offence of rioting and illegal confinement. The Bench, however, framed a charge-sheet under section 323 and fixed the 10th of

PALANI GOUNDAN, *In re.*

February 1919 as the date for hearing. In the meantime the applicant Parmeshwari Das has applied to the District Magistrate for transfer of his case from the Bench of Honorary Magistrates and his application was disallowed. On the 10th of February 1919 when the case came up for hearing, the Bench of Honorary Magistrates, without proceeding any further with the case, made an order that as the opposite party had been discharged by them on the 18th of January 1919 the case could not proceed under section 403 of the Criminal Procedure Code. The case was struck off. It is from this order of the 10th of February 1919 that Parmeshwari Das has come up in revision to this Court and contends that section 403 of the Criminal Procedure Code has no application whatsoever. I think that the contention is well founded. The section in question applies to cases of acquittal or conviction and not to cases of discharge. The order striking off the case from the list of the Bench of Honorary Magistrates was illegal. I set it aside and direct the Bench to dispose of the case according to law.

Order set aside.

MADRAS HIGH COURT.

FULL BENCH.

REFERRED TRIAL No. 2 OF 1919

AND

CRIMINAL APPEAL No. 33 OF 1919.

April 7, 1919.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Coutts Trotter.

In re PALANI GOUNDAN—PRISONER.

Penal Code (Act XLV of 1860), ss 79, 299, 300—Hanging person supposed to be dead after inflicting grievous hurt—Death resulting from asphyxiation—Culpable homicide—Murder—"Causing death," meaning of.

The accused struck his wife a blow on the head with a plough share, which rendered her senseless. He believed her to be dead and in order to lay the foundation for a false defence of suicide by hanging, which he afterwards set up, proceeded to hang her from a beam by a rope, which resulted in her death by asphyxiation:

Held, that the accused could not be convicted of culpable homicide or of murder, though he was guilty of causing grievous hurt. [p. 170, col. 1.]

The expression "causing death" in section 299, Indian Penal Code, means putting an end to a human life, and all the three intentions mentioned in the section must be directed either deliberately to putting an end to a human life or to some act which, to the knowledge of the accused, is likely to eventuate in the putting an end to a human life The knowledge must have reference to the particular circumstances in which an accused is placed The intention of the accused must be judged, not in the light of actual circumstances, but in the light of what he supposed to be the circumstances A man is not guilty of culpable homicide if his intention was directed to what he supposed to be a lifeless body. [p 169, col 2; p 170, col 1.]

Emperor v. *Dalu Sardar*, 26 Ind. Cas. 157; 18 C. W. N. 1279; 15 Cr. L. J 709 and *Queen-Empress* v. *Khandu*, 15 B. 194; 8 Ind Dec. (N. S.) 131, followed.

Queen-Empress v *Khandu*, 15 B. 194; 8 Ind. Dec. (N. S.) 131 and *Gour Gobindo Thakoor, In re*, 6 W. R. Cr., 55, distinguished.

Trial referred by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 99 of the Calendar for 1918.

Appeal by the prisoner against the said sentence.

This case coming on for hearing on the 24th and 26th of February 1919, upon perusing the petition of appeal, the record of the evidence and proceedings of the said Court of Session, and upon hearing the arguments of Mr. *V. R. Ponnuswamy Aiyangar*, engaged for the defence of the Prisoner under G. O, dated 17th December 1884, No. 3273, Judicial, and of the Public Prosecutor on behalf of the Crown, and the case having stood over for consideration till the 7th March 1919, the Court (Sadasiva Aiyar and Napier, JJ.), made the following

ORDER OF REFERENCE TO A FULL BENCH.

NAPIER, J.—The accused has been convicted of the murder of his wife. The evidence shows that on Wednesday the 23rd of October 1918 at about 4 or 5 *nalighis* before sunset she was seen by prosecution 6th witness weeping and she said that her husband had beaten her. The witness told her to go home, promised to send for her father and then went to the father himself, who lived in another hamlet of the same village a mile away a little before sunset, and told him of the occurrence. After sunset the father, prosecution witness No. 2, sent his son, prosecution witness No. 3, and his son in law, prosecution witness No. 4, to the house where his daughter was living. Their

evidence is that they arrived at the house at 4 or 5 *nalig is* after sunset and that just outside the door they found the mother and the brother of the accused in the *vasal* and that the mother was remonstrating with her son inside, saying 'do not beat a woman.' According to their evidence they did not hear any cries inside the house at that time After they waited a few minutes the accused opened the door and came out. They say they went inside and found Ramayee lying dead on the floor with a ploughshare lying near her. They say they at once went and told Rasa Goundan, who lives two doors off from the accused's house, to go and call their father, prosecution witness No 2. Rasa Goundan, prosecution witness No. 5, says that he went and informed prosecution witness No. 2, who at once came and found his daughter lying dead at about 10 or 11 o'clock in the night. Prosecution witness No. 2, says that he taxed the accused with the murder of his daughter and the accused said she hanged herself. Prosecution witness No. 2 further says that he went to the Monigar and reported, but the Monigar was busy with a procession and only promised to report. He thought that the Monigar was endeavouring to hush the matter up, so he went to report the matter to the Police himself at Kodumudi 3 or 4 miles away and laid a complaint. This complaint was recorded at 9.15 A. M. the next morning. That the Monigar was endeavouring to hush the matter up there can be no doubt, for it is clear that he sent no report to the Police whatsoever as was his duty to do. The accused told a story to the effect that he came back early in the evening to get his meals and found his wife hanging with a rope tied to the roof, and he calls two witnesses who say that the accused came and told them that his wife would not let him in and they went in with him and found his wife hanging from a beam. I do not think there can be any doubt that the deceased was hanged, but the evidence of the two defence witnesses is so discrepant that it is impossible to believe their version of the occurrence. The medical evidence shows that the woman had received a severe blow on the side of her head which would probably have rendered her unconscious, and it also shows that she died of strangulation which may have been the effect of hanging. That she hanged herself is impossible because, as pointed out by the Medical Officer, the blow on the head must have produced unconsciousness, and, therefore, she could not hang herself. I am satisfied on the evidence of the following facts: that the accused struck his wife a violent blow on the head with the ploughshare which rendered her unconscious, that it is not shown that the blow was likely to cause death and I am also satisfied that the accused hanged his wife very soon afterwards under the impression that she was already dead, intending to create false evidence as to the cause of the death and to conceal his own crime. The question is, whether this is murder.

Section 299 of the Indian Penal Code provides: "Whoever causes death by doing an act with the intention of causing..... such bodily injury as is likely to cause death.....commits the offence of culpable homicide," and section 300, clause 3, provides that "if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death," then in such cases culpable homicide is murder. Now, the hanging of a woman who dies from the effect of the hanging is on the face of it causing bodily injury which is sufficient in the ordinary course of nature to cause death, and the section only requires that there should be homicide, namely, the causing of death, to make this murder. It cannot, I think, be disputed that the accused intended to cause bodily injury, for he intended to hang and did hang whether the body was alive or dead. If he had stabbed her or shot her intending it to be believed that she had stabbed or shot herself, I cannot see that he would have done otherwise than intended to cause the wounds which he did cause. In this case the bodily injury was strangulation by hanging. It is, however, suggested that there is a necessary limitation, namely, that the person on whom the bodily injury is inflicted must be a person who is to *the knowledge of the accused* capable of being killed and that, therefore, if the accused thinks that the person is dead already he cannot be convicted of culpable homicide. One

objection to this theory is that it is not necessary that the person who is killed should be a person to whom the offender intends to cause the bodily injury, and that, therefore, his knowledge of the condition of the person killed is not a necessary element for conviction for murder. If *A* shoots at *B* with intent to kill *B* but misses *B* and kills *C*, then he has committed the murder of *C* although he did not even know that *C* was there. This point has been the subject of an express decision of this Court in a case [*Public Prosecutor* v. *Mushunooru Suryanarayanamoorty* (1)] where the accused attempted to poison one person and the poison was taken by another. There is no doubt that such is the law and it seems to me to follow that the opinion of the person who inflicts the injury as to the condition of the person who actually suffers the injury is immaterial. There is a general exception in the Penal Code which saves persons acting innocently, *viz.*, section 79. So the burying of a person wrongly believed to be dead would be protected from the scope of section 299.

The Public Prosecutor, therefore, suggested that the proper limitation will be found by introducing the word 'unlawfully.' That would perhaps leave one class of persons unprotected as in the following instance. Suppose that in this case the accused, having struck his wife a blow on the head that made her unconscious and believing her to be dead, had gone to his relatives and told them of the occurrence and they, having sent him away, themselves hanged the body of the woman believing her to be dead for the purpose of concealing his crime. They would be undoubtedly acting unlawfully for they would be guilty of an offence, under section 201, namely, causing evidence of the commission of an offence to disappear with the intention of screening the offender from legal punishment, and yet it seems a strong proposition to say that they have committed murder. Of course the position of the accused in this case is far worse, for, he has committed the offence of grievous hurt; and speaking for myself I see no reason why he should not have to bear the consequences of his subsequent act in killing the woman. Still it does appear that there should be some limitation of the strict words of the section and the difficulty is to say what that limitation is to be.

The protection would seem to be found in English Law by the application of the doctrine of *mens rea*, though this might again be affected by the doctrine of malice in law which makes the killing in the course of a felony homicide. This doctrine of *mens rea*, though extremely difficult of definition, operates to protect persons who have no wrongful intention or other blameworthy condition of mind. To what extent it would operate to protect persons who knew that they were committing a criminal offence, namely, concealment of murder, is a question which I do not propose to consider, though the decision in *R.* v. *Prince* (2) referred to by the Public Prosecutor would seem to apply the *mens rea* to a person who intended to do an unlawful act but not the unlawful act which he in fact did. This is in fact the argument of the Public Prosecutor who asks us to apply this doctrine. I do not think, however, that it arises for consideration.

Mr. Mayne is quite clear that under the Penal Code the maxim is wholly out of place. He says that every offence is defined and the definition states not only what the accused must have done but his state of mind in regard to his act when he was doing it. The whole of his discussion in sections 8, 9 and 10 on *mens rea* and knowledge is worthy of very close consideration, and he seems to be quite clear that all the protections found in the English Criminal Law are reproduced in the Chapter of General Exceptions in the Penal Code. Sections 79, 80 and 81 would seem to cover all cases where a person is not acting with a criminal intent. Now it seems to me that the particular clauses in sections 299 and 300 which we have to interpret do create what I am tempted to call constructive murder. The first clause of section 299 requires the intention of causing death; the third clause requires a knowledge that he is likely by such act to cause death. In the same way the first clause of section 300 requires an intention to cause death, the second clause requires an intention to cause such bodily injury as the offender knows to be

(1) 13 Ind. Cas. 833; 11 M. L. T. 127; 22 M. L. J. 323; (1912) M. W. N. 136; 13 Cr. L. J. 145.

(2) (1875) 2 C. C. 154; 44 L. J. M. C. 122; 32 L. T. 700; 24 W. R. 76; 13 Cox, C. C. 138.

likely to cause death, and the fourth clause requires the knowledge that the act is so imminently dangerous that it must, in all probability, cause death or is likely to cause death and the act is committed without any excuse for incurring the risk. In all these we have intention, knowledge and recklessness directed towards the causing of death. On the other hand, in the second clause to section 299 the intention is directed towards the bodily injury and in the third clause to section 300 the intention is the same. What makes the offence murder is that the bodily injury should *in fact* be likely to cause death entirely apart from intention or knowledge. The Legislature has thought fit to make the offence murder without proof of intention or knowledge directed towards death on the principle, of course, that a person must be deemed to intend the natural result of the injury which he inflicts; that is to say, if he inflicts an injury which is likely to cause death and that person dies, he must take the consequences of his action. But the intention provided for is confined to the bodily injury and not to the death. That is the law which we have to apply, and unless a person can be protected by one of the General Exceptions, I cannot see for myself how he is to escape from the language of the section. Apart from the actual offence of concealing a murder, it is the grossest violation of natural rights to stab, shoot or hang a person without absolute knowledge that that person is dead, unless of course it is done innocently, and I see no reason why the offender should not suffer the consequences of this act.

I shall now refer to the cases. The first is *Gour Gobindo Thakoor, In re* (3). The facts are very similar. There one Gour Gobindo struck the deceased Dil Muhammad a blow which knocked him down, and then he and others, without enquiry as to whether he was dead or not, in haste hung him up to a tree so as to make it appear that he committed suicide. The accused were all convicted of hurt but the High Court quashed the proceedings and directed the accused to be re tried on charges of murder, culpable homicide not amounting to murder and hurt. Mr. Justice Seton Karr says, "if, however, the deceased was not actually killed by the blow, but was killed by the suspension, then Gour Gobindo himself and also all the other Thakoors who took part in hanging him up to the tree, would be clearly liable to a charge of culpable homicide amounting to murder; for, without having ascertained that he was actually dead, and under the impression that he was only stunned, they must have done the act with the intention of causing death, or bodily injury likely to cause death, and without the exceptions provided by the law, or they might have been committed for culpable homicide *not* amounting to murder." Mr. Justice Norman says: "Suppose, secondly, that the Thakoors had no intention of killing the deceased, but, finding him insensible, without enquiry whether he was dead or alive, or giving him time to recover, under an impression that he was dead, hung him to the tree, and thereby killed him. It appears to me that they might all have been put on their trial, under section 304, for culpable homicide not amounting to murder. I think a Jury might fairly presume against them that they must have known that they were *likely by that act to cause death*". The difficulty in this case is that the learned Judges did not wish to decide the case, and, therefore, their language is hypothetical. Mr. Justice Norman says that a Jury might fairly presume knowledge that they were likely to cause death, hereby introducing a limitation which is not to be found in the clauses we have under consideration. Certainly Seton-Karr, J., thinks the offence to be culpable homicide.

The next case is *Queen Empress* v. *Khandu* (4). In that case it was found that the accused struck the deceased three blows on the head with a stick with the intention of killing him. The accused, believing him to be dead, set fire to the hut in which he was lying with a view to remove all evidence of the crime. The medical evidence showed that the blows were not likely to cause death and did not cause death and that death was really caused by injuries from burning. Mr. Justice Birdwood states the provisions of section 299 and says, "it is not as if the accused had intended, by setting fire to the shed, to make the deceased's death certain," and, therefore, acquits him of murder though he convicts him of an attempt to commit murder because of the

(3) 6 W. R Cr. 55.

(4) 15 B. 194; 3 Ind. Dec. (N. S.) 131.

accused's own admission that he intended by the blow to kill. With great deference the learned Judge gives no reason for the view he takes. Mr. Justice Parsons took the view that the whole transaction, the blow and the burning, must be treated as one and that, therefore, the original intention to cause death applied to the act of burning which did cause death. The Chief Justice disagreed with Mr. Justice Parsons as to the transaction being one and without giving any other reason acquitted. With the greatest deference to the learned Judges I do not find any assistance from the manner in which they disposed of the case. Mr. Mayne deals with this case in section 414 of his notes and is inclined to agree with the dissenting Judge that the intention should be treated as continuing up to the burning.

The last case is *Emperor* v. *Dalu Sardar* (5). In that case, the accused assaulted his wife by kicking her below the navel. She fell down and became unconscious. In order to create an appearance that the woman had committed suicide, he took up the unconscious body and, thinking it be a dead body, hung it by a rope. The *post mortem* examination showed that death was due to hanging. The Court, I think, assumed that at the time he struck her he was not intending to cause death, and, I think, we may also take it that the injury was not in fact likely to cause death. The learned Judges say that as he thought it to be adead body, he could not have intended to kill her if he thought that the woman was dead, and seem to assume that the intention to cause death is a necessary element in the offence of murder. With very great deference to the learned Judges, they seem to have ignored the language of sections 299 and 300 and accordingly I can find no assistance from this case. That being the state of the authorities, it seems to me to be advisable to get a definite pronouncement from this Court and I would, therefore, refer to a Full Bench the question whether on the facts found by us in this case the offence of murder has been committed.

SADASIVA AYAR, J.—I agree in referring the question to a Full Bench as proposed by my learned brother. I shall, however, give my own opinion shortly on the matter referred. I do not think that the case of *R.* v. *Prince* (2) relied on strongly by Mr. Osborne has much relevancy in the consideration of the question before us. In that case the decision mainly depended upon the wording of the Statute 24 and 25 Vict. C. 100, section 55, which made the taking unlawfully of an unmarried girl, being under the age of 16 years, out of the possession of the father a misdemeanour. The majority held in that case that there was no lawful excuse for taking her away, and the accused's ignorance of her age did not make it not unlawful. We have simply to construe the definition of culpable homicide in section 299. The intention "to cause such bodily injury as is likely to cause death" cannot, in my opinion, mean anything except 'bodily injury' to a *living human body*. If this is not so, then, according to the strict letter of the definition, the relatives who burn the body of a man believing it to be dead would be guilty of culpable homicide; I may even say that it is remarkable that the words "of a human being" are not added in the body of the definition after "death" and as the definition stands, the causing of the death of anything with intention will be culpable homicide which of course is a contradiction in terms. I think after the words 'bodily injury' the following words must be understood, namely, 'to some living human body or other' [it need not be a particular person's body according to illustration (*a*) and it may even be the body of another living person than the one intended actually that received the injury]. The case in *Emperor* v. *Dalu Sardar* (5) is almost exactly a similar case to the present. Though (as my learned brother points out) the Judges refer only to the intention to kill and not the intention to cause bodily injury likely to cause death, the two stand clearly on the same footing.

As regards Mr. Osborne's argument that a person who does an unlawful act such as trying to conceal a murder should take the consequences of the same if the act done in furtherance of that unlawful intention results unintentionally in homicide, I need refer only to illustration (*c*) to section 299, which indicates that the Indian Legislature did not wish to import the artificial

(5) 26 Ind. Cas. 157; 18 C. W. N. 1279; 15 Cr. L. J. 706.

rules of the English Law of Felony into the Indian Criminal Law.

A similar case in *Queen Empress* v. *Khandu* (4) contains observations by Sargent, C. J., and Birdwood, J., that "what occurred from first to last cannot be regarded as one continuous act done with the intention of killing the deceased" and I agree with them respectfully. As regards the case, *Gour Gobindo Thakoor, In re* (3), no final opinion was expressed and the fact that the accused hastily and recklessly came to the conclusion that the woman was dead might make him liable for punishment under section 304A (causing death by doing rash or negligent act) but not under culpable homicide, sections 300 and 304 having the same relation to each other as section 325 and section 338 relating to grievous hurt.

This case came on for hearing in pursuance of the above Order of Reference to a Full Bench on the 17th March 1919.

Mr. *E. R. Osborne*, Public Prosecutor, for the Crown.—It is doubtful whether the English Law should be followed in India. If in fact death was caused by the act of hanging, is the knowledge of the accused material? *Queen Empress* v. *Khandu* (4) is a case in point. See also *Emperor* v. *Dalu Sardar* (5) and *Gour Gobindo Thakoor, In re* (3). I do not propose, however, to argue that the act of the accused does constitute the offence of murder or culpable homicide.

[WALLIS, C. J.—Suppose the offence is not under section 300, Indian Penal Code, does it fall under section 304A?]

The act is neither rash nor negligent. The act of hanging is a deliberate act.

Mr. *V. K. Ponnusowmy Aiyangar*, for the Accused, was not called upon.

OPINION.—The accused was convicted of murder by the Sessions Judge of Coimbatore. He appealed to this Court, which took a different view of the facts from that taken by the learned Sessions Judge and has referred to us the question whether on the facts, as found by the learned Judges who composed it, the accused has in law committed the offence of murder. Napier, J., inclined to the view that he had: Sadasiva Aiyar, J., thought he had not. The facts as found are these: the accused struck his wife a blow on the head with a ploughshare, which knocked her senseless. He believed her to be dead and in order to lay the foundation for a false defence of suicide by hanging, which he afterwards set up, proceeded to hang her on a beam by a rope. In fact the first blow was not a fatal one and the cause of death was asphyxiation by hanging, which was the act of the accused.

When the case came before us, Mr. Osborne, the Public Prosecutor, at once intimated that he did not propose to contend that the facts as found by the learned referring Judges constitute the crime of murder or even culpable homicide. We think that he was right in doing so: but as doubts have been entertained on the subject, we think it proper to state shortly the grounds for our opinion. By English Law this would clearly not be murder but manslaughter, on the general principles of the Common Law. In India every offence is defined, both as to what must be done and with what intention it must be done, by the section of the Penal Code which creates it a crime. There are certain general exceptions laid down in Chapter IV, but none of them fits the present case. We must, therefore, turn to the defining section 299. Section 299 defines culpable homicide as the act of causing death with one of three intentions:

(*a*) of causing death,
(*b*) of causing such bodily injury as is likely to cause death,
(*c*) of doing something which the accused knows to be likely to cause death.

It is not necessary that any intention should exist with regard to the particular person whose death is caused, as in the familiar example of a shot aimed at one person killing another, or poison intended for one being taken by another. 'Causing death' may be paraphrased as putting an end to human life: and thus all three intentions must be directed either deliberately to putting an end to a human life or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to human life. The knowledge must have reference to the particular circumstances in which the accused is placed. No doubt if a man cuts the head off from a human body, he does

an act which he knows will put an end to life, *if it exis's*. But we think that the intention demanded by the section must stand in some relation to a person who either is alive, or who is believed by the accused to be alive. If a man kills another by shooting at what he believes to be a third person whom he intends to kill, but which is in fact the stump of a tree, it is clear that he would be guilty of culpable homicide. This is because, though he had no criminal intention towards any human being actually in existence, he had such an intention towards what he believed to be a living human being. The conclusion is irresistible that the intention of the accused must be judged, not in the light of the actual circumstances, but in the light of what he supposed to be the circumstances. It follows that a man is not guilty of culpable homicide, if his intention was directed only to what he believed to be a lifeless body. Complications may arise when it is arguable that the two acts of the accused should be treated as being really one transaction, as in *Queen Empress* v. *Khandu* (4), or when the facts suggest a doubt whether there may not be imputed to the accused a reckless indifference and ignorance as to whether the body he handled was alive or dead, as in *Gour Gobindo's case* (3). The facts as found here eliminate both these possibilities, and are practically the same as those found in *Emperor* v. *Dalu Sardar* (5). We agree with the decision of the learned Judges in that case, and with clear intimation of opinion by Sargent, C. J., in *Queen-Empress* v. *Khandu* (4).

Though in our opinion, on the facts as found, the accused cannot be convicted either of murder or culpable homicide, he can, of course, be punished both for his original assault on his wife, and for his attempt to create false evidence by hanging her. These, however, are matters for the consideration and determination of the referring Bench.

Answered in negative.

M. C. P.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 844 OF 1918.

February 4, 1919.

Present :—Justice Sir George Knox, KT.

BRAHMA NATH—APPLICANT

versus

SUNDAR NATH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898*)*, *ss.* 145, 435, 439—*Title and possession, question of, decided by Civil Court—Proceedings under s.* 145, *whether competent—Jurisdiction of Criminal Courts—Revision—High Court, power of interference of.*

Where a Civil Court has decided the question of *title* to property which forms the subject of proceedings under Chapter XII of the Code of Criminal Procedure, and has directed that possession thereof be given to a particular person, the Criminal Court has no jurisdiction to initiate fresh proceedings under section 145 in respect of the same property. Such a proceeding is without jurisdiction and is liable to be quashed in revision by the High Court. [p. 172, col. 2.]

Proceedings under section 145 of the Criminal Procedure Code must be in intention, in form and in fact proceedings under Chapter XII of the Code by a Magistrate duly empowered to act under that chapter. [p 172, col. 1.]

Where an order under section 145 of the Code of Criminal Procedure was passed by a Magistrate whose jurisdiction was open to doubt and as a result of proceedings which were not in intention, form or fact proceedings under Chapter XII of the Code:

Held, that the proceedings were illegal and were liable to be set aside in revision. [p. 173, col. 1.]

Criminal revision from an order of the Magistrate, First Class, Gorakhpur.

Mr. *Pearey Lal Banerji* (with him Mr. *Shiva Prasad Sinha*), for the Applicant.

Mr. *N. C. Vaish* (with him Dr. *S. M. Sulaiman* and Mr. *Iswar Saran*), for the Opposite Party.

JUDGMENT.—This is an application for criminal revision of certain proceedings connected with property within the District of Gorakhpur. The proceedings are proceedings purporting to have been taken under section 145 of the Code of Criminal Procedure. The application in this Court was filed on the 21st of December 1918. The applicant prayed that this Court might be pleased to call for the record and quash all proceedings on the following grounds:—

1. Because the proceedings are absolutely without jurisdiction and are illegal.

2. Because the right and title to possession having been just decided by a competent Court, fresh proceedings, ostensibly

under section 145 of the Code of Criminal Procedure, cannot be started with the object of continuing the attachment of the property.

3. Because the order, dated the 23rd of July 1918, attaching the property is under the circumstances beyond the competence of the Criminal Court.

4. Because the jurisdiction of the Criminal Courts has ceased with the decision of the Civil Court.

The application was admitted on the grounds stated therein and in consequence the record is now on the table before me. The property in dispute is said to be property attached to a *math* called Asthan Gorakhnath. Part of it is situate somewhere, I am told, in Tahsil Sadar and the greater part of it in Tahsil Maharajganj. It apparently is conceded on both sides that there have been various disputes regarding this property and those disputes have resulted in cases instituted in Criminal Courts of Gorakhpur. It is contended on behalf of Baba Sunder Nath that those cases represent cases of serious offences in the Indian Penal Code. According to him riots have multiplied and there has been damage to property. On the other hand looking to the result of the cases and the orders issued upon them, either these cases were not of the serious nature alleged, or they have been grappled with by punishments which would lead to an inference that the proceedings were not so serious as has been alleged. Be that as it may, two cross suits in the Civil Courts had been instituted and both of these were decided by the Subordinate Judge of Gorakhpur, and that as recently as the 15th of June 1918. While these civil suits were pending, a considerable portion of the property in dispute, partly situate in Tahsil Sadar and partly situate in Tahsil Maharajganj, was under attachment by the Magisterial authorities. It appears that as soon as the Subordinate Judge of Gorakhpur decided the cases before him, an application was made by Baba Brahma Nath to the Sub-Divisional Magistrate, Sadar, stating that he, Brahma Nath, had been held in the judgment of the Civil Court to be in possession. The judgment needs careful perusal, for the Civil Court held that though Brahma Nath had failed to prove that Baba Sundar Nath was deposed and that Brahma Nath was made Mahant, yet it held Brahma Nath entitled to possession of the property and ordered him to explain the accounts to Sundar Nath. As I say, there is more in the judgment, but for the purposes of the proceedings before me I do not think it necessary to recapitulate all that has been stated, but to go at once to the order of the Civil Court which is to the effect that the attachment made of any property of the temple should be withdrawn in all cases. Brahma Nath was held by the Civil Court entitled to possession and all the property attached was now to pass into the possession of Brahma Nath, who was liable to explain the accounts to Sundar Nath. The Tahsil Sadar acting upon this order released all the property attached within the jurisdiction of the Sub Divisional Magistrate of Sadar.

On the 1st of July 1918 Baba Brahma Nath applied to the Sub-Divisional Magistrate of Maharajganj asking that the village Ubrichak situate within his jurisdiction should be similarly released. The Sub-Divisional Magistrate of Maharajganj, therefore, addressed the District Magistrate of Gorakhpur stating that he agreed with the Sub Divisional Magistrate of Sadar and asking for an order from the District Magistrate. The opinion of both these officers is said to have been that a fresh case under section 145 of the Criminal Procedure Code should be started in respect to all the immoveable property belonging to the *math* of Gorakhnath Asthan situate within Tahsil Sadar as well as within Tahsil Maharajganj and asking that some particular Magistrate might be ordered to try and dispose of the case in respect to the entire property. This points to the matters before the Sub-Divisional Magistrates being proceedings and not cases. If they were cases, this communication between the Sub-Divisional Magistrates and the District Magistrate was entirely out of order. On the 20th of July, the District Magistrate recorded the following order: —

"It having been brought to my notice that there has been a dispute regarding the title to the management of the immoveable property of the Asthan of Gorakh Nath, and that this dispute is likely to be the occasion of a breach of the peace, I direct that proceedings under section

145 of the Criminal Procedure Code be taken in respect of this property. The property not being all situate in one Sub-Division, I direct that the proceedings in respect of the whole property be taken by Pandit Badri Narain Misra, Deputy Magistrate of the first class."

It is claimed by the learned Counsel for Baba Sundar Nath that the District Magistrate was competent to pass this order under section 192 of the Code of Criminal Procedure. Section 192 authorises a District Magistrate to transfer a case of which he has taken cognizance, for enquiry or trial, to any Magistrate subordinate to him. It may be open to question whether by passing this order of the 20th of July, the District Magistrate can be said to have taken cognizance of the case, and further it may be questioned whether section 192 has any reference whatever to proceedings under section 145 of the Code of Criminal Procedure. Chapter XII, in which section 145 and the following sections are to be found, very carefully avoids mentioning the word "case" at all. It talks of disputes and of proceedings, but nowhere of cases; and a third difficulty arises whether, if transfer was authorised under section 192, the transfer was to a Magistrate competent under the Code. The Magistrate selected by the District Magistrate of Gorakhpur was directed to pass orders in connection with property part of which was not within the local limits of the jurisdiction of Sub-Division Maharajganj. Further, the District Magistrate, if he took cognizance of the case, had to be satisfied that a dispute likely to cause a breach of the peace existed concerning land within his jurisdiction. He had to make an order in writing, stating the grounds of his being so satisfied. He had to require the parties concerned in such dispute to attend his Court in person or by Pleader within a time to be fixed by him and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. The District Magistrate in his order of the 20th of July puts on record not one of these steps. If we pass on to the order passed by the Sub-Divisional Magistrate of Maharajganj, we shall find a notice issued on the 23rd of July 191-. In this notice the Sub-Divisional Magistrate of Maharajganj does set out that he is satisfied that a dispute likely to cause a breach of the peace exists concerning immoveable property. He then goes on to shelter himself behind an order of the District Magistrate, but he nowhere states the grounds of his being satisfied that such a dispute does exist.

It may seem, to use a proverbial expression, that this is, "dotting i's and crossing t's with a vengeance;" but it has been held over and over again by this Court, for example in *Jhingai Singh* v. *Ram Pratap* (1), that proceedings under section 145 must be in intention, in form, and in fact proceedings under Chapter XII of the Code of Criminal Procedure by a Magistrate duly empowered to act under that chapter. The same has been held by a Divisional Bench of this Court in *Sayeeda Khatun* v. *Lal Singh* (2). It is true that in *Ganga Saran Singh* v. *Bhagwat Prasad* (3), to which I was a party (a case in which the initial order was defective, in that it did not set forth the grounds for the Magistrate being satisfied with the existence of a dispute likely to cause a breach of the peace), this Court declined in revision to interfere with the Magistrate's order, but that was an exceptional case, and we, rightly or wrongly, did not deem it expedient to exercise our power in revision. In the present case I deem it expedient to exercise my power in revision and I set aside the proceedings held by the Sub-Divisional Magistrate of Maharajganj.

A great deal was addressed to me upon the fact that there is a dispute likely to cause a breach of the peace, that the property in dispute will be in danger of being badly administered, that the *math* of Gorakhnath is in danger of being misused, if not misappropriated, but all this is really irrelevant to the matter before me. I cannot overlook the fact that a Civil Court, whose competence has been nowhere attacked in the course of the argument, has passed an order directing possession to be given to Brahma Nath over the property in dispute That order can be taken before, and I believe at the present moment is being taken before, a competent Civil Court in appeal. The Civil

(1) 11 Ind. Cas. 762; 31 A. 150; 9 Cr. L. J. 382: 6 A. L. J. 113.

(2) 25 Ind. Cas. 324; 36 A. 233; 12 A. L. J. 344; 15 Cr. L. J. 572.

(3) 5 Ind. Cas. 471; 32 A. 132; 7 A. L. J. 53; 11 Cr. L. J. 141.

Procedure Code gives ample power over property which can be shown to be in danger of being misappropriated or wasted, being protected without having resort to a Criminal Court to pass orders contrary to Civil Court orders which up to the present have not been disturbed. The Criminal Court also had ample jurisdiction, provided the facts had been properly stated to it, of binding the parties over to keep the peace. Orders under section 107 can be so framed as to make it not worthwhile for either party to attempt a breach of the peace, and for these reasons I do not deem it expedient that action should be taken under section 143, especially since orders have been passed by a Magistrate whose jurisdiction is open to doubt, and which are, not in intention, form or fact, proceedings under Chapter XII of the Code of Criminal Procedure. The proceedings are entirely set aside and the parties will revert to the status immediately preceding the institution of these proceedings. Let the record be returned.

Record returned

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 295 OF 1919.

May 3, 1919.

Present:—Mr. Justice Stuart.

RAGHUBIR KURMI—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 406, 420—Cheating—Deception, proof of, whether necessary—Property obtained for one purpose used for another—Offence.

To justify a conviction under section 420 of the Penal Code, deception must be proved Where in the absence of deception a person obtains property for one purpose and uses it for another, he is guilty of an offence under section 406, and not under section 420, of the Code.

Criminal appeal against the order of the Sessions Judge, Azamgarh, dated the 17th February 1919.

Mr. *L. M. Banerji* (Government Pleader), for the Crown.

JUDGMENT.—It is clearly proved that the appellant induced the complainant to entrust him with a gold *mohur*. The complainant's little boy was weeping and the appellant told him (the complainant Jhagroo) to hand him over a gold *mohur*

which was tied round Jhagroo's neck, so that he might induce the boy to stop weeping by distracting his attention with it. Jhagroo gave the appellant the gold *mohur* and the appellant misappropriated it.

The offence is clear, but it is not an offence under section 420, Indian Penal Code, it is one under section 406 There was no deception in the matter. The appellant asked for the gold *mohur* in order that he might play with the child, using the *mohur* as a plaything. There is nothing to show that he intended to deceive the complainant thereby. He got hold of the gold *mohur* for one purpose and used it for another.

I alter the conviction from one under section 420 to one under section 406. In view of the fact that the appellant had been convicted six times, I uphold the sentence.

The revised conviction will be under section 406/75 of the Indian Penal Code. The sentence will stand at seven years' rigorous imprisonment.

Conviction atered.

PATNA HIGH COURT.

CRIMINAL REVISION No. 96 OF 1917.

April 24, 1917.

Present:—Mr. Justice Mullick.

EQBAL KHAN—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 190, 192, 195, 200, 202, 476—Complaint—Complainant, failure to examine, effect of—Process issued to witnesses of complainant, effect of—Transfer of case—Non-cognizable offence—Jurisdiction of Magistrate to take cognizance on Police report—Procedure—Sanction to prosecute Order directing prosecution, legality of—Appeal, whether lies.

A Magistrate has no jurisdiction to dispose of a complaint without examining the complainant on oath antecedent to ordering an enquiry under section 202, Criminal Procedure Code, nor can this primary absence of jurisdiction be cured by examining the complainant subsequent to the enquiry. [p. 175, col 2]

The fact that a Magistrate before transferring a complaint under section 192, Criminal Procedure Code, for enquiry and disposal issues processes upon the witnesses of the complainant, does not materially alter the nature of the transfer, nor does it affect his jurisdiction [p. 175, col. 2.]

A duly empowered Magistrate may take cognis-

ance of a non-cognizable offence on a Police report under section 190 (*b*), Criminal Procedure Code, but in that case he must immediately summon the accused. He cannot hold a judicial enquiry under section 202, Criminal Procedure Code. [p. 176, col 1.]

There cannot in the same proceeding be a sanction under section 195, Criminal Procedure Code, and an order for prosecution under section 476, Criminal Procedure Code. [p 175, col. 1.]

A Sessions Judge has no jurisdiction to deal in appeal with an order of a lower Court passed under section 476, Criminal Procedure Code.[p. 175, col. 1.]

Criminal revision against the order of the Sessions Judge, Purneah, dated the 24th January 1917 affirming that of the Deputy Magistrate, Purneah, dated the 4th December 1916, sanctioning the prosecution of the petitioner under section 211, Indian Penal Code.

FACTS appear from the judgment.

Mr. *Mustafa Khan*, for the Petitioner.—The proceedings under section 476, Criminal Procedure Code, are *ultra vires* and illegal, because the order of the Deputy Magistrate sanctioning my prosecution under section 211, Indian Penal Code, was set aside on appeal by the Sessions Judge and also because there was no order of the Deputy Magistrate independent of the order of sanction which was set aside by the Judge.

Further the Sub-Divisional Officer had no jurisdiction to transfer the case, nor had the Deputy Magistrate any jurisdiction to pass an order sanctioning my prosecution because the petitioner-complainant was never examined before the case was transferred or before the beginning of the enquiry. In fact the complainant was never examined at all in any stage.

The Sub-Divisional Officer before transferring the case issued summonses to petitioner's witnesses, therefore, he only sent the case for enquiry. In this view also M. Abdul Majid had no jurisdiction to draw up proceedings under section 476 because he could not dismiss the complaint.

Mr. *Manohar Lall*, Assistant Government Advocate, for the Crown.—The Sessions Judge had no jurisdiction to hear an appeal from an order passed under section 476 of the Criminal Procedure Code. Therefore the whole order should be ignored as if it does not exist. He was under the mistaken impression that the Deputy Magistrate had passed an order under section 195, Criminal Procedure Code. The Deputy Magistrate says: "I sanction prosecution of Eqbal Khan under section 211, Indian Penal Code. Draw up proceedings accordingly." The order is not happily worded, but it is clear from a perusal of the proceeding which he actually drew up under section 476, Criminal Procedure Code, on the 9th of December that his original order of the 4th of December was intended to be passed under section 476, not under sections 195, Criminal Procedure Code M. Abdul Majid could not have passed an order under section 195 because there was no application before him of anybody asking for sanction under section 195, Criminal Procedure Code.

Non-examination of the complainant is a mere irregularity; the complainant can be examined at the time of the trial and his non examination has not prejudiced him, because all his witnesses have been examined and, therefore, he could not have improved upon their statements.

The order of Sub Divisional Officer is this: "To M. Abdul Majid, Deputy Magistrate, for disposal. He will enquire and pass final orders on this and connected cases, if any." It is clear, therefore, that M. Abdul Majid was competent to dismiss the complaint and draw up a proceeding under section 476, Criminal Procedure Code, as he did. The issuing of processes to witnesses is not an regularity at all, and, even if it was, it does not affect the matter.

JUDGMENT.—The petitioner in this Rule lodged an information before the Police charging certain persons with committing dacoity. The Police investigated the charge and found it to be false and reported the matter to the Sub Divisional Magistrate of Purneah, requesting that the petitioner might be prosecuted under section 211, Indian Penal Code, for preferring a false charge. In the meantime the petitioner lodged a petition before the Sub-Divisional Magistrate maintaining that his information to the Police was true and asking that an enquiry might be made into the complaint. The Sub Divisional Magistrate thereupon, on the 8th of September 1916, directed that the petition should be treated as a complaint and should be inquired into judicially and on the 22nd of September, he issued processes upon the petitioner's witnesses for an inquiry to be held on the 18th of October. On the

30th of October, when the witnesses of the petitioner were present in Court, the Sub-Divisional Magistrate transferred the case to a Deputy Magistrate directing him to inquire and pass final orders in the case.

The Deputy Magistrate thereupon made an enquiry, examined the witnesses and finally on the 4th of December 1916, dismissed the petitioner's complaint under section 203, Criminal Procedure Code. He also added the following order: "Enter maliciously false, section 395, Indian Penal Code. I sanction prosecution of Eqbal Khan under section 211, Indian Penal Code. Draw up proceedings accordingly."

The petitioner thereupon appealed to the Sessions Judge. The proceedings of the learned Judge are not very intelligible, but in the result he appears to have expunged from the judgment of the learned Deputy Magistrate the following words: "I sanction prosecution of Eqbal Khan under section 211, Indian Penal Code." If the learned Judge was under the impression that the learned Deputy Magistrate had sanctioned the prosecution of Eqbal Khan under section 195, Criminal Procedure Code, and had also at the same time instituted proceedings under section 476, Criminal Procedure Code, he obviously was in error. There could not in the same proceeding be a sanction and an order for prosecution under section 476, Criminal Procedure Code, and the learned Judge's order directing that so far as the sanction was concerned the judgment of the learned Deputy Magistrate should be set aside, seems to have been totally misconceived. The fact was that the order of the learned Deputy Magistrate was nothing more or less than an order under section 476, Criminal Procedure Code, and, therefore, the learned Judge had no jurisdiction to deal with it in appeal. The learned Judge was not competent merely upon the consent of the Government Advocate to expunge certain words from the order. If the order was one under section 476, Criminal Procedure Code, the learned Judge had no jurisdiction. If it was one under section 195, then the learned Judge had jurisdiction and in clear terms should have declared whether the proceedings against the petitioner were quashed. The learned Judge's proceeding, however, does not materially affect the matter now before me. Treating the order of the learned Deputy Magistrate as an order under section 476, Criminal Procedure Code, the question that I now have to determine is whether that order was made with jurisdiction.

Now it appears that the petition or complaint, which was made to the Sub-Divisional Magistrate by the petitioner asking for an enquiry, was transferred to the learned Deputy Magistrate under section 192, Criminal Procedure Code. The learned Vakil for the petitioner contends that the transfer was made under section 202, and not under section 192, and that all that the learned Deputy Magistrate was competent to do was to make an enquiry and return the papers to the Sub-Divisional Magistrate; but that clearly is not correct. The learned Sub-Divisional Magistrate transferred the complaint for disposal by the Deputy Magistrate and directed him to pass final orders. The fact that the learned Sub-Divisional Magistrate issued processes upon the witnesses of petitioner does not materially alter the nature of the transfer. The issue of processes was perhaps premature, but it in no way affected the jurisdiction of the Deputy Magistrate to deal with the complaint according to the terms of Chapter XVI. The fatal objection, however, to the proceedings of the learned Deputy Magistrate is that he omitted to examine the complainant and that under the terms of section 202, Criminal Procedure Code, until he did so examine the complainant, he had no jurisdiction whatsoever to dispose of the complaint. Therefore in the present case, although the learned Deputy Magistrate has made an elaborate enquiry, that enquiry is wholly without jurisdiction and infructuous. It will not avail to seek to cure the defect by examination of the complainant at the present stage, for jurisdiction founded upon the examination of the complaint subsequent to the enquiry will not cure the primary absence of jurisdiction. It is unfortunate that the proceedings of the learned Deputy Magistrate have to be set aside, but there is no help for it.

Then the learned Deputy Government Advocate urges that although the proceedings may not have been strictly in accordance with law under the provisions of section 202, Criminal Procedure Code, yet the Sub-Divi-

sional Magistrate and through him the Deputy Magistrate had jurisdiction to enquire on the footing that the Sub-Divisional Magistrate may be said to have taken cognizance of the Police report under section 190 (*b*), Criminal Procedure Code.

It is undoubtedly true that a Magistrate duly empowered may take cognizance of a non cognizable offence on a Police report under section 190 *b*), Criminal Procedure Code, but in that case he must immediately summon the accused, and he cannot under the provisions of the Criminal Procedure Code proceed to hold a judicial enquiry as was done in the present case. The proceedings of the learned Sub Divisional Magistrate and the learned Deputy Magistrate clearly indicate that cognizance was taken of a complaint under section 190 (*a*) and that the transfer was made under section 192.

The result, therefore, is that the order directing the prosecution of the petitioner must be set aside and that the whole proceedings be re-commenced from the stage at which the petitioner made his complaint. The Sub Divisional Magistrate will examine the petitioner on oath as required under the terms of section 200, Criminal Procedure Code, and will then proceed to dispose of the complaint according to law. If it is still found that the complaint is false and that the petitioner should be prosecuted for making a false charge under section 211, Indian Penal Code, a proceeding should be drawn up as required by section 476, Criminal Procedure Code, and submitted to the nearest First Class Magistrate as required by that section. I have directed the Sub Divisional Magistrate to deal with the case himself because having regard to the extra-judicial enquiries which the learned Deputy Magistrate has made, it is not desirable that he should again hear the case.

Order accordingly.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 507 OF 1918.
(TAKEN UP No. 31 OF 1918.)
November 6, 1918.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Krishnan.

In re RATHINAM PILLAI AND ANOTHER—ACCUSED NOS. 3 AND 4.

Criminal Procedure Code (Act V of 1898), s. 532, scope of—Want of territorial jurisdiction in Committing Magistrate, effect of—Committal, order for, whether liable to be quashed.

Section 532 of the Criminal Procedure Code does not deal with cases in which the defect in the committal order arises from want of territorial jurisdiction

Criminal revision from an order passed by the Court of Session, Tanjore.

FACTS appear from the judgment.

The Public Prosecutor, for the Crown.—The committal is not irregular within the meaning of section 532, Criminal Procedure Code. The Magistrate had power to commit under section 206 and the defect referred to in section 532 is not a defect arising from want of territorial jurisdiction: *Queen-Empress* v. *Abbi Reddi* (1) and *Queen-Empress* v. *James Ingle* (2).

Mr. *T. R. Venkatarama Sastri*, for the Accused.—It was not within the competence of the Magistrate to commit. He had no local jurisdiction to commit and the case is covered by section 532.

ORDER.—The Sessions Judge of Tanjore has passed an order under section 532 of the Code of Criminal Procedure quashing the commitment of accused Nos. 3 and 4, on the ground that the Committing Magistrate had no local jurisdiction to commit. This is not a ground giving a Sessions Judge jurisdiction to pass an order under section 532 of the Code of Criminal Procedure: *vide Queen-Empress* v. *Abbi Reddi* (1) and *Queen-Empress* v. *James Ingle* (2). There is no question that the Committing Magistrate in this case was empowered to commit under section 206 of the Code of Criminal Procedure, and we agree with the rulings above quoted that section 532 does not deal with cases in which the defect in the committal order arises from want of territorial jurisdiction.

We set aside the order of the Sessions Judge and direct him to accept the committal of these accused and dispose of the case according to law.

Order set aside.

M. C. P.

(1) 17 M. 402; 4 M. L. J. 196; 2 Weir 704; 6 Ind. Dec. (N. S.) 279.
(2) 16 B 209; 8 Ind. Dec. (N. S.) 611.

DAMUSA *v.* ABDUL SAMAD.

PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

February 27, 1919.

Present:—Viscount Haldane, Viscount Cave, Lord Dunedin, Sir John Edge and Mr. Ameer Ali.

DAMUSA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

ABDUL SAMAD AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 100—Appeal, second—Issue not framed in trial Court or first Appellate Court, whether can be decided in second appeal.

A Court of second appeal is within its rights in cases where the appropriate issue has not been framed but in which there is sufficient evidence on the record for deciding that issue, in raising and deciding such issue itself [p. 179, col. 2.]

Appeal from a decree of the Court of the Judicial Commissioner, Central Provinces, dated the 27th June 1913, reversing a decree of the District Judge, East Berar.

FACTS of the case are sufficiently stated in their Lordships' judgment. The defendants, by a deed which they alleged to be a mortgage by conditional sale, but which plaintiffs alleged to be a sale-deed, transferred to plaintiffs for Rs. 3,000 certain fields which were worth more. It was agreed that plaintiffs should re-sell to defendants if defendants re paid the Rs. 3,000 on June 27, 1909. That day fell on a Sunday. On the preceding Saturday plaintiffs attended at the Registrar's office and presented for registration a deed re-transferring the fields to defendants for Rs 3,000. The deed was not registered as the money was not paid: first defendant attended with the money later in the day, but plaintiffs had then gone, and on Monday, when the defendants were willing to pay, plaintiffs alleged the term was past.

Plaintiffs brought this suit for cancellation of the (unregistered) sale deed and possession The Trial Judge found (1) that there was no agreement proved to substitute Monday for Saturday, (2) that the first defendant had been guilty of fraud, having obtained the sale-deed without any intention of paying. He decreed the suit and the first Court of Appeal upheld his decision and findings. In second appeal the Judicial Commissioner's Court held that the real question was, who was responsible for the non-production of the purchase-money: he found this in defendants' favour and dismissed the suit. He held there was no evidence of fraud.

Hence this appeal.

Messrs. *DeGruyther*, *K. C.*, and *Parikh*, for the Appellants, submitted that the powers of a Court of second appeal were strictly limited by section 100 of the Code. Both the lower Courts have found this is an out and out sale, not a mortgage by conditional sale, both Courts have held that the execution of the deed which we seek to set aside was brought about by the respondents' fraud. We have concurrent findings of fact in our favour and the Judicial Commissioner's Court had no power to disturb them.

Sir *W. Garth*, for the Respondents.—It is a question of law, not of fact, whether there is evidence to support the finding of fraud: there is none. There is no evidence that we had no intention to pay the money. The entries in the Sub Registrar's book are an admission, and as such are evidence in our favour. There ought to have been a distinct finding, whether the Sub-Registrar and the appellants did not make it impossible for respondents to pay.

The deed by which the fields were transferred to plaintiffs was a mortgage by conditional sale Time was not of the essence of the contract.

[Their Lordships requested Mr. DeGruyther to confine his reply to two points, (1) whether an issue was raised in the trial Court and in first appeal as to who was responsible for the non payment, (2) whether there was any evidence of fraud.]

Mr. *DeGruyther*, *K. C.* in reply.—The facts are plain: the only question is what inferences should be drawn from those facts. There being no issue fixed as to who was responsible for the non-payment, the Judicial Commissioner could not come to any finding on any such issue: all he could do, and all this Board can do, is to remit the case: fresh facts cannot be found in second appeal.

JUDGMENT.

VISCOUNT HALDANE.—This is an appeal from a judgment of the Judicial Commissioner, Central Provinces, which reversed a judgment of the District Court, Amraoti,

which in its turn affirmed a judgment of the Subordinate Judge there.

The question which arises is whether the appellants are entitled to cancellation of a sale deed, dated the 26th June 1909, executed by them in favour of the respondent Abdul Samad, and to possession of the land to which it relates. Abdul Samad was the owner of three fields and on the 27th June 1908 he executed a deed in favour of the appellants purporting to be a deed of absolute sale of these fields for Rs. 3,000 (it being the fact that the fields were of a much greater value). He also executed an agreement reciting the sale-deed and providing that if purchase-money of the same amount be paid for the fields on the 27th June 1909 the appellants should re-sell, but the entire amount was to be paid on the date mentioned. This agreement was of the same date as the deed of sale. There was also a lease, dated two days later, on the 29th June 1908, under which the first appellant purported to let the fields to the first respondent, in the *benami* name of his nephew, for a year at a rent which would have been equal to about 24 per cent. interest on the purchase-money.

The effect of the transactions referred to was that the first respondent remained as before in possession of the fields. A year later, on the 26th June 1909, which was a Saturday, he appears to have been desirous of then paying the stipulated purchase-money of Rs. 3,000, and of obtaining a reconveyance of the property. A sale deed was drawn up for signature by him and the appellants, and for registration, and he paid to the appellants' agent Rs. 720, being the rent due under the lease, as well as Rs. 30 laid out for the stamp on the deed. The terms of the reconveyance provided that the amount of the purchase-money was to be received by the appellants from the first respondent in the presence of the Registering Officer at Kholapur. The deed was drawn up on the stamped paper and executed by the appellants, who went to the Registration Office and presented the document for registration. The first respondent was not there, but his agent was, with a sum of money in bags, out of which he paid the Rs. 30 for the registration fee. He then went to fetch the first respondent, taking the money with him. After he had gone the appellants waited, but only until the Sub Registrar left the office and went upstairs to his private quarters in the same house, and then they went away. A little later (about 3.30 P. M.) the respondent arrived, but was told by the Sub-Registrar's clerk that the deed could not then be registered. In the Registrar's minute-book an entry was made to the effect that the vendors were present and that the deed had been presented for registration, but that, as the purchaser was not present to pay the amount to the debtors, and as the debtors had not made their statement, registration was adjourned until the purchaser should make his appearance, up to the 26th October 1909. Whether this is accurate or not, it appears that the reason why the vendors and the Registrar were not there when the purchaser arrived a little later was that the Sub-Registrar, feeling unwell, had gone to his rooms upstairs, so that there was no one in the office when the purchaser arrived. The Sub-Registrar's view was apparently that the absence of the purchaser and the want of a statement from the vendors made it the proper course to adjourn registration till a later date. The 27th of June was a Sunday, when no business was transacted. On the Monday the first respondent went to the Registry Office, but the first appellant, although sent for, refused to attend, taking up the ground that the date for the exercise of the right to re-purchase was past. The first respondent explained his delay in being at the office on the Saturday as due to the fact that he had to look for and bring with him the lease which was to come to an end.

The question is, whether the appellants are entitled to get rid of the sale-deed which they executed, and which was registered but remained in the condition of an escrow, pending payment of the purchase-money, on the ground of the failure of the respondent Abdul Samad to attend on the Saturday afternoon before the Sub-Registrar had quitted the office. It appears from the evidence that the Sub-Registrar quitted the office before the usual hour of closing it. Witnesses were called on both sides, and there is some conflict of testimony. The Trial Judge held that no agreement had

been proved on the part of the appellants to accept the money on the 23th instead of the 27th or the preceding Saturday; he also found fraud on the part of the first respondent, in the form of a deliberate intention not to pay on the date specified. The Judge of the first Court of Appeal concurred in finding that there was no agreement to substitute Monday, the 28th, for Sunday, the 27th, and that this was enough to dispose of the case. On this point he concurred with the Trial Judge, and he also concurred with him in finding that there was fraud, the sale-deed being obtained to the extent of securing its registration without any intention of paying the purchase meney. On the second appeal to the Court of the Judicial Commissioner that learned Judge reversed the decisions in the two Courts below, holding that the real question was: Who was responsible for the non production of the purchase-money? He held that there was no evidence on which a finding of fraud could be based, and he expressed the opinion that the appellants really went away early on Saturday the 26th from the Registration Office, in order to avoid the arrival of the first respondent with his purchase money.

It is said that, having regard to the terms of section 100 of the Code of Civil Procedure, 1908, it was not competent to the Judicial Commissioner to interfere with the concurrent findings of fact or to entertain an appeal on the grounds he did. Their Lordships are unable to agree with this contention. The view of the Judicial Commissioner was that the first respondent was ready and willing to pay the purchase-money on the 26th June, and that it was due to the action of the Sub-Registrar and of the appellants in leaving the office when they did that he was prevented from doing so. He was also rightly of opinion that in point of law there was no evidence at all to support the finding of fraud. It is unfortunate that an issue was not framed on the real question, which was whether the first respondent was ready and willing to pay the purchase-money on the 26th June, and was prevented from doing so by the action of the appellants. This question is a different one from the question of narrower scope whether there was a new agreement come to in substitution of the 28th June for the 27th as the date of completion. Their Lordships are of opinion that the Judicial Commissioner was within his powers in taking the evidence as it stands, and coming to the conclusion that the real cause of the non-completion on the Saturday was that the Sub Registrar and the appellants left the Registration Office before the time at which the first respondent went there to complete, and without any desire on their part to have him come. Their Lordships have scanned the evidence closely and they think that it warrants this conclusion, and that it was within the power of the second Court of Appeal to draw it, notwithstanding that the appropriate issue had not been framed. The Trial Judge and the first Appellate Judge appear to have misconceived the real question they had to try, and this was first appreciated when the Judicial Commissioner dealt with the evidence.

Two other questions were raised on which, in the view they take, it is unnecessary for their Lordships to enter. The one relates to the question whether time was of the essence of the contract, and the other whether the transaction was not really one of mortgage; but the conclusion to which they have come makes it sufficient for them to say that they see no reason for disturbing the judgment appealed from and that the appeal ought consequently to be dismissed with costs. They will humbly advise His Majesty to that effect.

Appeal dismissed.

Solicitor for the Appellants.—Mr. *E. Dalgado.*

Solicitors for the Respondents.—Messrs. *Watkins & Hunter.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 174 OF 1916.

August 27, 1918.

Present :—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Shah.

DWARKADAS MOTILAL, AND OTHERS—DEFENDANTS—APPELLANTS

versus

BAI JEKORE—PLAINTIFF—RESPONDENT.

Bombay Watan Act (V of 1886), s. 2—Panch

DWARKADAS MOTILAL *v.* BAI JEKORE.

Mahal, tenure in—Jivak badal *grant*—*Death of* vatandar—*Daughter, whether entitled to share.*

A dispute whether an hereditary office in the Panch Mahals was held on service tenure was settled by Government. In announcing the settlement the Government admitted that the grant had been made *jivak badal, i. e.*, without the condition of service, and it was found that this announcement was made before the extension to the Panch Mahals of the Vatan Amendment Act, V of 1886. On the death of the last male holder his daughter filed the present suit for a declaration that she was entitled to a one-fourth share of her father's property. Her suit was decreed, and the defendants appealed to the High Court contending that the property in suit was all *watan* property:

Held, that the property in suit was not service *inam* to which alone the Watan Act applied, and that, therefore, the plaintiff's suit had been rightly decreed. [p. 184, col. 1.]

First appeal from the decision of the Additional First Class Subordinate Judge, Ahmedabad, in Suit No. 1024 of 1913.

Mr. *Coyajee* (with him Messrs. *Gokuldas K. Parekh* and *G. N. Thakor*), for the Appellants.

Mr. *Jayakar* (with him Mr. *M. H. Mehta*), for the Respondent.

JUDGMENT.—This is a suit by the plaintiff to obtain a declaration of her right to one-fourth share in the property mentioned in the plaint, which she alleges to be known as Vania Desai Vatan Property. It consists of two villages and part of two others, also *pasaita* lands and cash allowances. The plaintiff is the daughter of one Lallu Naranji, who died in 1870 leaving a widow named Jadav who died on the 8th January 1912. The plaintiff claims as a reversioner of Lallu Naranji. The family to which she belongs was entitled to Inam lands and other property in the Panch Mahals. One branch of the family was entitled to property with which we are not concerned. The other branch descended from one Valji Raghavji who is represented by Sunderji Valji and Kuvarji Valji, each of whom had an eight annas share in the Inam property of that branch. With Kuvarji's share we are not concerned. Sunderji's eight annas share descended in equal moieties to Kasanji and Mulji. We are not concerned with Kasanji's four annas share. Mulji had four sons Raiji, Jagubhai, Naranji and Bapuji. Bapuji married Deokuvar who represented the collateral branch of the Inamdar family, and Bapuji and his children have since then enjoyed the income of the Inams appertaining to that branch, and for the purpose of this suit it may be taken that Bapuji did not participate with his brothers in the enjoyment of the four-annas share descended from Mulji Sunderji. Mulji's grandson Jadhav Raiji having committed murder, his one-anna share was assigned by the Government of the time to his cousins Lalji Jagubhai and Naranji Mulji. Thus Jagubhai and Naranji's families became entitled to Mulji's four annas in equal shares. The plaintiff claims not only a share of her father Lallu Naranji, but also a share of her father's cousin Nandlal Lalji, and thus makes up her claim to one-fourth of the Inam property held by Valji's branch of the family. The chief defence is that the plaintiff being a female is excluded by the provisions of Act V of 1886 from participating in the inheritance, for the defendants contend that the property in suit is all Vatan property. The first important question, therefore, is as to the quality of the Inam, is it Jat Inam or Service Inam? and, secondly, if it be held not to be Service Inam, so that the plaintiff is not barred by the provisions of the Act of 1886, is she entitled to anything more than the two-annas share of her father Lallu Naranji?

Although the Inams are said to be 700 years old no Sanad or original grant is forthcoming. It is said that there were original Sanads but that they were destroyed in a fire in Godhra. Whether that allegation is true or false, there are no copies of any alleged Sanads forthcoming until the year 1888. In the year 1860 the Panch Mahals passed by treaty from the Maharaja Scindhia of Gwalior to the British Government, and Major Buckle representing the British Government was charged with the duty of investigating the nature of the various holdings in the territory so ceded. The result of his investigation was embodied in a report to Government in which he reported that the four villages in which the plaintiff claims to be entitled to share were held on service tenure. Government acted upon this report for a considerable time.

In 1872 they made rules for the settlement of alienated lands and cash allowances in the Panch Mahals: the following portions of the rules are relevant :—

"2. All lands held by individuals as personal Inams, without the condition of service, the estimated value of which has been allowed for in the exchange of territory with His Highness Scindhia shall be continued hereditarily to lineal male heirs in male descent of persons who were in possession at the time of the cession of the Panch Mahals or of those whose names are found entered in the accounts or in any authentic documents of His Highness Scindhia or in perpetuity as heritable and transferable property on the payment of two annas quit rent levied in Gujarat under Act VII of 1863.

"5. All lands not fulfilling the conditions laid down in rules 1 to 4 but claims to which may have been registered under the Notification of the 22nd December 1865, may, unless the claim appear to the Settling Officer to be so entirely unfounded as to warrant resumption (in which case an appeal will lie as hereinafter provided), be continued subject to the payment of a quit rent of from one-fourth to one-half of the survey assessment in perpetuity as endowment property in the case of those held in trust for religious or charitable institutions and as heritable and transferable property in the case of those held as personal Inams. Provided that lands claimed by Hereditary District and Village Officers on any other than service tenure shall be considered as held on that tenure unless they are proved to be held on some other tenure to the satisfaction of the Settling Officer.

"N. B.—The case of lands held by Hereditary District Officers shall be disposed of separately.

"N B.—Allowances to Hereditary District Officers will be disposed of separately."

The family to which the parties to this suit belong were known as Vania Desais, the term Desai implying a hereditary servant of the Pargana or District The family were offered in settlement under the rules the option of paying four annas in the rupee of assessment in lieu of service, that is, Government offered "to relieve them of all liability to perform service and to resume $\frac{1}{4}$ths of their service allowances, land and cash, leaving them the remaining $\frac{3}{4}$ths as private property." The Desais declined this offer, and on the 9th May 1879 Government by a Resolution declared that service had been exacted from the Desais in the past, and that Government required them to perform in the future all the work of the Katcheri. This Resolution evoked a petition from the Nagar and Bania Desais of Godhra on the 21st July 1879 in which they complained that the four-anna settlement which had been offered to them was too heavy, that their Inams were not held for service, and the only work that their ancestors had done in the past was occasionally to advise the Scindhia's Government, on which advice they received presents. In reply to this petition Government by a Resolution of the 14th November 1881 called upon the Desais either to accept or definitely to decline the four-anna settlement. On the 23rd January 1882 the Nagar and Bania Desais again presented a petition to Government and contended that their Inam was Jat or personal Inam, granted for maintenance (Jivak Badal) and not held for service.

As a result of this petition Government entirely altered its attitude towards the Desais. In a Resolution, dated the 8th May 1884, it was announced that the Government having reviewed the whole of the correspondence on the subject of the Vatan emoluments of the Desais of Godhra was inclined to reconsider the offer of a non-service settlement previously made to them. Government understood that what the Desais asked for was a two-anna settlement of the nine villages (five being Nagar and four Bania Desai villages) which were granted to them Jivak Badal to be calculated and paid at once on the full assessment of these villages and that they assented to a four-anna settlement of their miscellaneous lands and cash allowances. Government observed that the title asserted to the nine villages hardly brought them under the class of hereditary Inam, but on the other hand doubts entertained as to the nature of the title might perhaps be admitted to be such as the Summary Settlement was intended to remove. The Commissioner was directed to report after consultation with the Collector the detailed arrangements of settlement on the terms which Government was willing to entertain.

On the 18th January 1888, a Sanad was

issued by Government to the Bania Desais in respect of the village of Sureli, which recited that the village had been found to be held as personal Inam without the condition of service, and that the holder of the village had with a view to its being continued as private property agreed to pay to Government a fixed quit rent at two annas in the rupee, and it was thereby declared that the village should be continued for ever by the British Government as the private property of the person who should from time to time be its lawful holder on the conditions specified therein. On the 17th March 1888 a Sanad was issued to the Bania Desais in respect of the village of Vinzol purporting to be in accordance with the rules of 1872, reciting that the village had been found to be held as personal Inam without the condition of service. It was in other respects identical, *mutatis mutandis*, in terms with the Sureli Sanad. Sanads are not forthcoming for the lands held by the Bania Desais in Padardi and Kasanpur. Why such Sanads have not been produced has not been explained, but that there was a Sanad for Padardi granted a little before the Sureli Sanad appears from the Alienation Register for 1887-88 kept under the provisions of the rules under section 214 of the Land Revenue Code. From that register (column 11) it appears that the Inam lands in the villages of Padardi, Sureli and Vinzol were 'permanently enfranchised as private property.' Under this comprehensive description the period of enjoyment which has to be entered in column 11 is stated. It is true, as pointed out by the appellants' Counsel, that column 4 which is reserved for a description of the alienation has an entry of 'Watan Inams' against Padardi, but whatever may be the ground upon which this entry was made, it cannot affect the question now under consideration, for the fourth column seems to us to be concerned with the origin of the cession and not with the term and nature of the present enjoyment for the statement of which the eleventh column is provided. In the catalogue of Inams for 1884 85, Sureli was entered in the category of the servants of the Pargana. In the same catalogue Vinzol in 1886 87 was entered under servants of the Pargana and in the following year as Watan Inam. Padardi for the years 1884-85, 1885 86, 1886-87 was entered under servants of the Pargana and in 1888-89 as Permanent Watan Inam. These entries may have been in supposed compliance with the proviso to rule 5 of 1872. The *pasaita* lands are also specified in the Alienation Register under the villages to which they appertain and in each case the eleventh column describes them as 'permanently enfranchised as private property.'

The village of Kasanpur is not mentioned in the petition of the Desais to Government, but forms part of the plaintiff's claim in this suit. On the other hand the villages of Narsana and Dhandalpur are mentioned in the petition as belonging to the Bania Desais, but they are not included in this suit. Those villages belonged to Kalianji's branch of the family, and, therefore, Nandlal Lalji was not interested in them. That is the explanation of their not being included in the suit. Kasanpur was a village in which a four annas share belonged to the family for many years, and in 1885 86 a further three annas were purchased by the Bania Desais. The village appears to stand on the same footing as regards the quality of its tenure as the other villages in question in the suit. For it is mentioned in the Alienation Register as "permanently enfranchised as private property" in the same way as the villages of Padardi, Sureli and Vinzol are mentioned, and the same Register mentions in the column relating to Sanads the date of the Sanad issued in respect of Kasanpur, which indicates that the settlement of the tenure must have been come to at the same time as the settlement relating to the other villages.

The cash allowances undoubtedly fall under the category of Desaigiri Haks or cash allowances granted to persons holding the title of Desai. It is not surprising that whatever the settlement arrived at in 1888, they should be described as 'emoluments of a Watan' in the Sanad of the 6th of April 1888 (Exhibit 245), which recites that the holders of the Watan thereinafter set forth and held on service tenure had agreed to the annual deduction of four-annas in the rupee on the cash emoluments on condition of enjoying the remain-

der free from the obligation of service and the enjoyment of such remainder being guaranteed to them by Sanad. The Sanad then declares "the emoluments of this Watan shall, as now confirmed, be continued by the British Government in perpetuity without demand of service or any further deduction therefrom on that account and without any objection or question on the part of Government as to title, whether it shall have accrued in virtue of inheritance, adoption, transfer or otherwise."

In the Register of Nemnuks or allowances, the holders of the allowances in question are described as Watandars of the province and the nature of their property "private property for ever subject to four annas in the rupee."

The manner in which the settlement recorded in the Government Resolution of 1884 was worked out has now been stated. It was a settlement in perpetuity giving to the holders full and complete rights of ownership free from service and subject only to the reserved quit rent or deduction.

In terms and in substance it conferred upon the Desais the whole of the Inam property, subject as aforesaid, as their private property for ever with all incidents of inheritance and alienation attaching to other private property.

The Government Resolution of 1884 was before, but the Sanads were granted after, the passing of the Panch Mahals Laws Act (Act VII of 1885) and the Watan Act Amendment Act, V of 1886.

There can be no doubt that whatever construction may be placed upon certain provisions of the Watan Act relied upon by the defendants, the Crown Lands Act, 1895, compels us to construe the Sanads of the Sureli and Vinzol lands according to their tenor as confirming the villages as the private property of the holders subject to payment of quit-rent, and where this is the conclusion forced upon us by the only Sanads of the lands in suit which have been produced, it is difficult to come to a different conclusion as to the nature of the settlement in so far as it relates to the other villages referred to in the Government Resolution of 1884 which records the fact of the settlement. We have in this case to decide a dispute between the plaintiff and the defendants claiming as reversioners of Nandlal and Lallu a beneficial interest in the Inams and Haks. Government is not a party, and nothing we now say will affect any contentions which may hereafter be raised on behalf of Government. Without prejudice to any contention on the part of Government, we are unable to come to any other conclusion with regard to Kasanpur and the *pasaita* lands and the cash allowances which were confirmed in perpetuity subject to quit rent or deduction of four annas in the rupee according to the same Settlement of 1885. At that Settlement the Government contention was abandoned that the Desais held their villages otherwise than for their maintenance without obligation of service and having regard to the Desais' contention in their petitions of 1879 and 1882, the same result must have been arrived at with regard to the *pasaita* lands and cash allowances regarding which the *quantum* of quit rent or deduction was not in controversy.

The defendants take up an attitude directly opposed to that of their predecessors, the petitioning Desais, at a time when they successfully contended that their Inam lands and Haks were not held for service but were their private property. In order to defeat the plaintiff the defendants rely upon the terms of the Watan Act as interpreted in *Bai Jadav* v. *Narsilal* (1), contending that that decision shows that the property in suit is and always has been held for service and must be so held for the future and that for that reason the plaintiff as a female is debarred from inheritance by Act V of 1886.

That decision, however, must not be applied to a state of facts different from those which were before the Court. The actual point decided is correctly stated in the first clause of the head-note: "A Vatan in Gujarat does not cease to be Vatan property as defined by section 4 of Bombay Act III of 1874, merely because a service commutation settlement has been effected. Such a settlement does not change the nature of the property simply because service is not demanded."

In 1886 the services attached to a Watan were dispensed with and a Sanad was

(1) 25 B. 470 at p. 474; 3 Bom. L. R. 249.

issued in the following terms: "The Watan as now confirmed shall be continued without demand of service or any objection or question on the part of Government as to title to whomsoever shall from time to time be the lawful holder thereof but without affecting the rights and interests of other parties." There was no dispute as to existence of an hereditary office for which services had been exacted and the Watan was confirmed and continued.

The facts here are entirely different. The existence at any time of an hereditary office held on service tenure was disputed and Government by the Resolution announcing the settlement admitted that the grants of the villages had been made Jivak Badal, which was the contention of the Desais as to all the lands and the cash allowances. The settlement was in fact arrived at before the extension to the Panch Mahals of the provisions of the Watan Act but such settlements were confirmed by clause 2 of section 15 of that Act, assuming that the Watan Act would apply.

We hold, therefore, on the first question that the property in suit was not service Inam to which the Watan Act applies.

[*Note*.—The rest of the judgment is not material for this report.—*Ed*,]

Appeal partly allowed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 147 OF 1917.

May 22, 1919.

Present:—Sir George Knox, KT., Acting Chief Justice, and Justice Sir P. C. Banerji, KT.

PARBHU DAYAL—PLAINTIFF—APPELLANT

versus

ANANDI DIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Sale—Objection allowed—Remedy of decree-holder—Separate suit, maintainability of

Where an objection to a sale in execution of a decree is allowed, the decree-holder, if aggrieved thereby, has his remedy by way of appeal and second appeal, and if he omits to appeal the order of the executing Court is final and binding upon the parties. Section 47 of the Civil Procedure Code forbids the institution of a regular suit to avoid the consequences of such an order. [p. 185, col. 2.]

Appeal against the order of Mr. Justice Rafique, dated the 18th May 1917, under section 10, Letters Patent, in Second Appeal No. 93 of 1916.

Mr. *A. P. Dube*, for the Appellant.

Mr. *Damoder Das*, for the Respondents.

JUDGMENT.—The facts of the case out of which this appeal arises are fully set forth in the judgment of the learned Judge of this Court. The appeal, however, may be decided upon another ground, which is not the ground upon which the suit was decided by the Courts below and by the learned Judge of this Court. It appears that one Anandi Din executed a simple mortgage in favour of the present plaintiff Prabhu Dayal. A decree upon that simple mortgage was obtained against him and the respondent Ajudhia Parshad, who had purchased the equity of redemption from Anandi Din before the suit was brought. Anandi Din had executed a usufructuary mortgage in favour of Prabhu Dayal in respect of some other property in 1899. In execution of the decree upon the simple mortgage obtained by Prabhu Dayal, the mortgaged property was sold and as the proceeds of the sale proved insufficient to discharge the amount of the decree, Prabhu Dayal applied for and obtained a decree under Order XXXIV, rule 6, of the Code of Civil Procedure. To the proceedings relating to that decree he had made Ajudhia Pershad a party, but the Court refused to make a personal decree against him and exempted him from the suit. Subsequently Prabhu Dayal attached the equity of redemption of Anandi Din in respect of the usufructuary mortgage to which we have referred and some other property. This equity of redemption was also included in the sale deed executed by Anandi Din in favour of Ajudhia Parshad. Ajudhia Parshad filed an objection stating that the equity of redemption could not be sold as he had purchased it. The objection was allowed by the Court executing the decree and the prayer for the sale of the property was disallowed. Prabhu Dayal appealed from this order under section 47 of the Code of Civil Procedure. The Appellate Court held that no appeal lay and accordingly dismissed the appeal. Prabhu Dayal did not prefer a second appeal to this Court but he instituted the present suit on the 16th of January

1915. The order of the Court allowing the objection of Ajudhia Parshad was dated the 12th of February 1913 and one of the questions which was raised in the suit in the Court below was, whether the suit was time-barred. It was held that it was barred by the law of limitation. In the view which we take of the case, we do not deem it necessary to consider the question of limitation. The proceedings for a decree under Order XXXIV, rule 6, were proceedings in the suit brought by Prabhu Dayal to enforce the simple mortgage executed by Anandi Din. As stated above, the suit at that stage was dismissed against Ajudhia Parshad and he was exempted. Under the Explanation to section 47 of the Code of Civil Procedure a defendant against whom a suit has been dismissed is for the purposes of that section a party to the suit, and any question relating to execution, satisfaction or discharge of the decree as between him and the decree holder is a question between the parties to the suit. Although Ajudhia Parshad had been a party to the suit and had been exempted from the personal decree passed in the suit, he still continued to be a party to the suit within the meaning of section 47 and his objection to the sale of the property, which the decree-holder Prabhu Dayal sought to sell, was an objection relating to the execution, satisfaction or discharge of the decree. It is true that under the old Code of Civil Procedure it had been held by this Court that a defendant against whom the suit had been dismissed had ceased to be a party to the suit and that a question relating to execution as between the decree-holder and him was not a question between the parties to the suit. There was a conflict of opinion on the point between the different High Courts and it is manifest that in order to put an end to this conflict the Explanation to section 47 was inserted in the present Code of Civil Procedure. In view of the provisions of the section as it stands, Ajudhia Parshad was a party to the suit for the purposes of section 47 and the questions which arose between him and the decree-holder Prabhu Dayal were questions relating to the execution, discharge or satisfaction of the decree. Those questions could only be determined by the Court executing the decree and not by separate suit. Ajudhia Parshad rightly preferred his objections under the section and those objections having been allowed, the decree-holder's remedy was to appeal. He did appeal but unfortunately the Appellate Court took an erroneous view of the law. That, however, could not make any difference. He ought to have appealed to this Court and obtained a decision from this Court on the point. He did not do so but he instituted a suit which is forbidden by the provisions of section 47. The learned Counsel for the appellant has asked us to treat the present suit as an application for execution and has invoked in aid the provisions of sub-section 2 of the section. The answer to this contention is that the matter having been already decided by the Court executing the decree and the decision of that Court having now become final and binding upon the parties, the same question cannot be raised in execution. In this view the suit was bound to fail and was rightly dismissed. We dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

February 25, 1919.

Present:—Viscount Haldane, Viscount Cave Lord Dunedin, Sir John Edge and Mr. Ameer Ali.

Sri Rajah SETRUCHERLA RAMABHADRARAJU BAHADUR GARU AND OTHERS—APPELLANTS

versus

Sri Sri Sri VIKRAMA DEO MAHARAJULUM GARU, MAHARAJA OF JEYPORE, AND OTHERS—RESPONDENTS.

Mortgage—Property, whether can be sold for arrears of interest—Civil Procedure Code (Act V of 1908), ss. 1 (3), 17, 21—Applicability of Code to Scheduled Districts—Jurisdiction—Objection, whether can be taken in appeal.

Apart from special stipulation, mortgaged lands cannot be sold for payment of interest in arrear and a mortgagee has no right to demand such a sale. [p. 188, col. 1]

On an appeal to the High Court against an order decreeing the sale of lands, some of which were situated in what are known as the Agency Districts, an objection was taken for the first time that the order was made without jurisdiction. The High Court, viewing the objection as relating to

the place of suing, overruled it on the ground that under section 21 of the Civil Procedure Code such objection could not be taken for the first in appeal:

Held, that as the provisions of the Code under which the order of sale was made did not apply to the district in which some of the lands were situate, and as the objection was one going to the nullity of the order on the ground of want of jurisdiction, it must, so far as that portion of the lands was concerned, prevail, notwithstanding the provisions of section 17 of the Code, the word "Courts" in which section must be held as meaning Courts to which the Code applies. [p. 188, col. 2; p. 189, col. 1.]

Appeal from a decree of the Madras. High Court, dated the 3rd March 1916, reported as 34 Ind. Cas. 411, affirming that of the Subordinate Judge, Vizagapatam.

FACTS of the case are sufficiently stated in their Lordships' judgment and in the above head note. The present appeal raised two questions: (1) whether the suit was premature, (2) whether the objection as to the Court's jurisdiction to order sale of properties within the Agency Districts, not having been taken in the first Court, was still open. On their Lordships' construction of the mortgage deeds the first point did not arise. On the second point the judgment of the Madras High Court (Abdur Rahim and Srinivasa Aiyangar, JJ.) was as follows:—

"The other point taken by the appellants is this: that the Subordinate Judge's Court, Vizagapatam, had no jurisdiction to grant any relief respecting lands situate in the Agency Tracts, as under Act XIV of 1839 the operation of the ordinary rules for the administration of civil justice ceased to have effect in these tracts, and a special machinery with special rules for the administration of justice was created. Section 17 of the Code, which gives jurisdiction to a Court to give relief in suits for lands part of which is within its jurisdiction and part within the jurisdiction of another Court, does not apply. It is contended that that section applies only to cases where both the Courts are governed by the Civil Procedure Code. This objection was, however, not taken in the first Court, nor even in appeal at the time when it was filed, but was taken long after as a supplemental ground of appeal. Mr. Sarma for the respondent contends that this is an objection to the 'place of suing' within the meaning of section 21 of the Code and we are not, therefore, at liberty to give effect to this contention even if it is sound. We agree with Mr. Sarma that we are precluded from allowing this objection. Mr. Ramesam contends that section 21 does not apply to this case, because his objection is not to the 'place of suing', as his contention is, not that the Vizagapatam Court was not the proper Court to entertain the suit, but only that it cannot give relief respecting immoveable properties in the Agency Tracts. Section 21 follows sections 15 to 20 which regulate the place of suing; and an examination of those sections shows that a contest might arise as to the place of suing with reference to the cause of action, the residence of the defendant or defendants, or the situation of property both moveable and immoveable. In all cases where objection is taken that the Court taking cognizance of the suit is not entitled to adjudicate upon the claim, whether in whole or in part, for want of jurisdiction, it is an objection to the place of suing. We are, therefore, of opinion that this contention is not now open to the appellant. We have come to this conclusion the more readily, as it is conceded by the learned Pleader for the appellants that his clients had no more defence to an action instituted in the Agency's Court than they had to the present suit. The appeal must, therefore, be dismissed with costs. Time for redemption six months from this date."

Sir *W. Garth*, for the Appellants, submitted that on the true construction of the mortgages the suit, in so far as it asked for sale of the mortgaged properties, was premature. The High Court had rightly held that at its institution it was premature in respect of principal, and they were wrong in affirming the decree on the strength of events which had happened after the issue of the writ. Plaintiffs were only entitled to relief which had accrued at the date of suit: *Evans* v. *Bagshaw* (1) and *Ruys* v. *Royal Exchange Assurance Co.* (2).

(1) (1870) 5 Ch. 340; 39 L. J. Ch. 145; 18 W. R. 657.

(2) (1897) 2 Q. B. 135; 66 L. J. Q. B. 534; 77 L. T. 23; 8 Asp. M. C. 294.

The case of *Ram Ratan Sahu* v. *Mohant Sahu* (3), cited by the High Court, is wholly different from the present one.

[VISCOUNT HALDANE.—The rule that a Court should not regard what happens after issue of writ is primarily a rule for contentious matters only, not for matters of administration.]

The appellants' objection as regards the sale of property within the Agency Tracts should have been allowed. The suit is filed under the Code of Civil Procedure, which does not apply to the Agency Districts: *vide* the Code itself, section 1 (3), and Act XXIV of 1839. The High Court was wrong in holding that the objection was to the "place of suing." It was an objection to the jurisdiction of the Court, and could be taken at any stage. Section 21 of the Code does not apply.

Messrs. *De Gruyther*, *K. C.*, and *Kenworthy Brown*, for the Respondent.—The suit was not premature. On a proper construction of the mortgages the principal was due at date of suit. The objection as to the lands within the Agency Tracts was rightly rejected as having been taken too late, in substance it was an objection as to the place of suing. Reference was made to sections 16 and 19 of the Civil Procedure Code, 1882, and sections 16 and 17 of the Code of Civil Procedure, 1908.

Sir *W. Garth* replied.

JUDGMENT.

LORD DUNEDIN.—On the 4th January 1903 the appellants, who are Zemindars, borrowed from the respondent, the Maharajah of Jaipur, 5 lacs of rupees, and in security thereof mortgaged certain lands The mortgage is in ordinary form providing for payment of interest and compound interest, but contains the following special clause:—

"These properties are mortgaged and retained in our possession. But in case at any time any amount remains due out of the amount of interest payable on the due dates of any two years consecutively, or in case, within seven years from this date, the entire amount of principal and interest then remaining due be not paid, though the interest is paid according to instalments, we shall raise no sort of objections to your entering on and taking possession of the above-mentioned mortgaged properties, irrespective of the said mortgage term."

The term of payment was, therefore, on the 4th January 1913. By the 4th January 1911 the borrowers were two years in arrear in payment of interest, and were in need of further monies. Accordingly, a second mortgage was granted in July 1911, for the said two years of interest and compound interest and further monies, amounting in all to Rs. 1,20,000. The deed, after reciting the various sums, which amount to the Rs. 1,20,000, continues as follows:—

"We shall pay the above principal sum of Rs. 1,20,000 and the interest accruing according to the terms of the deed, in full, on the 4th January 1916. Further, though the 4th January 1913 is the due date for the mortgage-deed for Rs. 5,00,000 executed on the 4th January 1906 in your favour by Nos. 1, 2, 3, 4, 5 and 7 among us and by late Sri Somasekhararju Bahadur Garu and registered as No. 22 of 1906 in the Sub Registrar's Office at Parvatipur, you and we have settled now that the due date for the said deed should also be the 4th January 1916, along with this deed. Therefore, by this change, the entire terms of the registered deed, dated the 4th January 1906, are deemed to have been included in this deed, and we shall agree to the said terms even regarding the discharge of the principal and interest of this deed also and be bound by them. If, according to the terms of this deed, the interest of each year be not paid on the respective due date, these terms will not prevent you from recovering the said amount then and there: if you should so desire, without waiting for the due date, namely, the 4th January 1916."

The appellants paid no interest whatever after the date of the second deed, and accordingly, in July 1913, there being two years' interest in arrear, the respondent brought the present suit for decree for the whole sum due and for an order of sale of the mortgaged properties. To this action the appellants plead in defence, first, that the mortgage was a usufruct mortgage and did not authorise sale; and secondly, that the action was premature, the term of the 4th January 1916 not having yet arrived. The learned Subordinate Judge held that the mortgages were simple mortgages, with

(3) 6 C. L. J. 74; 11 C. W. N. 732.

merely an alternative power of entry into possession, and granted decree and order for sale in ordinary form.

Appeal being taken to the High Court of Madras, that Court affirmed the view that the mortgages were simple mortgages. They further held that the sale of the lands for principal was premature at the date of the decree of the Subordinate Judge, but in respect that by the time the case was before them the term of the 4th January 1916 had been passed and no payment had been made, they allowed the decree of the Subordinate Judge to stand.

Appeal being taken to this Board, the appellants urged that, inasmuch as the Appeal Court had held that the sale was premature in respect of the principal and only good for the interest, it was not permissible for them to enlarge the suit as laid because at the time they came to deal with the appeal a decree for the principal on a new suit would have been competent, to which the respondent replied that, as the proceeding was entirely executory, it was proper for the Appellate Court to pronounce a decree which would regulate the true rights of parties as they stood at the time when the final judgment came to be pronounced.

The first question, however, which arises, and which if settled one way renders any further discussion unnecessary, is whether, in view of the terms of the second mortgage, the suit raised in July 1913 for the whole sums due was or was not premature. This question depends on the meaning of the clause:—

"If according to the terms of this deed, the interest of each year be not paid on the respective due date, these terms will not prevent you from recovering the said amount then and there, if you should so desire, without waiting for the due date, namely, the 4th January 1916."

It is settled that, apart from special stipulation, there is no right to demand a sale of mortgaged lands for payment of interest in arrear. The learned Judges of the High Court thought that "the said amount" meant interest alone, and that the clause received meaning as giving the right of sale for interest. Their Lordships do not think that that is the meaning of the clause. It was a most natural thing that, as nothing had been ever paid by the borrowers, the lender, on being asked to allow the surplus interest to become principal in a new mortgage, and to postpone the term of the old mortgage, should stipulate that, if this non payment of anything should continue, he might be done with the whole matter and call everything up. Besides, a power to enter into possession, if interest was not paid, had already been given, for all the terms of the first mortgage are incorporated in the second. It seems, therefore, antecedently much more probable that the meaning of the clause, if ambiguously expressed, should be to give the power of recalling the prolongation of the term than to give a mere power of sale for interest, which would avail little. This view would lead to an affirmance of the decree, though on different grounds.

There is, however, another point. Some of the lands of which sale had been decreed are situate in what are known as the Agency Districts. Now the suit is raised in terms of the Code of Civil Procedure, 1908. By section 1 (3) the Code is, with the exception of certain sections not here in point, excluded from the Scheduled Districts, and by Act XXIV of 1839 the district in which the lands above referred to are situate was scheduled. The learned Judges of the Court of Appeal thought that the matter was met by section 21 of the Code, which provides that no objection as to the place of suing shall be allowed by any Appellate Court unless the objection was taken in the Court of first instance, which in this case had admittedly not been done. Their Lordships cannot agree with this view. This is not an objection as to the place of suing; it is an objection going to the nullity of the order on the ground of want of jurisdiction. The order for sale is made under sections of the Code of Civil Procedure which the Code itself says are not to apply to the scheduled district.

The learned Counsel for the respondent sought to justify the decree in respect of the terms of section 17, which provides that:—

"Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situate within the jurisdiction of

different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate."

Their Lordships think that "Courts" here must be held as meaning Courts to which the Code applies, and that, therefore, no help is to be claimed from this section.

Their Lordships think, therefore, that the decree pronounced by the High Court must be varied by deleting the order for sale so far as applicable to the lands situate within the Agency Districts. This will be, of course, without prejudice to the respondent's right to apply in the Agency Court for an order for sale of those lands.

This variation is insufficient in their Lordships' opinion to deprive the respondent of any portion of his costs here or in the Courts below. Their Lordships will humbly advise his Majesty accordingly.

Decree varied.

Solicitor for the Appellants :—Mr. *Douglas Grant.*

Solicitors for the Respondent :—Messrs. *T. L. Wilson & Co.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 99 OF 1918

AND

CIVIL REVISION No 330 OF 1917.

February 20, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

NAURANG RAM SAHU—PLAINTIFF—APPELLANT

versus

BHAKHORI MANDAR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 2, O XVII, rr 2, 3- Suit dismissed or decreed —Duty of Court to specify provision of law applicable —Dismissal for default—Appeal, second, whether lies —Revision—Jurisdiction, failure to exercise, what amounts to—Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107- Right of fair trial, denial of—Remedy.

Plaintiff obtained two adjournments for the purpose of amending his plaint. He applied for a third adjournment but this was refused and the Court passed the following order:—"No steps taken. Suit dismissed for default". The plaintiff then applied to have the suit restored, but the Court declined to do so. The District Judge declined to interfere on the ground that no appeal lay to him. Against this order the plaintiff filed a second appeal in the High Court, and also invoked the aid of that Court on the revision side:

Held, (1) that a second appeal did not lie; [p. 190, col. 1]

(2) that as the order dismissing the suit did not indicate whether or not the conditions necessary for the exercise of the Court's powers under rule 3 of Order XVII of the Civil Procedure Code were present, the order was bad in law: [p 19 , col 2: p 191, col 1.]

(3) that upon the Court expressing its unwillingness to grant a further adjournment, it was open to the plaintiff to continue the suit upon the plaint without amendment and it was the duty of the Court in that case to proceed at once to frame issues and to continue the trial [p 190, col. 2]

A Court which dismisses or decrees a suit under the provisions of Order IX or Order XVII of the Civil Procedure Code has a duty cast on it by the law to specify clearly under what provision of the law it has acted. [p. 190, col. 2.]

An order of dismissal by a Court made without applying its mind to any provision of the law amounts not only to a refusal to exercise jurisdiction to which section 115 of the Civil Procedure Code would be applicable, but it is also a denial of the right of fair trial contemplated by the Government of India Act, 1915. [p 191, col. 1.]

Appeal from a decision of the District Judge, Bhagalpur, dated the 2nd August 1917, confirming that of the Subordinate Judge, Bhagalpur, dated the 16th April 1917.

Messrs. *Ganesh Dutt Singh* and *Jalgobind Prasad Sinha*, for the Appellant.

Messrs. *Lalit Mohan Ghosh* and *Banarsi Prasad Jhunjhunwala*, for the Respondent.

JUDGMENT.

MULLICK, J.—The facts giving rise to this appeal and application for revision before us are as follows:—On the 18th of December 1916 the plaintiff filed a mortgage suit against the defendants On the 3rd of January summons was issued fixing the 6th of February 1917 for hearing. On the 6th of February 1917 time was allowed till the 20th of February 1917 for settlement of issues, and the second party defendants were directed to file their defence before that date. On the 7th of March 1917 the second party defendants filed their written statement, and the 20th of March 1917 was fixed for settlement of issues. On the 7th of March 1917 the plaintiff made an application for the amendment of the plaint. He said that the three defendants who had been described by him as adults were in fact minors, and he prayed for permission to amend the plaint by making an entry to this effect, and moved the Court for time to appoint a guardian *ad litem* in respect of these minors. On the 20th of March time was given to the plaintiff to get the plaint

amended. On the 4th and 10th of April further time was given for the same purpose. On the 16th of April the plaintiff again applied for time, but the Court refused to grant his prayer. Thereupon the Court recorded the following order:—

"No step taken for prosecution, the suit is dismissed thereon."

Against that order the plaintiff filed an application on the 20th of April asking that the suit be restored. On the 5th of May the Court, having examined the plaintiff, was of opinion that no reason had been given for the plaintiff's absence from Court on the 16th of April and he declined to restore the case. The plaintiff thereupon filed an appeal to the District Judge against the order dismissing the suit as well as against the order refusing to restore it. The District Judge held that no appeal lay to him, and he, therefore, declined to interfere. Against that order of the District Judge the plaintiff files Second Appeal No. 99 of 1918 to us. He has also an application for revision, which is No. 320 of 1917.

Now, it is admitted that no second appeal lies, and, therefore, so far as Appeal No. 99 of 1918 is concerned, it must be dismissed with costs; but with regard to the application for revision the matter stands differently.

It appears that under Order XVII of the Code of Civil Procedure the Court had power to proceed under rules 2 and 3 for the disposal of the suit. As the plaintiff had failed to amend the plaint the Court, notwithstanding his default, had jurisdiction to proceed to decide the suit forthwith. That the Court did not do. The order recording that the suit is dismissed is not a decision of the suit. Then the question is whether the Court acted under rule 2. It is contended by the learned Vakil for the opposite party that the Court has acted under that rule, read with Order IX, and that it has in fact dismissed the suit under the provisions of rule 3 of this latter Order. Now it is quite clear that the Court did not act within the terms of that Order. It is only when neither party appears when the suit is called on for hearing that the Court may make an order that the suit be dismissed. What is there in this case to show that the plaintiff did not appear? It is admitted that the defendant did not appear, but from the fact that the plaintiff's Pleader asked for further adjournment for the purpose of amending the plaint it would seem that he certainly was present in Court; but then it is argued that mere presence in Court is not sufficient, there must be some act or intention to actively prosecute the suit. That is certainly true, but the Subordinate Judge has not given us any indication that the plaintiff's Pleader was not anxious to prosecute the suit. The Subordinate Judge has used a formula which does not indicate whether or not the conditions necessary for the exercise of powers under rule 3 were present. The expression "no step taken for prosecution" does not satisfy us that the plaintiff's Pleader was not present for the purpose of continuing the suit if the Court chose to continue the trial. As a matter of fact it was not necessary for the Pleader to do any act at that stage, because even though the Court was unwilling to grant an adjournment for the purpose of amending the plaint, it was open to the plaintiff to continue the suit upon the plaint without amendment, and it was the duty of the Court in that case to frame issues for the purpose of the trial. We fail to see why the Court, although it had declined to give any adjournment, did not proceed there and then to frame issues and to continue the hearing. It is not for the petitioner before us to satisfy us by an affidavit or otherwise that he did in fact make such a request to the Court. It is sufficient if the order itself fails to show that the ingredients necessary for the exercise of the powers under rule 3 were not present. That duty is in every case cast upon the Court which makes the order, and it is for this reason that it is particularly necessary when suits are dismissed or decreed under the provisions of Order IX or Order XVII, that the Court should be astute to state under what provision of law it has acted, otherwise there is the greatest confusion caused when applications are made to this Court either by way of appeal or revision of the order. Therefore in this case we are not satisfied that the plaintiff failed to appear within the meaning of Order IX, and that being so, the Court acted without any authority in law for the dismissal of the suit. It is contended that the Court had jurisdiction to dismiss the suit even if it had

made an error in law. That is no doubt correct, but what the Court here appears to have done is to pass an order of dismissal without applying its mind to any provision of law at all. That amounts to a refusal to exercise jurisdiction, in other words, a refusal to do his duty, and, therefore, section 115 of the Code of Civil Procedure would be applicable. In any event this is eminently a case under section 107 of the Government of India Act because there has been a denial of the right of fair trial. It was the Court's duty to go on, if the parties so wished, with the trial, from the stage which it had reached on the 16th of April, and the refusal to do so is a matter which can be cured by the exercise of our powers of superintendence. Therefore, the result is that the order of dismissal will be set aside and the Court will be directed to proceed with the trial from the stage at which it was on the 16th of April 1917. The petition will be allowed.

JWALA PRASAD, J.—The plaintiff's suit was for the enforcement of a mortgage executed in his favour by defendants first party. The defendants first party did not appear in the suit. On the 7th March the defendants second party filed their written statement, and the case was fixed for the 20th March for settlement of issues. It appeared from the written statement that some of the defendants second party were minors, and the plaintiff applied for leave to amend the plaint by describing them to be minors and for the appointment of their guardian *ad litem* under Order XXXII of the Code. The plaintiff, however, failed to amend the plaint in spite of his having taken repeated adjournments. On the 16th of April 1917 the Court refused to allow further time for amendment and passed the following order:—

"No steps taken. Suit dismissed for default."

This is clearly not a proper disposal of the suit, and the Court has failed in its duty to try the suit. Under Order XVII, rule 3, the Court, after refusing time to the plaintiff to amend the plaint, was required to "proceed to decide the suit forthwith." The only effect of the plaintiff's failure to amend the plaint by describing some of the defendants as minors was that the said defendants were deleted from the suit as if no action was laid against them. There were besides the said minors the defendants first party, mortgagors who had not appeared in the suit and some of the major defendants second party, who had already filed their written statements. The obvious duty of the Court, therefore, was to proceed to try the suit and decide it on the merits as against these defendants, and as some of the defendants had already filed written statements, the first thing that the Court had to do was to frame issues in the case and to continue the suit. From the order-sheet it does not appear that the plaintiff, after his application for time to amend the plaint was refused, absented himself from the Court, and declined to go on with the suit, nor does it appear that the plaintiff was required at that stage by the Court to take any step in the suit which he failed to do. It seems to me that the Court did not apply its mind at all to decide the suit so far as the defendants first party or those of the defendants second party who had filed written statements are concerned. In this view the Court failed to exercise the jurisdiction that was vested in it by law to try the suit. I, therefore, agree with the order proposed by my learned brother.

Appeal dismissed;
Application allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 132 OF 1918.

December 16, 1918.

Present:—Mr. Stuart, J. C.

DULARE—PLAINTIFF—APPELLANT

versus

IBRAHIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Attachment, unlawful—Attached property, removal of—Damages, suit for.

Where an unauthorised attachment is made and the property attached is subsequently removed by a third party without the knowledge and against the will of the person who has made the attach-

ment, the person removing the property is nevertheless liable in damages to the owner of the property.

Appeal against the decree of the District Judge, Sitapur, dated the 3rd January 1918, reversing that of the Subordinate Judge, Kheri, dated the 17th September 1917.

Mr. *Girja Saran Lal*, for the Appellant.

Mr. *Abdul Rauf*, for Respondents Nos. 1 to 3.

JUDGMENT.—The learned District Judge did not consider the decision in *Gomu Mahad Patil* v *Gokaldas Khimji* (1) and a subsequent decision in *Bishambhar Nath* v. *Goddar* (2). In those decisions it was clearly laid down that where an unauthorised attachment was made and the property attached was subsequently removed by a third party, without the knowledge and against the will of the person who made the unlawful attachment, the former is nevertheless liable in damages to the owner of the property. The Bombay decision was not arrived at hastily or without consideration. It is based upon arguments which were found acceptable both in England and in India in previous cases and arguments which I find unanswerable. I, therefore, on the authority of those decisions, which I accept as laying down the correct view of the law, allow this appeal. I set aside the decision of the learned District Judge and restore the decision of the learned Subordinate Judge. The opposite side will pay their own costs and those of the appellant in all Courts.

Appeal allowed.

(1) 3 B. 74; 2 Ind. Dec. (N. S.) 49.
(2) 6 Ind. Cas. 789; 8 A. L. J. 92.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 184 OF 1918.

February 25, 1919.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

JUGAL KISHORE AND ANOTHER—APPELLANTS

versus

BANKIM CHANDRA—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss 31, 32—Insolvency—Mortgagee, position of—Interest, whether payable up to date of payment.

A mortgagee of the property of an insolvent is not a person proving in the bankrupt's estate; he is a secured creditor and is entitled to receive out of the sale of the mortgaged property his principal and interest at the contractual rate up to date of payment and costs.

First appeal from an order of the District Judge, Jhansi.

Mr. *Pearey Lal Banerji*, for the Appellants.

Mr. *Sital Prasad Ghosh*, for the Respondent.

JUDGMENT. This appeal arises out of insolvency proceedings. The appellants are mortgagees of the property of the insolvent. The mortgaged property has been taken possession of by the Receiver and sold. The Court below thought that the mortgagee was only entitled to interest at the contractual rate up to date of the insolvency. In our judgment the Court below was quite wrong. The mortgagee, according to law, is clearly entitled to receive out of the proceeds of the sale of the mortgaged property his principal, interest and costs. He is entitled to receive interest up to the date of payment. A mortgagee as mortgagee is not a person proving in the bankrupt's estate, he is a secured creditor and entitled to look to his security to realise the amount of the debt secured thereon. We do not think that the cases cited by the learned District Judge have any bearing on the question involved in this appeal. We allow the appeal, modify the order of the Court below by directing that the mortgagees, appellants here, must be paid the principal and interest (the latter calculated up to the date of payment at the contractual rate mentioned in the mortgage). As the mortgagee has had to appeal here, we think that to this sum should be added the costs of the appeal necessarily incurred in the Court below. These sums also should come out of the proceeds of the sale of the mortgaged property. As stated above, the appellants will have their costs in this Court.

Appeal allowed.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 248 OF 1918.

October 1, 1918.

Present:—Mr. Justice Heaton and Mr. Justice Hayward.

Haji GULAM MAHOMED AZAM—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (*Act XLV of* 1860), *s.* 339—*Wrongful restraint—Landlord and tenant—Tenant holding over, position of—Landlord preventing tenant from entering premises—Offence—Specific Relief Act* (*I of* 1877), *s.* 9.

A tenant holding over has a position recognised by the law and has a right to retain possession of the premises he occupies even against the landlord himself until dispossessed in due course of law. [p. 194, col. 1; p 195, col. 1.]

Therefore, where a landlord blocked up the entrance to a tenant's rooms who was holding over and thus prevented him from entering the rooms:

Held, that the landlord was guilty of wrongful restraint. [p. 194, col. 1.]

Criminal application for revision from conviction and sentence passed by the Chief Presidency Magistrate, Bombay.

Messrs. *Strangman* and *Velinkar*, instructed by Messrs. *Payne & Co.*, for the Applicant.

Mr. *Setalvad* (with him Mr. *N. K. Mehta*, for Mr. *G. N. Thakor*), for the Complainant.

Mr. *S. S. Patkar*, Government Pleader, (with him Mr. *E. F. Nicholson*, Public Prosecutor), for the Crown.

JUDGMENT.

HEATON, J.—The accused, a landlord, has been found guilty of abetting the offence of wrongful restraint in that he caused the door of complainant's room which opened outward, to be blocked up. By so doing he prevented complainant from entering his room by the ordinary door, that is, he prevented him from going in a direction in which it is said he had a right to go. If the facts and if the rights of the complainant are as stated and implied in this brief statement, then the conviction is correct.

The case is not one of the kind that usually invites our consideration in revision. The Magistrate was quite competent to ascertain the facts and to make the required inferences from them. I do not propose, therefore, to say more on that aspect of the case.

But owing to the circumstances that the accused is a Bombay landlord and the complainant had been one of his tenants and still remained in occupation of one of the rooms in the landlord's premises, the discussion has touched points of some general importance. As these points are relevant to the case something ought to be said about them.

By the 1st March at latest the complainant had ceased to be a real tenant of the accused and though he remained in occupation of the room he had formerly rented, the complainant did so against the wish of the landlord. He was what is termed a tenant holding over. He was this peculiar product of the law of landlord and tenant on the 1st May when he found himself barred from entering his room by the usual way.

Had he a right to enter the room by that way? If he had, the conviction of the accused is correct, if he had not, that conviction is bad. This, therefore, is the question to be solved. Had the case arisen in England, the answer would apparently be that the tenant had not a right to enter the room. That seems to me to follow from the case of *Jones* v. *Foley* (1). The law in this country is, however, different. It is true that the landlord was entitled to possession of the room; that the complainant was not strictly entitled to it; and that in occupying the room he was not acting as of right, was indeed defying the legal rights of the landlord. How then can the complainant be said to have a right to enter the room when fundamentally as between landlord and tenant he had not such a right? Is it not equivalent to saying that he has a right to do wrong? This view of the case would have prevailed with me were it not for the curious, and it may be highly beneficial, embellishment of the relations of landlord and tenant introduced by section 9 of the Specific Relief Act. Under that provision of the law a tenant holding over, who is dispossessed by any one other than his landlord, can bring a summary suit and be restored to possession. That is natural enough, for whatever his immediate position the tenant acquired possession legally and should not be dis-

(1) (1891) 1 Q. B. 730; 60 L. J. Q. B. 464; 64 L. T. 534; 39 W. R. 510; 55 J. P. 521.

possessed with impunity by one who has no right whatever to possession. But by the case of *Rudrappa* v. *Narsingrao* (2), the very simple position above described has been imposed upon the landlord and tenant themselves, when the former dispossesses his tenant holding over, otherwise than in due course of law. This shows that the tenant holding over has a position recognised by the law and that he has a right to retain possession of the premises he occupies even against the landlord himself, until dispossessed in course of law. That being so, the complainant, undoubtedly, had a right to enter the room.

It was urged that in the Town and Island of Bombay the English law is in force unless modified by Acts of the Indian Legislature. Assuming this to be so, yet the English law is in this matter modified or rather superseded by the Transfer of Property Act, section 9 of the Specific Relief Act and other enactments. The modern law is not, as I think, the English law modified merely in the sense that a single exception is grafted on to it. An Indian law is enacted and is so complete that for the basic principle of the law of landlord and tenant in India we must look to and see what is implied in the Indian Acts and not the English law.

Undoubtedly, therefore, in my view of the case, the conviction is correct. The landlord was, however, severely provoked; his tenant was contumacious. So the penalty imposed was negligible to a man in what we are informed is the position of the accused. That was, I think, right in this case.

I would discharge the Rule.

HAYWARD, J.—I concur. I think it has been established that the complainant's tenancy on monthly rent was extended at most to the end of February 1918. Thereafter he was holding over and no more than a tenant at sufferance, liable for use and occupation of the room to his landlord, the 1st accused. It must also, in my opinion, be held as established that the landlord, the 1st accused, did, with a view to secure possession, direct the Mistry, the 2nd accused, to block up the door of the room in the course [of the alterations ordered to be made to the buildings towards the end of April 1918. The object was obviously to eject the tenant at sufferance and to put in the other tenant at a higher rent, the photographer, without having to have recourse to the uncertain process of an ejectment suit in face of the recently introduced Bombay Rent Act, II of 1918.

The question, therefore, for us to decide is whether the action of the 1st accused, coupled with that of the 2nd accused, did or did not amount to restraining the tenant at sufferance from proceeding in a direction in which he had a right to proceed within the meaning of sections 339 and 341 of the Indian Penal Code.

It has been argued upon this question that the tenant at sufferance was a mere trespasser and had no right whatever to proceed to the room, and in support of this argument a case was quoted in which a landlady was held entitled in somewhat similar circumstances in England to remove the roof of the house of her tenant, the case of *Jones* v. *Foley* (1). It has also been pointed out that a landlord might in such circumstances himself take possession of his property in England, provided he did not use force and so infringe the Statutes passed against forcible entry referred to in the note to paragraph 1073 of the 18th Volume of Halsbury's Laws of England. It has been urged that the same law has application in this country on the authority of the case of *Bandu* v. *Naba* (3), in which it was held that such dispossession by the owner was valid, though it was there significantly added "subject to the provisions of section 9 of the Specific Relief Act." Reference was also made to the case of *Kantheppa Radai* v. *Sheshappa* (4), where it was held that the possession of a tenant at sufferance was wrongful within the meaning of the Indian Limitation Act.

It was, however, argued in reply that the tenant at sufferance was not a mere trespasser without any right whatever to possession and it was pointed out that he could bring a suit for possession against any other person who was nothing more

(2) 29 B. 213; 7 Bom. L. R. 12.

(3) 15 B. 238 at p. 241; 8 Ind. Dec. (N. S.) 161.
(4) 22 B. 893 at p. 898; 11 Ind. Dec. (N. S.) 1178.

than a mere trespasser even in England according to the 2nd clause of paragraph 904 of the 18th Volume of Halsbury's Laws of England. It was admitted that a person who was nothing more than a mere trespasser could not even in this country sue to recover possession on being dispossessed under section 9 of the Specific Relief Act, according to the case of *Amirudin* v. *Mahamad Jamal* (5). But it was pointed out that a tenant at sufferance in this country was much more, because he could maintain a suit for possession even against his own landlord who had evicted him otherwise than in due course of law, that is to say, otherwise than by recourse to the Civil Courts according to the decision in *Rudrappa* v. *Narsingrao* (2), decided with special reference to the provisions of section 9 of the Specific Relief Act. It was accordingly urged that the law obtaining under the Statutes against forcible entry in England was not the same as that resulting from these provisions of the Specific Relief Act in India.

It seems to me that this reply has been well founded and that it would be impossible to hold that the tenant at sufferance in this country has no right whatever to proceed to his room and exercise other similar rights of possession, when such a person has been expressly given the right to protect his possession even against his own landlord, according to the ruling of this Court, under the provisions of section 9 of the Specific Relief Act. It would appear that the tenant at sufferance has been recognised to have these limited rights of possession in order to prevent the disorders which would otherwise arise from allowing people in this country to take the law into their own hands and endeavour to obtain possession, even when lawfully due to them, without having recourse to the Civil Courts, The provisions of section 9 of the Specific Relief Act would appear to differ materially from the Statutes against forcible entry in England. It is not necessary and indeed would not be proper here to decide the substantial question between the parties, namely, whether a tenant at sufferance would or would not be a tenant within the meaning of section 9 of the Bombay Rent Act, II of 1918. That question and all other questions arising between them under the Rent Act would be matters properly for decision in regular proceedings in the Civil Courts. The behaviour of the parties has no doubt been petty and entitles neither of them to much respect but it would not, in my opinion, be right to treat as merely trivial, as urged on behalf of the accused, deliberate endeavours to evade the special provision for settling peaceably disputes between landlords and tenants laid down by law. It is, on the contrary, requisite to insist by infliction of substantial punishment that landlords and tenants should not take the law into their own hands, but should proceed by regular process in the Civil Courts as prescribed in this country by the Indian Legislature.

Rule discharged.

(5) 15 B. 685; 8 Ind. Dec. (N. S.) 463.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 311 OF 1918.

October 19, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

EMPEROR—APPELLANT

versus

MUNSHI RAM—RESPONDENT.

Opium Act (I of 1878), ss. 5, 9, 10—Rules framed by Punjab Government under s. 5, r. 49 (3) (f)—Retail vendor, whether bound to keep accounts—Illegal possession of opium—Offence.

Under rule 49 (3) (*f*) of the rules framed by the Punjab Government under section 5 of the Opium Act, the holder of a retail license for the sale of opium is bound to keep correct accounts of his daily sales [p. 196, col. 2.]

By virtue of the provisions of section 10 of the Opium Act, in prosecutions under section 9 of the Act it must be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily is opium in respect of which he has committed an offence under the Act. [p. 197, col 1.]

The accused, a licensed vendor of opium, falsified his sale accounts by showing sales in excess of the actual amount sold and was thus enabled to accumulate a certain amount of opium:

Held, that the accused was guilty of an offence under section 9 (*c*) of the Opium Act. [p. 197, col. 2.]

EMPEROR *v.* MUNSHI RAM.

Appeal from the order of the Sessions Judge, Karnal, dated the 21st December 1917.

Mr. *C. Bevan Petman*, Government Advocate, for the Appellant.

Mr. *Rama Nand*, for the Respondent.

JUDGMENT.—The facts of this case are as follows:—

On the 2nd of November 1917, Excise Inspector Ganpat Rai examined the shop and the sale register of one Munshi Ram, son of Udham, Bania of Shahabad, who held an opium license for the retail sale of opium. It was ascertained that the sale register showed that on the 31st October 1917 nine chhataks of opium had been sold. As this was an unusually large amount for a daily sale, the Inspector grew suspicious and the stock of opium in the shop was weighed and found to be 2 seers 14 chhataks and $1\frac{1}{2}$ tolas. This was at 2 P. M. Rs. 5-4 9 were found in the till which represents, it is said, the price of about $1\frac{1}{2}$ chhataks of opium. The books showed that the balance in hand on the evening of the 1st November was 2 seers 15 chhataks 4 tolas of opium. In a corner of the shop a loose brick was noticed, which was examined and on removal exposed a hollow or niche in which 2 chhataks of opium were found. Upon this, according to Ganpat Rai, Inspector, P. W. No. 1, Munshi Ram stated that although he had shown 9 chhataks of opium as sold on the 31st October, he had as a matter of fact only sold 5 chhataks and that he had shown this excess sale in order to be able to obtain more opium from the Treasury; in other words, Munshi Ram admitted definitely that he had falsified his accounts in order to be able to obtain more opium. The Police were called in and subsequently the house of Munshi Ram was searched, with the result that 15 chhataks 2 tolas of opium were found in the lower storey of the house. Munshi Ram was sent up for trial under section 9 of the Opium Act and a charge was framed against him by the Magistrate under section 9 (*c*) of Act I of 1878 charging him with possession of 2 chhataks of opium at his shop and 15 chhataks and 2 tolas at his house and thus contravening the Act and the rules made thereunder. Munshi Ram was convicted of the charge laid against him on the 30th of November 1917 and sentenced to three months' rigorous imprisonment and a fine of Rs. 50 or two months' rigorous imprisonment in default.

On appeal by him against his conviction and sentence the learned Sessions Judge acquitted him on the 21st December 1917, on the ground that he was admittedly a licensed vendor and under rule 40 was entitled to have in his possession any quantity of opium which he was authorised to sell and that it had not been proved that any of the opium in his possession had been purchased by him from persons other than the Government or a licensed vendor. Placing reliance on *Umesh Chunder Ghose* v. *Queen-Empress* (1), the learned Sessions Judge held that if a "licensed vendor keeps an incorrect account as in this case, he cannot be convicted of an offence punishable under section 5 of the rules inasmuch as he was not bound by the rules to keep an account."

Against this acquittal the Local Government has preferred this appeal under section 417, Criminal Procedure Code, and we have heard the learned Government Advocate in support of it, while Lala Ramanand has addressed us on behalf of the respondent Munshi Ram. The delay in the disposal of this appeal, which was filed on the 13th of May 1918, is due to the fact that it had been impossible to serve Munshi Ram with notice. The learned Government Advocate has pointed out that the Local Government has, by section 5 of Act I of 1878, been empowered to frame certain rules, and in the exercise of those powers has, in connection with the Opium Act, framed and duly published rules to be found in Punjab Excise Manual, Volume II, at page 73. The relevant notifications are Nos. 954, dated the 16th October 1916, and 6523-C and J, dated 27th March 1917. Under rule 49, sub clause 3 (*f*), it has been declared that a licensee shall keep correctly daily accounts of sales of opium and poppy-heads in such form as the Financial Commissioner may from time to time prescribe, and shall at the end of each month prepare and submit to the Collector a monthly abstract of his receipts and sales. Under this rule it was urged, and we think with force, that the holder of a retail license was bound to keep correct accounts of his daily sales.

(1) 26 C. 571; 3 C. W. N. 365; 13 Ind. Dec. (N. S.) 966.

MOHAMMAD HUSAIN *v.* EMPEROR.

Under section 9 of Act I of 1878 any person who in contravention of this Act or of the rules made or notified under section 5 or section 8 (*c*) possesses opium * * * * * * and any person who otherwise contravenes any such rule shall, on conviction before a Magistrate, be liable to the punishment therein prescribed. Mr. Petman contended that in all probability what the respondent did was to show sales in excess of the actual amount sold. By so doing he was enabled to accumulate a certain amount of opium which he could sell more profitably in an illicit manner. He contended that section 10 of the Opium Act lays down that in prosecutions under section 9, it shall be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily is opium in respect of which he has committed an offence under this Act. Further it was contended that Munshi Ram had failed to account satisfactorily for the possession of the opium in this case and that, therefore, the Court was bound to presume that Munshi Ram had committed an offence under the Act in respect of it. The record shows that *qua* the 2 chhataks found hidden in Munshi Ram's shop, Munshi Ram pleaded that he had falsified his daily accounts and *qua* the 15 chhataks 2 tolas found in his house his defence was that some enemy had placed it there. We may state at once that we are satisfied that the opium was found in the possession of Munshi Ram as deposed to by the witnesses. This being so, in our opinion, section 10 of the Opium Act applies and the presumption is that Munshi Ram has committed an offence in respect of this opium, unless he can satisfactorily account for it. With regard to the 15 chhataks 2 tolas he has contented himself with a denial of its discovery in his possession, so that there is no satisfactory explanation of his possession of this amount. Nor do we consider that the explanation he has given with regard to the excess opium found in his shop can be regarded as satisfactory. In these circumstances we consider that the learned Sessions Judge was wrong in acquitting him and we must, therefore, find him guilty of an offence under section 9 (*c*) of the Opium Act.

We would add further that, as contended by the learned Government Advocate, *Umesh Chunder Ghose* v. *Queen-Empress* (1) is distinguishable inasmuch as the rules framed under section 5 of the Bengal Government are different from the rules framed under that section by the Punjab Government. As pointed out by Counsel in the Calcutta case, the corresponding rule did not require the keeping of daily accounts. This matter was relegated to one of the conditions in the license itself. Here under rule 49 (3) (*f*) every holder of a retail license is required by the rule itself to maintain correct daily accounts and section 9 of the Opium Act provides that any person who contravenes in any way any rule made and notified under section 5 commits an offence punishable under that section. On Munshi Ram's own showing he has falsified his accounts and thus rendered himself liable to punishment under section 9 for contravention of rule 49 (3) (*f*). He was, however, not specifically charged with that offence and we do not consider it necessary to direct a re-trial at this stage.

We accordingly accept this appeal and convict Munshi Ram of an offence under section 9 (*c*) of Act I of 1878 and sentence him to the imprisonment already undergone and to a fine of Rs. 100 or in default three months' rigorous imprisonment. We do not think it necessary to send him back to jail at this stage, as it appears that he had served out 23 days of the term imposed on him by the Magistrate before he was released under the orders of the Sessions Judge.

Appeal accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 135 OF 1919.

May 1, 1919.

Present:—Mr. Justice Stuart.

MOHAMMAD HUSAIN AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 296—Causing a disturbance, what amounts to—Spreading false rumour, whether offence.

The essential ingredient of an offence under section 296 of the Penal Code is the doing of an

act which causes a disturbance. The mere spreading of false rumours, although they might result in most serious consequences, cannot be described as "causing a disturbance."

Criminal revision against the order of the Sessions Judge, Bareilly, dated the 6th February 1919.

Dr. *S. M. Sulaiman*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—On the 17th of October 1918 during the Moharrum procession in Bareilly a Julaha, called Mindhai ran to a Police Station in the town with a report that a conch was being sounded in a Hindu temple adjoining the route of the procession in contravention of the Magistrate's orders. Mindhai with two other Julahas Mohammad Husain and Bhaggu then ran to the procession and shouted to the crowd that the Hindus were sounding conches and that the Tazias should be put down.

Thereupon the Tazias were put down and the procession was stopped. In the course of the criminal proceedings that followed, it was found that the report that conches were being sounded was absolutely untrue, that the Hindus were giving no provocation of any kind and that Mindhai, Mohammad Husain and Bhaggu spread false rumours which might have affected the Muhammadan crowd very seriously. Mindhai was convicted under section 182 for making a false report to the Police. All three men were convicted under section 296, Indian Penal Code, for voluntarily causing disturbance to an assembly lawfully engaged in the performance of religious worship or religious ceremonies. Mohammad Husain and Bhaggu have come up in revision. Mindhai has made no application. No offence has been made out under section 296. It cannot possibly be said that any of these men voluntarily caused disturbance to the procession. They caused no disturbance to the procession; they spread false rumours which caused the procession to come to an end. Fortunately the Muhammadans composing the procession were not incited to any act of violence against the Hindus. The actions of the applicants, although they might have had the most serious consequences, cannot be described as "causing a disturbance" to the procession and their convictions under section 296 must be set aside. It would appear that a prosecution may have lain on these facts under the provisions of section 505 (*c*), Indian Peral Code, for having circulated a false report which was likely to incite a class or community of persons to commit an offence against any other class or community. No such prosecution can, however, lie under the provisions of section 196 of the Code of Criminal Procedure unless upon a complaint made by order or under authority from the Governor-General in Council, the Local Government or some officer empowered by the Governor General in Council in this behalf, and in the absence of such authority, I have no jurisdiction to frame a charge under this section.

The result is that the convictions being set aside, the bail bonds will be cancelled.

Convictions set aside.

MADRAS HIGH COURT.

SECOND APPEAL No. 2158 OF 1917.

November 16, 1918.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

ASAN ALLIAR MARAIKAYAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

T. B MASILAMANI NADAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 4 (p), 166—Police Officer present at station house, meaning of—Illegal search, suit for damages for—Search by person in charge of station during permanent incumbent's absence, legality of—Liability of person assisting Police Officer lawfully making search.

Under section 4 (*p*) of the Code of Criminal Procedure, if a person is deputed to be in charge of a Police Station, the fact that he is doing duty elsewhere does not deprive him of his capacity of station house officer. [p. 199, col 2.]

The words 'present at the station house' in section 4 (*p*) of the Criminal Procedure Code do not have the effect of depriving an officer of his functions if he happens to go out of the station house. [p. 200, col. 1.]

A search by a person, therefore, who is appointed to do the duties of a station house officer but who happens to be out of the station at the time is not illegal. [p. 200, col. 1.]

A person assisting a Police Officer lawfully engaged in making a search is not liable in damages for an illegal search. [p. 200, col 2; p. 201, col. 1.]

ASAN ALLIAR *v.* MASILAMANI NADAR.

Second appeal against the decree of the District Court, Tinnevelly, in Appeal Suit No. 500 of 1916, preferred against the decree of the Court of the Additional District Munsif, Tinnevelly, in Original Suit No. 211 of 1915.

FACTS appear from the judgment.

Mr. *K. R. Gurusami Aiyar* (with him Mr. *A. Subbarama Aiyar*), for the Appellants. —The 2nd defendant was not in the station house at the time he made the search. He was not an officer in charge of a Police Station within the meaning of section 4 (*p*), Criminal Procedure Code. The 2nd defendant left his head quarters and was doing duty in the outlying village. He had no power to make the search.

Messrs. *C. Narasimhachariar* and *S. Anantharama Aiyar*, for the Respondents.— The 2nd defendant was doing the duties of the permanent station house officer during the latter's absence. It was not necessary that he should be in the station house or at the head-quarters to enable him to make a search within his jurisdiction. He was a station house officer for all purposes.

The lower Court erred in awarding damages as against 1st defendant. No doubt he had no power to make a search, but he did not make the search himself. He only assisted the Police Officer, who had jurisdiction to make the search and who was actually conducting the search.

JUDGMENT.

SESHAGIRI AIYAR, J.—This is a suit against two Police men for damages for illegal search of the plaintiff's house. On the 29th January 1915, the two defendants, undoubtedly, conducted the search. The District Munsif held that the search was illegal and awarded Rs. 100 as damages against each of the defendants. In appeal the District Judge exonerated the 2nd defendant altogether and gave a rupee damage against the 1st defendant. The plaintiffs have preferred this second appeal and the 1st defendant has filed a memorandum of objections.

On the question whether the 2nd defendant should be held liable I have come to the conclusion that the District Judge is right. The main argument addressed to us by the learned Vakil for the appellant was that the 2nd defendant was not an officer in charge of a Police Station and that consequently he had no power to make the search. Under section 4, clause (*p*), of the Code of Criminal Procedure an officer in charge of a Police Station includes, when a permanent incumbent is absent or unable to perform his duties, "the Police Officer present at the station house who is next in rank to such officer and is above the rank of a constable." In the present case, the Sub Inspector, as he is called, who is the officer in charge of the Police Station of Valliyoor, left his jurisdiction for the purpose of pursuing a gang of thieves. This was on the 26th January 1915. The only evidence we have in the case as to what happened when he left the station is the deposition of the 2nd defendant, in which he says: "I am the general charge officer and I look after the station work during the Sub-Inspector's absence as senior officer of the station.' Relying upon this evidence, the District Judge has come to the conclusion that the 2nd defendant was put in charge of the station when the permanent incumbent went out of the jurisdiction. I see no reason to differ from this finding of fact.

It is in evidence, however, that the 2nd defendant left the head-quarters of the station on the 26th to inspect some of the outlying villages within his jurisdiction. There is some doubt whether he returned back on the 29th or not. I am of opinion, having regard to what he states in the earlier portion of his deposition, that he was not in the station house on the 29th. But that does not matter. If he was deputed to be in charge of the station, the fact that he was doing duty elsewhere does not deprive him of his capacity of station house officer. If Mr. Gurusami Aiyar's contention were upheld, every moment that the officer in charge of a Police Station leaves the station house, a new station house officer must be installed there. Take for example a case in which the permanent incumbent who left the jurisdiction returns to the jurisdiction under his charge but not to the station house. If the contention for the appellants were upheld, until he takes charge of the station house, he cannot exercise the functions of an officer in charge of the Police Station. I am unable to agree with this contention. The object of the definition is to permit

of the discharge of the duties which can only be done by an officer in charge of a Police Station by some person who is deputed to look after that work. The aim is to bring in more men so that the duties of the office may be performed without delay, and not to exclude persons who were either permanent incumbents or who have been appointed to act for the permanent incumbent. My opinion, therefore, is that as the 2nd defendant was within the jurisdiction of the Police Station and as he was appointed to act for his superior when the latter went outside the jurisdiction, he was an officer in charge of a Police Station. It may be that Arunachalam Pillai, the station writer as he is called, was also an officer in charge of a Police Station, but it is not necessary to consider that matter. I am clear that the 2nd defendant was an officer in charge of the Police Station of Valliyoor. I do not think that the words 'present at the station house' would necessarily have the effect of depriving an officer of his functions, if he happens to go out of the station house. That clause, as I said before, is intended to empower more men to discharge these duties and not to deprive others of their functions. In this view, I am of opinion that the 2nd defendant in conducting the search acted within his powers. There is the finding by the District Judge that in exercising those powers he did not act harshly or oppressively. I am of opinion that the exoneration of the 2nd defendant was right. Therefore the appeal, so far as he is concerned, must be dismissed with costs.

The question of the liability of the 1st defendant is somewhat different. He is not attached to the Valliyoor Station. He is the head of another station. Therefore, *prima facie* he acted without jurisdiction in making the search. Under section 166 of the Code of Criminal Procedure if a theft is committed within the limits of a Police Station, and if the property is concealed within the limits of another station, the officer in charge of the station where the theft was committed can requisition the aid of the officer in charge of the station where the thief has secreted the property to cause a search to be made. That is not this case. The plaintiffs against whom the suspicion of having received stolen property was entertained had their house within the limits of Valliyoor Station. Therefore the 1st defendant had absolutely no right to make a search. I find no provision of law which would enable a Police Officer who did not belong to the constabulary of a particular Police Station to come within its limits and to help in the search of property. I must, therefore, hold that the 1st defendant acted without jurisdiction.

It was suggested in the course of the hearing that as the 2nd defendant was acting within his powers in making the search, the association of the 1st defendant did not matter. In *Morris* v. *Wise* (1) it was held that a person assisting a constable or other officer engaged in carrying out a lawful process of law would be justified, as it would not be unlawful to take part in a lawful act. Having regard to the rank of the 1st defendant, it is doubtful whether he can be said to have simply assisted the 2nd defendant. But the 2nd defendant had jurisdiction to conduct the search and was doing a lawful act. Consequently, if the entry into the plaintiff's house for the purpose of a search was lawful, can it be said that the association of another in this act was an actionable wrong? After consideration I am inclined to agree with my learned brother that he too was not liable. It is unnecessary to consider the other questions argued before us. I agree, therefore, that the memorandum of objections should be allowed with costs.

PHILLIPS, J.—Plaintiffs' suit is for damages for wrongful trespass committed by defendants in searching their house. The District Judge has found that the 2nd defendant was the officer in charge of the Valliyoor Police Station within the limits of which the search was conducted. The evidence of defendants Nos. 1 and 2 supports this finding and I think it may be accepted. The contention put forward by Mr. Gurusami Aiyar that the Sub-Inspector, who had been put in charge of the station, could be the only officer in charge of the station, subject to the proviso in section 4 (*p*) of the Criminal Procedure Code, does not appear to be correct. The Sub-Inspector was absent from the station on special duty and

(1) (1860) 2 F. & F. 51.

during his absence it would be necessary to have some other officer in charge and the evidence is that 2nd defendant was that other officer. Section 4 (*p*) of the Criminal Procedure Code only provides that in the temporary absence of the officer in charge the next senior officer above the rank of constable shall also be deemed to be the officer in charge of the station. This does not take away the power of acting as such from the officer who is really in charge of the station, for it is only necessary to state the proposition to see its absurdity. It would mean that as soon as such officer left the station house, the next senior officer would be the only officer in charge and no search outside the station house could be conducted by the officer in charge. Accepting this finding the suit was rightly dismissed as against 2nd defendant.

The District Judge has, however, found that 1st defendant acted without jurisdiction in that he took part in a search which he had no jurisdiction to make. The search, being conducted by 2nd defendant, was made with jurisdiction and the fact that a person not authorised by the Code to conduct the search took part in it, does not invalidate the search. It is not necessary that a person who conducts a search should do all the acts connected with the search with his own hand, but it is sufficient if he is present and personally supervises the proceedings. *Vide Satagopala Charlu* v. *Satrughna Behara* (2). In most searches one or more constables assist the officer conducting the search, and sometimes a cooly is employed to do manual labour, such as digging up the floor, etc., to facilitate the search. I do not for a moment think that such assistants could be held to be liable in damages for rendering such assistance. In the present case the 1st defendant, being 2nd defendant's superior officer, no doubt took a considerable part in effecting the search, but that is no reason for saying that he conducted the search, for he had been careful enough to send for 2nd defendant to conduct the search, knowing that he had no jurisdiction to conduct it himself. In doing what he did he cannot be said to have exceeded his jurisdiction, and he is not liable in damages to plaintiffs. In this view the second appeal must be dismissed with costs, and in allowance of the memorandum of objections plaintiffs' suit must be dismissed with costs throughout.

M. C. P.

Appeal dismissed;
Memo. of objections allowed.

(2) 17 Ind. Cas. 75; 23 M. L. J. 445; (1912) M. W. N. 1111; 13 Cr. L. J. 763.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 101 OF 1919.

April 12, 1919.

Present :—Mr. Justice Walsh.

HAR NARAIN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 430—Mischief—Evidence necessary for conviction—Northern India Canal and Drainage Act (VIII of 1873), s. 70—Interfering with banks of canal—Offence.

Where a person interfered with the banks of a canal and the prosecution could not prove by the evidence of respectable persons that the act had caused or must have been known to be likely to cause a diminution of the supply of water for agricultural purposes:

Held, that a conviction under section 430 of the Penal Code was improper and that a conviction under section 70 of the Northern India Canals and Drainage Act was more appropriate. [p. 202, col. 1.]

Criminal revision against the order of the First Additional Sessions Judge, Aligarh, dated the 9th February 1919.

Mr. *M. L. Agarwala*, for the Applicant.

Mr. *R. Malcomson*, (Assistant Government Advocate), for the Crown.

JUDGMENT.—In this case I propose to follow the example of my brother Knox in the case cited to me, *viz*, *Taj-ud-din* v. *Emperor* (1), and to convert the conviction into one under section 70 of the Canal Act No. VIII of 1873 instead of a conviction under section 430 of the Indian Penal Code. I will just say a word or two for the guidance of the lower Courts in this matter, which appears to me to be occurring rather frequently just now, possibly because of the shortage of water due to the failure of the rains. This is the converse case to the

(1) 5 A. L. J. 159; A. W. N. (1908), 55; 7 Cr. L. J. 296.

one which was referred to my brother Piggott and myself a few days ago. If the act is one which has in fact caused or but for prompt intervention would have caused diminution in the ordinary supply of water for agricultural purposes, it is an act of mischief within the meaning of section 430 of the Indian Penal Code, which has very much more serious consequences than merely interfering with the banks of a canal and may be punished with greater severity, and if having regard to the serious nature of the consequences and to the necessity of severer measures the prosecuting authorities think it right to formulate a charge under section 430, they must call some evidence to prove that within the meaning of the section, the act has caused or must have been known to be likely to cause a diminution of the supply of water for agricultural purposes. That fact ought to be supported by the evidence of some reputable person who knows the facts. On the other hand if that fact cannot be proved and it is not desired to establish the more serious aspect of the offence, then it is sufficient to prosecute under the section of the Canal Act which I have mentioned with a view to a lighter punishment.

Owing to the fact that there is in this case an absence of evidence directed to section 430, I have adopted the course ofaltering the conviction.

Following the example of my brother Knox, I think the sentence of one month appropriate to the circumstances of this case. As the applicant has already served substantially that period and is now on bail, I direct that his sentence be reduced to the amount already served and that his bail be discharged. It is, however, to be understood that if these offences increase in frequency, heavier sentences by way of deterrence will have to be administered.

Conviction altered.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 123-B OF 1913.

November 16, 1918.

Present:—Mr. Prideaux, A. J. C.

NARAYAN SHALIGRAM AND ANOTHER—APPLICANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195, 476, scope of—"Referred to in s. 195," meaning of —Order directing prosecution—Person proceeded against not party to suit, whether invalidates proceedings—Judge entertaining suspicion of commission of offence, whether can proceed against person suspected.

The words "referred to in section 195," which occur in section 476 of the Criminal Procedure Code, are merely words descriptive of the class of offences with which a particular Court can deal. They do not mean that section 195 governs section 476 to any extent other than this. [p. 204, col. 1.]

Proceedings under section 476 are not invalidated by the mere fact that the accused was neither a party nor a witness in the original suit. [p. 204, col. 1.]

If an offence is brought to the notice of a Court in the course of a judicial proceeding, it has jurisdiction to proceed under section 476 of the Criminal Procedure Code, it being immaterial whether the persons concerned appeared before the Court or not. [p. 204, cols. 1 & 2.]

Where a Judge entertains a suspicion that an attempt is being made to use as genuine a forged document, there is nothing to preclude him from proceeding against the persons concerned with regard to the forgery itself. [p. 204, col. 2.]

Criminal revision of the order passed by the Second Sub-Judge, Akola, in Miscellaneous Case No. 111 of 1917, dated the 10th September 1918.

The Hon'ble Mr. *M. R. Dixit* and Mr. *M. V. Joshi*, for the Applicants.

The Hon'ble Mr. *G. P. Dick*, Standing Counsel, for the Crown.

ORDER.—This revision has been filed by Narayan Shaligram and Babanlal. This order will also dispose of Criminal Revision No. 146 B of 1918, filed by Narayan Sitaram. The facts leading to these two applications are these:—Dhulchand, assignee of an usufructuary mortgage executed by one Akaji on 7th March 1906, filed Civil Suit No. 90 of 1915, claiming possession of the said property from the applicant, Narayan Shaligram, and Maroti, the surety and legal representative of the original mortgagor, Narayan Narhee. Among other pleas advanced by the present applicant, Narayan Shaligram, was that on 29th June 1906 the assignor,

Akaji, Maroti and Baji, the widow of the deceased Narayan Narhee, came to the shop and that Maroti and Baji acting for her minor son, Mitharam, agreed to sell their eight-annas share in the field (Survey No. 41) for Rs. 2,500. Akaji agreed to take Rs. 1,000 in full satisfaction of his mortgage deed. Narayan Shaligram thereupon paid Rs. 700 and Maruti paid Rs. 300. To evidence this payment a receipt (Exhibit 6 D-2) was filed. It is in connection with this receipt that the prosecution of the three applicants has been started by the Subordinate Judge, who acting under section 476, Criminal Procedure Code, has sent the three applicants to the Sub-Divisional Officer, Akola, for prosecution under sections 463 and 471 of the Indian Penal Code. It is necessary to state at some length how these proceedings started. The Subordinate Judge of Akola, Mr. Joshi, who tried the Suit No. 90 of 1915 delivered judgment on 30th March 1917. In that judgment the alleged payment of Rs. 1,000 said to be evidenced by the disputed receipt was held not proved. After giving the judgment, the Subordinate Judge wrote the following in the order sheet. He seems then to have been under order of transfer: "In deciding the above case I have held that the payment covered by Exhibit VI D 2 is not made. I have grave doubts as to the genuineness of that receipt. The Treasury Officer did not give me the date on which receipt stamps of the kind affixed to that receipt were first introduced. I, therefore, before taking further steps want to get that information, and for that the Superintendent of Stamps, Central Provinces and Berar, should be requested through the District Judge to give the information. No document will be returned until further orders." It is clear Mr. Joshi's suspicion had been aroused as to the genuineness of the receipt. It is further clear that if the information he sought for confirmed this suspicion, he intended to proceed further in the matter. The receipt itself was dated, as already stated, 9th June 1906. It is stamped with the stamp bearing King Edward's head inscribed "India Postage and Revenue." Mr. Joshi's enquiries elicited that the dates of the issue of this particular kind of stamp to the public at the various Indian and Burma depots were as follows:—

Depôt.	*Date of 1st issue.*
Bombay ...	5th January 1907
Karachi ...	22nd December 1906
Madras ...	16th January 1907
Rangoon ...	10th December 1906

As all these dates are subsequent to the date of the receipt, it was practically certain that the receipt could not have been written and stamped with that particular stamp on the date it bears. Mr. Joshi was then at Khandwa and he reported the result of the investigation through the District Judge, Khandwa, to the District Magistrate of Akola, who forwarded it to the District Judge. The papers reached the Subordinate Judge on 9th November 1917 and he started proceedings on the 12th of that month. Before him Narayan Shaligram stated that he left the place while the receipt was being written on 9th June 1906. On his return his brother told him that the receipt had been written. It was in February 1907 that he actually saw the receipt. He noticed it had no stamp on it and that it had been taken without a stamp being affixed to it. Akaji was sent for and the old receipt was returned to him, after a new receipt written by the same scribe and attested by the same persons had been taken. The new receipt was stamped and given the date of the old one. This second receipt is the one produced. Babanlal, the attesting witness, put in a written statement stating the same story. For Narayan Sitaram, his Pleader stated "the accused Narayan Sitaram was neither a party nor a witness in the original suit and hence this Court has no jurisdiction to start proceedings against him." The Subordinate Judge after full enquiry came to the conclusion that the defence of Narayan Shaligram and Babanlal is false and that he had the power to direct the prosecution of Narayan Sitaram as well as the other two. Against this order the present applications have been filed.

I will first deal with the application of Narayan Sitaram, said to be the writer of the receipt. He was not examined in the civil suit and his statement before the Subordinate Judge was confined to a denial

of the Court's jurisdiction to take proceedings against him. He was not asked whether he did, as a matter of fact, write the receipt or not. Even in this Court I have been unable to obtain a definite statement from his Counsel on this point. The main question raised for him here is that he being a stranger to the civil suit, the Subordinate Judge has no jurisdiction to order his prosecution under section 476 of Criminal Procedure Code, and that that section refers to section 195, clause (*c*), which limits its scope to offences committed by a party or a witness to any proceedings and not to a stranger. I am referred to the following cases in support of this argument: *Ghansham Singh* v. *Emperor* (1), *Jadunandan Singh* v. *Emperor* (2) and *Kallaru Ramalingam, In re* (3) (reported on page 797 of the 16th Volume of the Criminal Law Journal Reports). In the last case many points of the previous decisions covering this point are noticed. Against this view, however, may be quoted *Keshav Narayan Manolkar, In re* (4) and *Akhil Chandra Sen* v. *Queen-Empress* (5). The decision in *Emperor* v. *Khushali Ram* (6) commends itself to me. The Judge there held that the words "referred to in section 195," which have found a place in section 476 of the Code of Criminal Procedure, are merely words descriptive of the class of offences with which a particular Court can deal. They do not mean that section 195 governs section 476 to any extent other than this. It seems to me that the proceedings under section 476 against Narayan Sitaram are not invalidated by the fact that he was neither a party nor a witness in the original civil suit. The section itself states that the offence must be either before the Court or brought under its notice in the course of judicial proceedings and if brought to its notice in the course of these proceedings, it is immaterial whether the persons concerned appeared before the Court or not. I, therefore, decline to interfere with the order as regards Narayan Sitaram, for I have no doubt that the successor to Mr. Joshi had the power to institute these proceedings, though how far section 471 of the Indian Penal Code is applicable to the offence alleged against this accused is one for the Magistrate to decide.

As regards the other two applicants I can see no reason for interference. There is no question that the successor to Mr. Joshi had power to institute these proceedings [See *Nawal Singh* v. *Emperor* (7)]. It is contended that as regards the offence of forgery the matter cannot be said to have come to the Judge's notice in a judicial proceeding, though as regards using as genuine the forged document the Judge might have jurisdiction. I am not pressed by this argument. As already stated, it is clear that Mr. Joshi intended to take action if his suspicions were confirmed by enquiry. His successor, therefore, had the power, when that enquiry confirmed what Mr. Joshi suspected, to proceed under section 476. In the present case circumstances strongly point to a forgery having been committed. The offence being suspected when it was attempted to use a forged document as genuine, it cannot, in my opinion, be argued that the Judge cannot take notice of the forgery itself. The presentation in Court of the document directs his attention to the manner of its preparation and in my opinion the Judge is justified in proceeding against all three applicants with regard to the forgery itself. I decline to interfere and dismiss both applications. The criminal proceedings stopped by my predecessor's order of the 19th October last will continue.

Applications dismissed.

(1) 4 Ind. Cas. 105; 32 A. 74; 6 A. L. J. 983; 10 Cr. L. J. 497.

(2) 4 Ind. Cas. 710; 37 C. 250; 14 C. W. N. 330 10 C. L. J 564; 11 Cr. L. J. 37.

(3) 31 Ind. Cas. 653; 16 Cr. L. J. 797; 18 M. L. T 488; 2 L. W. 1135; 40 M. 100.

(4) 17 Ind. Cas. 720; 14 Bom. L R. 968; 13 Cr. L J. 848.

(5) 22 C. 1004; 11 Ind. Dec. (N. S.) 667.

(6) 43 Ind Cas. 436; 15 A. L. J. 912; 40 A. 116; 19 Cr. L. J. 148.

(7) 14 Ind. Cas. 766; 34 A, 593; 9 A. L. J. 491; Cr. L. J. 302.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 845 OF 1918.

February 8, 1919.

Present:—Mr. Justice Piggott.

RAM LAL AND OTHERS—APPLICANTS

versus

EMPEROR—RESPONDENT.

Workman's Breach of Contract Act (XIII of 1859), *ss.* 1, 2, *scope of—Penalty stipulated in contract of service for breach of contract, payment of, effect of—Employer, remedies of.*

A workman, who pays in full the penalty which his master or employer has agreed before-hand to accept as compensation for any breach of the contract of service on the part of the workman, has a lawful and reasonable excuse for refusing to continue to perform his work according to the terms of his contract. [p. 207, col. 1.]

An employer of labour is not precluded from availing himself of the provisions of the Workman's Breach of Contract Act merely because in the contract of service between himself and his workmen there is a stipulated penalty capable of enforcement by a civil suit, in the event of breach of the contract on the part of the workmen, which penalty has admittedly not been enforced, nor payment of the same tendered on the part of the workmen. [p. 207, col. 1.]

Criminal revision from an order of the Sessions Judge, Jhansi.

Mr. *Kailas Nath Katju*, for the Applicants.

Mr. *Sital Prasad Ghosh*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of the Sessions Judge of Jhansi, declining to interfere with an order by a First Class Magistrate of the same district passed under section 2 of the Workman's Breach of Contract Act (XIII of 1859). As the application raises one question of law on which it is supported by the authority of the Punjab Chief Court, I think it advisable to state the essential facts of the case and my reasons for rejecting the application. The applicants are eight workmen who entered into an agreement by which they incurred certain joint and several liabilities towards a contractor, named Murli Dhar. The applicants were to furnish Murli Dhar with stone road metal at certain specified rates. They were to receive advances from the said contractor and they were to continue working for him, and for no one else, so long as any sum remained due to Murli Dhar in respect of the said advances. There was a special provision to the effect that the contract might at any moment be terminated on the workmen's repaying to Murli Dhar double the amount of the balance due in respect of advances received. In the month of November 1917 the workmen left Murli Dhar's service and entered that of certain rival contractors. At that moment a very considerable sum was due to Murli Dhar on account of the advances which he had made. The sum to his credit in the hands of the applicants is found to have exceeded at the moment when they left his service Rs. 1,100. Murli Dhar did not immediately apply for the remedy which he now claims as open to him under Act XIII of 1859, nor did he immediately institute a civil suit for the relief which he might have claimed under the penalty clause, that is to say, to recover double the amount of the pending balance of the advances from the defaulting workmen. He entered into negotiations with the rival contractors into whose service the applicants had passed, and also with the applicants themselves. It is proved that negotiations took place in the course of which Murli Dhar made what seems to me on the materials available a fair, and even generous, offer. He said that he would be satisfied with the repayment of the pending balance of Rs. 1,100 and odd, without any penalty, provided that two recruits for military service were provided in his name. Presumably he desired to render a public service, and to obtain due credit for having done so, as a condition precedent to his accepting the settlement of the dispute between himself and the defaulting workmen on terms apparently most favourable to the latter. In consequence of this offer made by Murli Dhar, which I presume was ostensibly accepted by the workmen and by the rival contractors, Murli Dhar was repaid a sum of about Rs. 1,050. The finding is that a cash balance of Rs. 69 on account of the advances made to the applicants remained due from them, and this finding I am bound to accept. It appears also that Murli Dhar's stipulation as to the furnishing of two recruits for the public service was never complied with. When matters had reached this stage, Murli Dhar finally demanded that the workmen should return to his service and work off the balance of Rs. 69 due from them according to the terms of the contract, that is, by the supply of road metal at certain rates. The latter refused to do this,

and thereupon proceedings were taken resulting in the present application. An order has been passed by the Magistrate which complies in substance with the provisions of sections 2 and 3 of Act XIII of 1859. I should perhaps note that, in the course of these proceedings, the applicants admittedly tendered the balance of Rs. 69 due to Murli Dhar, but the latter insisted upon the option given him by section 2 of the Act to claim, not an order for the repayment of the money advanced, but one for the performance of the work according to the terms of the contract.

With reference to this point, one of the pleas taken before me is that the order for performance of the work should not have been passed in view of the tender made by the applicants of the balance due. It seems sufficient to say that, if the provisions of Act XIII of 1859 are applicable at all to the circumstances of the case, the complainant, that is to say, Murli Dhar, had an option to refuse to accept the mere repayment of the balance due as adequate compensation. Moreover, it can scarcely be contended that the mere repayment of this small balance of the advances could on the face of it be regarded as affording adequate compensation to Murli Dhar for the conduct of the workmen in abandoning his service. In the same connection the point is taken that the contract of service was too vague and indefinite to be specifically enforced. I can only say that, after due consideration of the terms of the contract, I am not of this opinion. The order is that the applicants shall supply stone road metal at certain specified rates, until the value of the material supplied at the said rates comes to Rs. 69. This is a clear and easily enforceable order, and it is in accordance with the terms of the original contract between the parties.

There remain two points for consideration. It is said that, inasmuch as the original contract of service provided for a penalty in the event of breach of the same, there was no remedy left to the employer under the provisions of Act XIII of 1859, and that he must be regarded as having virtually bound himself by contract to be content with the enforcement of the aforesaid penalty, that is to say, with the recovery through the Civil Courts of double the amount of the balance of the advances due from his workmen on the date on which they deserted his service. There is authority for this proposition in the case of *Emperor* v. *Muhammad Din* (1), which has been followed by the Punjab Chief Court in a later case reported as *Emperor* v. *Khuda Bakhsh* (2). The opinion expressed by the learned Judges of the Punjab Chief Court is not supported by any detailed argument, unless a reference to the preamble of Act XIII of 1859 is to be implied in the remarks of Mr. Justice Kensington in the earlier of the two cases. It was pointed out by a learned Judge of this Court in the case of *Queen-Empress* v. *Indarjit* (3) that it is the specific provisions of the Act which require to be interpreted and enforced and that these ought not to be read subject to the general language used in the preamble. I note more particularly that in the contract of service which was before the Court in that case there was a specific penalty provided, but it was not suggested that the presence of this stipulation took the contract out of the operation of Act XIII of 1859. My own opinion is that the presence of such stipulation in a contract of service may make it impossible for the employer to invoke the provisions of Act XIII of 1859, but that it will only do so in the event of the workmen or labourers who entered into the contract paying, or tendering in full, the penalty provided by the contract itself. I may illustrate my meaning by the facts of the reported case of *Queen-Empress* v. *Indarjit* (3). It was there provided that, if Indarjit committed a breach of the contract of service which he had entered into with the Elgin Mills and Co. at Cawnpore, he should pay a sum of Rs. 99, or in the alternative the Company might proceed against him under the provisions of Act XIII of 1859. In my opinion, if it had been found that Indarjit had, prior to the institution of any proceedings under the said Act, and indeed prior to any breach on his part of the conditions of the contract of service, paid or tendered to the Company the full stipulated penalty

(1) 22 Ind. Cas. 742; 23 P. R. 1913 Cr.; 93 P. L. R. 1914; 15 Cr. L. J. 166.

(2) 27 Ind. Cas. 931; 38 P. R. 1914 Cr.; 207 P. L. R. 1915; 16 Cr. L. J. 229.

(3) 11 A. 262; A. W. N. (1889) 85; 6 Ind. Dec. (N. S.) 595.

of Rs. 99, it would not have been reasonable or lawful to enforce against him the provisions of Act XIII of 1859. Referring to the terms of the Act itself, I would say that a workman who had paid up in full the penalty which his master or employer had agreed beforehand to accept as compensation for any breach of the contract of service on the part of the workmen, had thereby provided himself with a lawful and reasonable excuse for refusing to continue to perform his work according to the terms of his contract. In the present case it is not suggested that the applicants, before they left Murli Dhar's service, or indeed at any time since then, offered to pay the full penalty stipulated under the terms of the contract, that is to say, to repay to Murli Dhar double the balance of Rs. 1,100 and odd which was due to him on the date on which the contract of service was wilfully broker. I think, therefore, and it seems to me that I am supported in this view by the case of *Queen-Empress* v. *Indarjit* (3), that an employer of labour is not precluded from availing himself of the provisions of Act XIII of 1859 merely because, in the contract of service between himself and his workmen, there is a stipulated penalty capable of enforcement by a civil suit, in the event of breach of the contract on the part of the workmen, which penalty has admittedly not been enforced, nor payment of the same tendered on the part of the workmen.

The other point taken before me is that the negotiations which took place between Murli Dhar and the defaulting workmen, and also with the rival contractors into whose service the latter had entered, amounted to a novation of the contract of service between Murli Dhar and the applicants, so as to render the latter incapable of enforcement either by way of application under Act XIII of 1859 or in any other manner, but I think the simplest answer to this contention is that, on the facts found, there was no complete novation of contract. Murli Dhar offered to be satisfied with a certain payment, for less than the penalty to which he was entitled under his contract, provided a certain condition which he chose to attach to his offer were fulfilled. That condition was never fulfilled, and Murli Dhar's offer consequently lapsed.

For these reasons I think that the decision of the Courts below in this matter was correct and I dismiss this application.

Application dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 104 OF 1919.

April 29, 1919.

Present:—Mr. Justice Das.

JANKEY RAI AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 263, 367—Judgment in summary trial, contents of.

The law requires that a Magistrate or a Bench of Magistrates in a summary trial should give a brief statement of the reasons for their finding. A judgment in a single line is not a judgment in accordance with the law. [p. 207, col. 1.]

Criminal revision against the order of the Deputy Magistrate, Monghyr, dated the 6th January 1919, convicting and sentencing the petitioners under section 323, Indian Penal Code, an application against which order was rejected by the Sessions Judge, Monghyr, by his order dated the 24th February 1919.

Mr. *S. A. Sami*, for the Petitioners.

JUDGMENT.—The petitioners have been convicted in a summary trial under section 323, Indian Penal Code, and setenced to a fine of Rs. 40 each.

The law requires that a Magistrate or a Bench of Magistrates should in a summary trial give a brief statement of the reasons for conviction. The learned Magistrate hearing the case has first of all considered the theory put forward on behalf of the defence and rejected that theory as rather fantastic. Then dealing with the prosecution case he says: "The prosecution case has been fully proved by the evidence of 3 witnesses, besides the medical evidence." So far as the medical evidence is concerned, obviously it does not touch the petitioners because their case is that there was undoubtedly a *mar peet* in which other persons took part. I cannot accept a judgment in a single line as a judgment in accordance

with law. The course adopted by the learned Magistrate has necessitated my going through the evidence in the case and having gone through the evidence I am of opinion that there is a very grave doubt whether the assault was in fact committed by the petitioners.

I would, therefore, set aside the conviction and direct that the fine, if paid, be refunded to the petitioners.

Conviction set aside.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 158 OF 1919.
April 26, 1919.
Present:—Mr. Justice Stuart.
MALUA—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Arms Act (*XI of* 1878), *ss.* 13, 14, 15, 16, 19—*Servant of person exempted carrying and using master's gun—Offence.*

The servant of a person exempted from the operations of the Arms Act commits no offence by carrying his master's gun and shooting game with it with his master's permission.

Criminal revision from an order of the Magistrate, Hamirpur, dated the 13th of January 1919.

Mr. *Vishun Nath*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The District Magistrate of Hamirpur has convicted Malua under the provisions of section 19 of the Indian Arms Act and sentenced him to a fine of Rs. 20. The facts are as follows:—Malua is a trolley man on the G. I. P. Railway and has for many years been employed in his spare time by officers on the line as a *shikari*. On the 2nd of January 1919 Malua was seen by a Police Constable carrying a double-barrelled gun. The Police Constable asked him what right he had to carry the gun. Malua explained that he had been sent by Mr. Barton, Resident Engineer of the Railway, with the gun and some cartridges to track and despatch a *sambhar* which Mr. Barton had wounded the day before. He substantiated this story absolutely by producing a written authority from Mr. Barton directing him to carry the gun and despatch the *sambhar*. This was all. For this Malua has been convicted by the District Magistrate and sentenced to a fine of Rs. 20. Had there been any case in law against Malua the prosecution would have been most ill-advised on these facts, and the sentence in no circumstances could be supported. At the most the offence would have been a technical offence not requiring a prosecution. The sentence should never have been more than nominal, had Malua's act constituted an offence. But under the law Malua has committed no offence whatever.

It was laid down in this Court in *Hurley, In re* (1) that the servant of an European exempted from the operations of the Arms Act commits no offence by carrying his master's gun and shooting game with that gun with his master's permission. Later it was held by a Bench of this Court in *Queen-Empress* v. *Ganga Din* (2) that in the case of persons exempted from the operations of sections 13 to 16 of the Act, such persons would be permitted to send their servants to shoot birds with their weapons. The exemption in the case of the gentleman whose servant was prosecuted in *Queen-Empress* v. *Ganga Din* (2) was under section 2 of the Exemption Rules. The exemption in Mr. Barton's case is under section 13 but the principle is exactly the same. So the conviction is bad in law. I, therefore, accept this application, set aside the conviction and direct that the fine, if paid, be refunded.

Application accepted.

(1) A. W. N. (1881), 7; 2 Ind. Dec. (N. S.) 206.
(2) 22 A. 118; A. W. N. (1899), 213; 9 Ind. Dec, (N. S.) 1108.

SHIRINBAI *v.* RATANBAI.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 49 OF 1917.

September 3, 1918.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Macleod.

SHIRINBAI AND OTHERS—APPELLANTS

versus

RATANBAI & NAVAJBAI AND OTHERS —RESPONDENTS.

Will, construction of—Gift for life with direction to dispose of estate according to verbally expressed wishes, effect of—Trust, execution of—Power in nature of trust—Court, power of—Suit for undistributed share of intestacy—Limitation applicable—Limitation Act (IX of 1908), Sch. I, Art. 123.

A testator by his Will appointed his wife sole executrix and gave her his property for life. He then empowered her by her Will to dispose of his estate "as I have directed her orally and according to the times, *i. e*, as circumstances demand":

Held, (1) that the Will conferred no more than a life-estate on the widow; [p. 209, col. 2.]

(2) that the words "as I have directed her orally and according to the times, *i e*, as circumstances demand," indicated the existence of special directions as to the objects in whose favour the power was to be exercised and did not confer a general testamentary power; [p. 210, cols. 1 & 2.]

(3) that on the death of the testator's widow there was an intestacy as regards the property of the testator in her hands undisposed of at her death. [p. 212, col. 1; p. 214, col. 2.]

The limitation applicable to a suit to recover an undistributed share in the estate of an intestate is contained in Article 123 of Schedule I to the Limitation Act [p. 212, col. 2; p. 214, col. 2.]

Per *Scott, C. J.*—A Court will not try to compel the execution of a trust where the terms of the trust are not ascertained or ascertainable, but where a power in the nature of a trust has been executed in professed compliance with the authority given, the onus of proving that the execution was a fraud on the power lies on those who seek by challenging the execution to get possession of the property in the hands of those benefiting by the act of the donee of the power. [p. 214, col. 2.]

Messrs. *Setalvad* and *Taraporevalla*, for the Appellants.

Mr. *Strangman*, Advocate General (with him Mr. *Desai*), for Respondents Nos. 1 and 4.

Messrs. *Desai* and *Kanga*, for Respondents Nos. 6, 7, 8 and 9.

Mr. *F. S. Taleyarkhan*, for Respondent No. 5.

JUDGMENT.

SCOTT, C. J.—This is an appeal form the judgment of Beaman, J. We have to construe the Will of Bomanji Kaikhushru Modi, who, by clause 4 of his Will as to all his property, made his wife Kuverbai "Malek Mukhtyar" during her life, just as the testator was the owner, free from question by any of his other heirs, representatives, relatives and kinsmen, with directions (clause 5) that she should protect the children, as he had protected them, according to their means, declaring (clause 6) that if any of his children should not behave respectfully towards, and act according to the order of, the mother, then during her life time the child should not have any claim to any of the testator's property.

Clause 7 provided that "agreeably to what was written above, the wife was, during her life-time, to carry on 'Vahivat' (management) in respect of every kind of property and make expenses on auspicious and inauspicious occasions, as the testator had been doing." The clause proceeds "and in her life time, keeping God and Meher Davar (the Dipenser of Justice) before her mind, my wife shall duly as I have directed her orally and according to the times (*i. e*, as circumstances demand) make her Will, and all my heirs and the heirs of my heirs shall duly act agreeably to the same."

The learned Judge held that clause 4 conferred no more than a life-estate upon Kuverbai. In this construction I concur, for although "Malek Mukhtyar" would, standing by itself, imply absolute ownership, that term is limited by the words "during her life" in clause 4, as well as by the implication in clause 5 that the maintenance of the children should be proportioned to the means of the testator which he confided to his widow and the directions in clause 7 that the widow during her life-time should carry on 'Vahivat' and make expenses on auspicious and inauspicious occasions (such as marriages and deaths).

The learned Judge, however, states that in the cases of *Thomson's Estate, In re, Herring* v. *Barrow* (1) and *Pounder, In re, Williams* v. *Pounder* (2), the Courts were very clear that although an estate for life was given, the life tenant had absolute power to dispose of the property *inter vivos* though he had no power to dispose of it by Will and he was of opinion that the case was in all material points identical with this case. Kuverbai had a life estate with uncontrolled power of disposition *inter vivos*.

(1) (1883) 14 Ch. D. 263; 49 L. J. Ch. 622; 43 L. T. 35; 28 W. R. 802.

(2) (1887) 56 L. J. Ch. 113; 56 L. T. 104.

The learned Judge is under a misapprehension as to *Thomson's Estate, In re*; *Herring* v. *Barrow* (1). There the testator gave all his property to his widow "for the term of her natural life to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof and in the event of her decease, should there be anything remaining of the said property or any part thereof", he gave the "part or parts" thereof to certain persons. The Judges of the Court of Appeal expressed the opinion *obiter* that the widow took no more than a life-estate with a right to enjoy the property *in specie*. In *Pounder, In re*; *Williams* v. *Pounder* (2) the testator gave his residue to his wife absolutely and by a codicil revoked this gift and after making a specific gift gave his residue to his wife, for her own absolute use and benefit and disposal but without prejudice to the absolute power of disposal by his wife of all the residue, in case at her decease any part thereof should remain undisposed of by her, he gave the same to two other persons generally. It was held that the widow took a life interest with power of disposition by act *inter vivos* but not by Will.

The expression "power of disposal" in *Pounder, In re, Williams* v. *Pounder* (2), in my opinion, differentiates it entirely from the present case. Moreover the testator Bomanji provided by clause 8 that if his wife, that is to say, "administratrix" should die without making her Will as mentioned in paragraph 7 above, "then both my sons Nusserwanji and Sorabji shall duly become Malek in equal shares of all kinds of my property and effects" and pay certain legacies as provided. The testator treats the property not covered by a Will of Kuverbai as all his property, thereby indicating that except by her testamentary disposition, he expected his property to remain intact.

Kuverbai made a Will on the 16th May 1905 appointing Sorabji executor and died in March 1903. Sorabji proved the Will. His executrix Shirinbai is the 1st defendant. The plaintiff is the daughter of Nusserwanji, the other son of the testator who predeceased the mother Kuverbai. It is in connection with clause 7 of Bomanji's Will and the Will of Kuverbai that the principal contest and the most difficult question arises.

The plaintiff contends in paragraph 10 of the plaint:—

"10. The plaintiff says that the said Kuverbai had no power to make a Will dealing with the estate of the said Bomanji Kaikhushru Mody and that the whole of the estate alleged by the 1st defendant to belong to the said Sorabji really belonged to the estate of the said Bomanji Kaikhushru Mody and is divisible either under clause 8 of the said Will of the said Bomanji Kaikhushru Mody or is divisible amongst the heirs of the said Bomanji Kaikhushru Mody and the legal representatives of such as have died on an intestacy of the said Bomanji Kaikhushru Mody as to his property after the life-interest therein of the said Kuverbai."

Clause 8 of the Will of Bomanji referred to in paragraph 10 of the plaint is as follows:—

"8. Should my wife, that is to say, executrix die without making her Will, that is to say, testamentary writing as mentioned in paragraph seven above, then both my sons Nusserwanji and Sorabji shall duly become Malek (*i. e.*, owners) in equal shares of all kinds of my property and effects and both of them shall duly take certificate (that is obtain probate) from the Court; and out of my property and effects which they may take, they shall duly pay to their sister Nawajbai Rs. 5,000, in words five thousand, thirteen months after the demise of their respected mother, and to the said moneys neither Nawajbai's husband nor any of her creditors whatsoever shall duly have any manner of claim or right or title. And if, when the time for payment of the above mentioned moneys to my daughter Nawajbai, agreeably to what is written above, arrives, the said Nawajbai be not alive, then my sons shall duly pay her children that there may be in equal shares the moneys appertaining to their mother's share. And if the said children be minors, then the moneys in respect of their shares shall be set apart and interest thereon shall be realised by depositing the same in Savings Bank or (investing the same in) Government (Loan) Notes or in any good security and (the moneys) shall be duly paid to them on their attaining the age of

twenty-one years. But Nawajbai's husband shall have no manner of right or claim whatever to the said moneys, and if he should prefer any claim, the same shall duly be null and void."

Clause 9 contains a conditional legacy in favour of Banubai, the other daughter of the testatrix, similar in terms to that in favour of Navajbai but smaller in amount. Clause 10 is as follows:—

"10. If my wife and executrix should die without making a Will and if any of my sons should die before my wife and should there be son or sons of him, then he or they shall duly receive his or their father's share, and should there be a daughter or daughters of him, then my other son or his son shall get her or them married and shall duly pay to each of the daughters Rs. 1,000, in words one thousand, when she attains the proper age; and should there be a wife (widow) of the (deceased) son and if she should not remarry, then my other son or his son shall duly pay Rs. 2,000, in words two thousand, to her. If, after receiving the said amount, she re-marries, then my son or his heirs are duly Mukhtyars (*i. e.*, at liberty) to recover the said amount together with interest thereon from her."

It is impossible to hold that the sons under clause 8 got anything but interests contingent on their mother not making her Will as mentioned in clause 7.

The learned Judge has held that the testamentary power given by clause 7 was void for uncertainty on the authority of *Hetley* v. *Hetley* (3), but that notwithstanding, as Kuverbai did execute a Will, it cannot be said that she did not make a Will as mentioned in paragraph 7, and, therefore, the condition has not been shown to have been fulfilled, upon which clause 8 would come into operation.

The words "shall duly as I have directed her orally and according to the times (or as circumstances demand)" do not seem to me consistent with a general testamentary power; the reference to previous oral directions indicates the existence of special directions as to the objects in whose favour the power was to be exercised. I, therefore, agree with the lower Court that the power was limited as in the case of *Hetley* v. *Hetley* (3). I do not, however, feel satisfied that this Court should in the circumstances declare the power or trust in the form of a power to be void for uncertainty. The Court is not called on to declare whether or not an unexecuted power should be executed in a particular manner. It will not try to compell the execution of a trust where the terms of the trust are not ascertained or ascertainable, but where a power in the nature of a trust has been executed in professed compliance with the authority given, the onus, as it seems to me, of proving that the execution was a fraud on the power should lie on those who seek by challenging the execution to get possession of property in the hands of those benefiting by the act of the donee of the power. In many cases one can imagine very little evidence would be required to shift the onus of proof of title upon the parties in possession.

In the present case I doubt whether the Court would not best give effect to the intentions of the testator by assuming that Kuverabi, who did make a Will and whom he trusted, has carried out the testator's directions, for she refers to the testamentary power conferred upon her by her husband's Will and makes dispositions among the members of the family on line similar to those indicated by Bomanji in clause 10 of his Will to take effect in default of appointment by Kuverbai and in the event of the death of one of his sons.

I have had doubt whether the provisions of Kuverbai's Will should not be taken as evidence of the testator's directions following the course taken in *Podmore* v. *Gunning* (4). There the plaintiffs, the natural children of the testator, represented that previously to, and at the time of making his Will, the testator communicated to his wife his desire and determination to give the whole of his property, real and personal, to the plaintiffs after her death and that she undertook that if he made a Will in her favour she would carry into effect his determination in favour of the plaintiffs and that upon such undertaking and promise he made his Will giving his real

(3) (1902) 2 Ch. 866; 71 L. J. Ch. 769; 87 L. T. 265; 51 W. R. 202.

(4) (1836) 7 Sim. 644; 5 L. J. Ch. 266; 58 E. R. 285; 40 R. R. 203.

and personal estate to his wife absolutely, "having perfect confidence she will act up to those views which I have communicated to her in the absolute disposal of my property after her decease."

The testator's widow made two Wills, one almost entirely in favour of the plaintiffs and the other giving them greatly reduced legacies—both Wills were subsequently destroyed and the widow who married again died intestate.

The plaintiffs joined as defendants the second husband of the widow (who claimed as administrator of the personalty and as tenant by the courtesy of the real estate) and the heir-at-law and next-of-kin of the testator.

The Vice-Chancellor held that the words of the Will were consistent with the testator having given to his wife either some absolute direction or some general recommendation leaving it to her discretion to act upon it or not and in such manner as she might think fit.

For the next-of-kin and heir-at-law it was contended that on the face of the Will the wife was not to take the property beneficially for a longer period than her own life. This also was the plaintiff's contention. There were, therefore, three alternatives before the Court—a secret trust for the plaintiffs, a resulting trust for the next-of kin and heir-at law, or an absolute estate for the widow.

On the evidence it was held that no secret trust was made out but a discretion was left in the widow, the Vice-Chancellor holding that the two first Wills of the widow were extremely strong evidence of what passed between her and the testator. In the result, therefore, both the plaintiffs and the next-of-kin and heir-at law failed.

In consequence of my doubts the question has been argued at a further hearing of this appeal. I still doubt if a trust for the next of kin is more likely than the directions contained in Kuverbai's Will to carry out the intentions of the testator. There is, however, no direct but only inferential evidence as to the testator's directions and under all the circumstances of the case I am not prepared to set aside the decision of the lower Court or to hold that there is sufficient evidence of the terms of the power conferred on Kuverbai.

The only remaining question is whether the plaintiff's claim is barred by limitation. It is not barred if Article 123 applies. In my opinion that Article does apply, for the plaintiffs are suing for a distributive share of the property of an intestate. The recent decision of the Privy Council in *Maung Tun Tha* v. *Ma Thit* (5) displaces the line of Indian cases upon which reliance has been placed for the defendants.

The decree of the Court below must be varied by declaring that Kuverbai took only a life-estate under the Will of Bomanji and directing the Commissioner to take an account of the estate of Bomanji which come into the hands of Sorabji both before and after the death of Kuverbai.

The respondents other than Ratanbai must be treated as formal parties throughout the hearing in the lower Court under rule 503. Therefore, only one Counsel would be allowed to them in taxation of costs between party and party. After letters of administration were granted to Ratanbai, there was no reason for their appearing in the appeal at all as they claimed through Nusserwanji, and, therefore, no costs can be allowed to them on the appeal The order as to costs will be that the costs of all parties from the date of the filing of the suit to the decretal order of reference will come out of the estate, and the costs of the respondent Ratanbai in the Court of Appeal will come out of the estate. The costs of the appellants in the appeal must be borne by themselves.

MACLEOD, J.—One Bomanji Kaikhushru Mody died in March 1872, leaving him surviving his widow, Kuverbai, two sons, Nusservanji and Sorabji and two daughters, Nawazbai and Bannbai. He left a Will whereby he appointed Kuverbai executrix and she proved the Will in April 1872. Thereafter she administered the estate until her death in 1906. By her Will she appointed her surviving son Sorabji (Nusservanji having died in 1899) her executor and she purported to dispose of all her property, both her own and what she had received from her husband. After reciting that her daughter Nawazbai was dead and had in her life-

(5) 38 Ind. Cas 809; 19 Bom. L. R. 294; 15 A. L. J. 96; 32 M. L. J. 71; 21 M. L. T. 97; 21 C. W. N. 527; 44 C. 379; 16 C. L. J. 169; 9 L. B. R. 56; 10 Bur. L. T. 138; 44 I. A. 42 (P. C.).

time passed a release whereby she had given up all her claim against the estate of Bomanji, the testatrix proceeds to make bequests in favour of Banubai and the children of Nusservanji. By clauses 9 and 11 she bequeathed absolutely the residue to Sorabji. Clause 11 is important:—

"With regard to any remaining immoveable or moveable property and moneys in cash, whatever there may be and wherever the same may be and whether the same may be mine or whether the same may have been received by me on behalf of (from) my husband or which I may myself have been authorised according to my husband's Will to give away, I make over the whole thereof (*i. e.*, everything) to my said son, Sorabji Bomanji Modi."

From this clause it may be gathered that Kuverbai thought she had, under her husband's Will, a general power to appoint. Sorabji took possession of the estate and continued to hold it as owner until he died in October 1915, leaving a Will whereby he appointed his daughter Shirinbai executrix. The Will was proved on the 19th January 1916.

The plaintiff, who is a daughter of Nusservanji, then filed this suit praying *inter alia* that the estate of Bomanji might be administered by the Court, and that it might be declared that Kuverbai had no power to make a Will disposing of any part of the estate of Bomanji.

The chief points for consideration were:

"(1) Whether the plaintiff's claim was barred by limitation?

"(2) On a proper construction of Bomanji's Will did Kuverbai take (*a*) as absolute owner, or (*b*) as life tenant with a general power of appointment by Will or (*c*) as life-tenant with a special power of appointment by Will according to the oral directions of the testator?

"(3) If Kuverbai took only a life-estate and the power to make a Will was void for uncertainty, was there an intestacy?"

The learned Judge in the Court below has held that the suit was not barred by limitation; that Kuverbai took a life-interest with power of disposition *inter vivos*; that the direction in the Will to Kuverbai to make a Will was void; and that on Kuverbai's death there was an intestacy as regards the property of Bomanji remaining in her hands undisposed of at her death. Accordingly it was referred to the Commissioner to take an account of the estate of Bomanji which was in the hands of Sorabji at the death of Kuverbai, with a direction that he should ascertain whether the investments standing in the name of Sorabji formed part of the estate of Bomanji.

From that decree Shirinbai filed an appeal, while Ratanbai filed cross-objections on the ground that it should have been held that Kuverbai took a life-interest only in her husband's estate.

On the question of limitation it has been argued that Article 123 can only apply in cases where the claim for a distributive share in the estate of an intestate is made against a legal representative of the deceased or some one legally bound to distribute the estate. I agree with the learned Judge that the decision of the Privy Council in the case of *Maung Tun Tha* v. *Ma Thit* (5) lays it down that Article 123 applies to every suit in which the plaintiff seeks to recover an undistributed share in the estate of an intestate It is true that the Indian decisions to the contrary were not referred to, but with all respect those decisions appear to have resulted from a misreading of what was said by White, J., in *Issur Chunder Doss* v. *Juggut Chunder Shaha* (6). That was a suit for a legacy and it is obvious that such a suit can only lie against a person bound to pay the legacy under the testator's Will. In *Keshav Jagannath* v. *Narayan Sakharam* (7) Sargent, C. J., said:

"We concur in the opinion expressed by White and Macpherson, JJ., in *Issur Chunder Doss* v. *Juggut Chunder Shaha* (6) that the Article only applies to a case in which it is sought to obtain the share from a person who is the executor of the Will or otherwise represents the estate with a legal obligation to 'distribute the estate.'"

With all respect it will appear from the report in *Issur Chunder's case* (6) that the learned Judges said:

"Article 123 only applies to cases in which the property sought to be recovered is not only a legacy, but is also sought to be recovered as such from a person

(6) 9 C. 79; 4 Ind. Dec. (N. s.) 705.
(7) 14 B. 236; 7 Ind. Dec. (N. s.) 616.

who is bound by law to pay such legacy, either because he is the executor of the Will or otherwise represents the estate of the testator."

But a suit for a distributive share is of an entirely different nature and may lie against any one in possession of the estate.

The next question is, what is the proper construction to place upon clause 4 of Bomanji's Will? It is true that the testator makes Kuverbai 'Malek Mukhtyar' of all his property, but only 'during her life.' Clauses 5, 6 and 7 clearly show that the testator intended that Kuverbai should carry on the management only of the estate in the same way as he had been doing, and the gift over to the sons in equal shares of all funds of his property, if Kuverbai died without making a Will in accordance with his intentions, seems to me conclusive that the testator did not give and did not intend to give to his wife a power of disposition *inter vivos*.

Then in clause 7 there are the following words:—

"And in her life-time, keeping God and Meher Davar before her mind, my wife shall duly as I have directed her orally and according to the times make her Will and all my heirs and the heirs of my heirs shall duly act agreeably to the same."

It has been contended that these words constitute a general power of appointment. But in my opinion they cannot be read in that way. They point obviously to the fact that the testator gave certain oral directions to his wife and gave her power only to make a Will in accordance with those directions. Stress has been laid upon the words "and according to the times", but it has been shown to us that the proper translation of the actual Gujarati words is "according to the circumstances," *i. e.*, at the time Kuverbai made her Will, so that Kuverbai might make the testator's instructions conform to the circumstances as existing when she made her Will.

There can be no evidence now as to what these instructions were, but even if there were evidence, on the authority of *Hetley* v. *Hetley* (3), which appears directly in point, that evidence could not be admitted. The power then is void for uncertainty. It has been suggested that the case might fall within the principle laid down in *Fleetwood, In re*; *Sidgreaves* v. *Brewar* (8), but that principle is only applicable where, on the face of the Will, there has been an absolute gift with an indication that the gift is subject to a secret trust, so that it is clear there was no intention on the part of the testator that the donee should take a beneficial interest. Then parol evidence is admissible to prove the trust so as to prevent a fraud, but if the particular trust cannot be proved there is a resulting trust in favour of the next-of-kin.

The last question is, whether, since we cannot give effect to the Will of Kuverbai, there was in intestacy on her death, or whether the gift over in clauses 8 and 10 comes into operation.

The plaintiff contends that it is for the defendant to show that Kuverbai died without making a Will as mentioned in paragraph 7 before the gift over comes into operation, and as she cannot do so, there is an intestacy. The 1st defendant on the other hand argues that it makes no difference whether Kuverbai died without making a Will or whether she made a Will which is found to be a nullity.

No direct authority on the point has been cited. But it seems to me that the testator only intended that the gift over should take effect in the case of his wife dying intestate. He made no provision for what should happen if his wife died leaving an invalid Will. Therefore, there was an intestacy.

The decree of the Court below must be varied by declaring that Kuverbai took only a life-estate under the Will of Bomanji and directing the Commissioner to take an account of the estate of Bomanji which came into the hands of Sorabji both before and after the death of Kuverbai.

Decree varied.

(8) (1880) 15 Ch. D. 594; 49 L. J. Ch. 514; 29 W. R. 45.

CHANDI CHARAN *v.* HARIBOLA DAS.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 710 OF 1917.

March 10, 1919.

Present :—Justice Sir Ernest Fletcher, KT., and Mr. Justice Cuming.

CHANDI CHARAN MITRA—PLAINTIFF —APPELLANT

versus

HARIBOLA DAS—DEFENDANT—RESPONDENT.

Hindu Law—Debuttar—Endowment, general, for worship of God, validity of.

Under the Hindu system of law a general endowment for the worship of God without giving the name of the deity for whose benefit the endowment is to take effect is void for uncertainly. [p. 216, col. 1.]

Appeal against the decree of the District Judge, Rungpur, dated the 29th January 1917, reversing that of the Munsif, 2nd Court at that place, dated the 31st July 1915.

FACTS appear from the judgment.

Babu *Rishindra Nath Sarkar*, for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for recovery of possession of certain lands on a declaration of plaintiff's title thereto. Plaintiff purchased the lands in dispute by two deeds. Defendant resisted plaintiff's taking possession on the ground that the lands were *debuttar* and as such plaintiff's vendor could convey no title to plaintiff. The first Court rejected the story set up by the defence but on appeal the lower Appellate Court dismissed the plaintiff's suit. My submission is that when a transfer is made by a Shebait, a third party has no power to question it. A religious endowment can be put an end to if all the parties interested in the same join, as has been done in the present case. The case in point is *Gobinda Kumar Roy* v. *Debendra Kumar Roy Chowdhury* (1). My next point is that the deed of endowment is void for uncertainty. The properties have been dedicated for the Sheba of God. It does not specify which particular deity is to be worshipped. This vague sort of dedication, I submit, makes the endowment void. See *Phundan Lal* v. *Srimati Arya Pritinedhi Sabha* (2). The cases reported in *Bhupati Nath Smritiitirtho* v. *Ram Lal Mitra* (3), *Mohar Singh* v. *Het Singh* (4) and *Chaturbhuj* v. *Chaterjit* (5) are distinguishable from the present case, in that in each of those cases the deity for whose worship the dedication was made was specifically mentioned in the deed. Padmapurana, on which reliance has been placed by the lower Court, merely treats of gifts to Bramhans and not to gods. As regards my other points I do not press them.

JUDGMENT.—This appeal is preferred by the plaintiff against the decision of the learned District Judge of Rungpur, dated the 29th January 1917, reversing the decision of the 2nd Munsif of the same place. The plaintiff brought the suit to recover possession of certain lands on declaration of title. The plaintiff alleged that he had purchased the property under two deeds. Now, the learned Judge of the Court of Appeal below found that the property was *debuttar*, that the plaintiff's vendor was the Shebait and that there was no legal necessity for the alienations. The first point in the case is: "Is the property *debuttar*?" The document under which the endowment is said to have been established is before us. It conveys to one Santiram Bairagi the property for the purpose of the Shiba of God and Santiram Bairagi is allowed to enjoy the property from generation to generation. The point that has been urged is that this deed of endowment is void for uncertainty. It is said that under the Hindu system of law a general endowment for the worship of God without giving the name of the deity for whose benefit the endowment is to take effect is not valid. The case is covered by the decision of the Chief Justice Sir John Stanley of the Allahabad High Court and Mr. Justice Banerjee in the case of *Phundan Lal* v. *Srimati Arya Sritinedhi Sabha* (2). The learned Judges there remarked: "As we have already said, there was no Thakurji and no Thakardwara, therefore, the dedication was bad on the ground of uncertainty. This case is distinguishable from the cases

(1) 12 C. W. N. 98 at p. 101.
(2) 11 Ind. Cas. 260; 8 A. L. J. 944; 33 A. 793.
(3) 3 Ind. Cas. 642 (F. B.); 37 C. 128; 10 C. L. J. 355; 14 C. W. N. 18.
(4) 5 Ind. Cas. 584; 32 A. 337; 7 A. L. J. 296.
(5) 8 Ind. Cas. 832; 33 A. 253; 8 A. L. J. 34.

JWALA SINGH *v.* SARDAR.

of *Bhupati Nath Smrititirtho* v. *Ram Lal Mitra* (3), *Mohar Singh* v. *Het Singh* (4) and *Chaturbhuj* v. *Chaterjit* (5). In all those cases, the gift was in favour of the deity named in the deed of dedication and it was held that, although the image of the deity had not been installed and consecrated, the endowment was nevertheless valid." It really comes to this: An application of the ordinary principles of the Court of Equity with reference to the enforcement of a trust. The trust may be executory in form but the person for whose benefit it was got to be enforced must be capable of being ascertained and, according to these learned Judges, the gift for the benefit of God without naming the Thakurji is according to the Hindu system void for uncertainty. That seems to us to be right. As far as experience goes, all these endowments are made for the deity and each for a particular Thakur and there being no Thakur here indicated for whose benefit the property is to be held, the Court is unable to say for which of the Hindu deities the endower intended that this property should be held. The period of 3 years during which the rectification could be made has long expired, since the document is dated the 25th Assin 1136. In that view of the case, the person who transferred the property to the plaintiff apparently had a good title to transfer. We must accordingly set aside the judgment and decree of the learned District Judge and decree the plaintiff's suit with costs both here and in the Courts below.

Decree set aside.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 36 OF 1917.

May 8, 1919.

Present:—Sir George Knox, KT., Acting Chief Justice, and Justice Sir P. C. Banerji, KT.

JWALA SINGH AND OTHERS—DEFENDANTS —APPELLANTS

versus

SARDAR AND OTHERS—PLAINTIFFS —RESPONDENTS.

Hindu Law—Succession—Son of Kshatriya by Shudra woman, status of—Illegitimate sons, whether can succeed

The son of a Kshatriya by a Shudra woman belongs to a caste higher than a Shudra called Ugra, and his illegitimate sons, therefore, cannot succeed to the property which belonged to him [p. 217, col 2.]

Appeal, under section 10 of the Letters Patent, against the judgment of Mr. Justice Walsh, dated the 8th February 1917.

Messrs. *Gulzari Lal* and *S. M. Mukerji*, for the Appellants.

Mr. *Vishnu Nath*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was brought by the plaintiffs-respondents to recover possession of two cultivatory holdings, namely, the whole of Khata No. 32 and a fourth share in Khata No. 50. The holding in Khata No. 32 has been found to have been the non-occupancy holding of one Patpal Singh. The plaintiffs are the illegitimate sons of Patpal Singh. The defendants are his brothers It has been found that Patpal Singh was the son of one Debi Singh who was a Kshatriya. Patpal Singh's mother was a Shudra and the question is what was the status of Patpal Singh. If he was a Shudra his illegitimate sons, the plaintiffs, would succeed to his holding. If he belonged to some higher caste the illegitimate sons would have no right of succession. The point does not appear to have been decided by this Court, but it was considered in an elaborate judgment of the Madras High Court. In the case of *Brindavana* v. *Radhamani* (1) it was held that the illegitimate son of a Kshatriya by a Shudra woman is not a Shudra but was of a higher caste called "Ugra." This view is supported by the authorities cited in the judgment and we have not been referred to any case in which a contrary view

(1) 12 M. 72; 4 Ind. Dec. (N. S.) 393.

has been held. We think upon the authorities we should follow the view adopted by the Madras High Court. The result is that Patpal Singh belonged to a higher caste than that of a Shudra and, therefore, his illegitimate sons would not succeed to the property which belonged to him. In this view the plaintiffs' claim failed and should have been dismissed. We allow the appeal, set aside the decree of this Court and of the Courts below and dismiss the suit with costs in all Courts.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2018 OF 1917.

October 3, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

MUTHUVENKATANARAYANAN CHETTI—DEFENDANT—APPELLANT

versus

ATHIPANDURENGA NAIDU, MINOR, BY HIS NEXT FRIEND, BALAGURU NAIDU AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Gift by husband to wife in lieu of maintenance - Deed, conferring power of sale—Donee, estate taken by.

A Hindu husband, while contemplating retirement from the world, executed a deed of gift to his childless wife in lieu of her maintenance. The deed recited: "I have gifted this day in lieu of maintenance the undermentioned house with rights of alienation by sale":

Held, that the deed conferred on the donee an absolute estate and not only a life estate. [p. 218, col. 2.]

Moulvie Mohamed Shumsool Hooda v. *Shewukram*, 2 I. A. 7: 14 B. L. R. 226; 22 W. R. 409; 3 Sar. P. C. J. 405 and *Chutter Lall Singh* v. *Shewukram*, 5 B. L. R. 123: 13 W. R. 285, explained.

Bhujanga Rau v. *Ramayamma*, 7 M. 387: 8 Ind. Jur. 238; 2 Ind. Dec. (N. S.) 853, *Jogeswar Narain Deo* v. *Ram Chandra Dutt*, 25 C. 670 P. C.; 25 I. A. 37; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 2 Ind. Dec. (N. S.) 445 and *Manika Mudali* v. *Muthachi Kavandan*, 30 Ind. Cas. 685; 18 M. L. T. 346; 2 L. W. 887, dissented from.

Annaji Dattatraya v. *Chandrabai*, 17 B. 502; 9 Ind. Dec. (N. S.) 327 and *Nanjamma* v. *Nacharammal*, 17 M. L. J. 62, distinguished.

Per *Seshagiri Aiyar*, *J.*—A Hindu husband is bound to make provision for the maintenance of his wife before retirement from temporal affairs. [p. 218, col. 2.]

The grant of a power of sale in a deed of gift executed in favour of a Hindu female fully and sufficiently indicates the grant of an absolute estate. [p. 220, col. 1.]

Per *Spencer*, *J.*—Where words giving a power of alienation or absolute estate occur in a document, the ordinary presumption is that the grant is absolute in nature. [p. 220, col. 2.]

Second appeal against the decree of the District Court, Trichinopoly, in Appeal Suit No. 585 of 1916, preferred against the decree of the Court of the District Munsif, Trichinopoly, in Original Suit No. 231 of 1915.

FACTS appear from the judgment.

Messrs. *T. R. Venkatrama Sastri* and *S. Ramaswami Ayyangar*, for the Appellant—Exhibit I, the deed of gift in favour of plaintiff's mother, only conferred on her a life-estate. Gifts to females should, under Hindu Law, be construed restrictively. On the death of the donee the reversion went back to the 1st defendant, the donor. He was competent to dispose of the property. The gift was of immoveable property to be enjoyed by the plaintiff's mother for her maintenance. The intention of the donor could only have been to give her a life interest. See *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (1).

In *Bhujanga Rau* v. *Ramayamma* (2) it was held that even where the gift deed to a woman contained the words '*putra poutra paryantam*,' *i.e.*, from generation to generation, it did not confer an absolute heritable estate. That is, perhaps, the strongest expression which can be invoked in favour of an absolute gift.

The document only gives the donee a power of sale; it does not contain the usual recitals, 'powers of gift, alienation, etc.,' which only can confer an absolute estate.

Messrs. *T. V. Muthukrishna Ayyar* and *S. E. Sankara Ayyar*, for the Respondents.—There is no hard and fast rule that all gifts to Hindu females should be construed as conferring a life estate without reference to the recitals in the documents. Each case should be decided on its own facts. In the deed of gift to plaintiff's mother she is given the power to sell the house. That derogates from the theory of limited ownership.

Bhujanga Rau v. *Ramayamma* (2) requires re-consideration.

(1) 2 I. A. 7; 14 B. L. R. 226; 22 W. R. 409; 3 Sar. P. C. J. 405.

(2) 7 M. 387; 8 Ind. Jur. 238; 2 Ind. Dec. (N. S.) 853.

It is not necessary that the absolute estate conferred should be in an amplified form and contain all the expressions usually found in documents of that character.

JUDGMENT.

SADASIVA AIYAR, J.—The 2nd defendant is the appellant. He purchased the plaint house from the 1st defendant, who is the plaintiff's father. The plaintiff is the son of the 1st defendant by the 1st defendant's deceased first wife. The 1st defendant made a gift of the house in November 1903 to his first wife (that is, plaintiff's mother) by Exhibit I. The plaintiff was born after the date of the gift deed and he claims the property as the heir of his mother and seeks to recover possession of it from the purchaser, the 2nd defendant, after declaring that the sale-deed by the 1st defendant in September 1908 in favour of the 2nd defendant is not binding on the plaintiff. The defendants' contentions were that the gift deed to plaintiff's mother was a nominal transaction which was never acted upon and that the sale to the 2nd defendant, by the first defendant acting for himself and as guardian of the plaintiff, was made for proper purposes binding on the plaintiff. When this suit was brought the plaintiff was a minor and the suit was, therefore, brought by his next friend, his paternal aunt's husband. (It is clear from the written statements that the 1st and 2nd defendants have been acting together, the 1st defendant having married a second wife.) The plaintiff also claims mesne profits for 3 years before suit and the only defence so far as this claim is concerned is that the claim is excessive.

In the first Court no contention was raised in dispute of the allegation in paragraph 6 of the plaint that an absolute interest in the plaint house had vested in Kuppammal under the gift deed. The learned District Munsif found that the gift deed was a real transaction and that the plaintiff's mother did enjoy the house with full rights. He found also that the sale deed was not binding on the plaintiff as it was not executed for the advantage of the minor. In appeal a new contention seems to have been raised in the appeal memorandum that the deed Exhibit I, even if effective, gave the mother, in law, only a life interest and that the reversion came back to the plaintiff's father on plaintiff's mother's death. It does not, however, appear that this point was argued before the Appellate Court, as no reference is made in the judgment of the learned District Judge to this contention. The contention, however, has been strongly pressed before us in second appeal and I shall at once deal with that contention.

Exhibit I states that the husband, who is contemplating retirement from the world and pilgrimage to holy shrines, makes a gift of the suit house to his childless wife in lieu of her maintenance. A husband is bound to make provision for the maintenance of his wife before retirement from temporal affairs and that obligation is evidently intended to be discharged by this gift. Under the deed the donor gives the house "with its site, water-courses, treasures and stones" with power of alienation by sale expressly conferred on the donee and recites that he gives also possession of the title deeds. Construing this document in its ordinary sense according to the plain meaning of the language, I can find no difficulty whatever in arriving at the conclusion that it conferred an absolute heritable interest on the donee. It was, however, argued by Mr. T. R. Venkatrama Sastriar, on the strength of some judicial observations in the decisions he has quoted, that because the gift was made to a Hindu woman, more especially to a wife, we must construe the document restrictively having regard to the supposed intention of a person who makes a gift to a Hindu woman not to give her more than a life-interest. I shall refer to a few of those cases. The first case I shall refer to is the decision of the Privy Council in *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (1). The facts and the course of decision in that case were rather peculiar. The document in that case was a disposition in favour of his daughter in-law by a testator. He made her the heir and *malik* of his properties after his death. Then he said that her daughters shall be her heirs. There were no words of inheritance (such as *putra poutradi*) in the document and no powers of alienation were expressly conferred. That document had been construed by Bayley and Hobhouse, JJ., in

Chutter Lall Singh v. *Shewuk Ram* (3) as granting an absolute heritable estate to the daughter-in-law, where the learned Judges had to construe it in the first of the two suits in which the document had to be construed. In the later suit the decision of the High Court which is reported in the foot-note* to *Srimati Pabitra Dasi* v. *Damudar Jana* (4), that same document was construed by two out of three Judges as giving only a life-interest to the daughter-in-law (D. K.) having regard to the notions of Hindus about the extent of women's interest in the property inherited by them, but the third Judge [who was one of the Judges who took part in the decision in *Chutter Lall Singh* v. *Shewuk Ram* (3)] dissented and he adhered to his former opinion. Then the case went up to the Privy Council and their Lordships, on the particular facts of that case and having regard to the surrounding circumstances, thought that the majority of the Judges in *Srimati Pabitra Dasi* v. *Damudar Jana* (4) came to the right conclusion on the construction of a rather difficult deed. The decision of their Lordships of the Privy Council seems to have been considered in several decisions of the High Courts as if it laid down the broad proposition that a gift to a Hindu female (and especially to a wife or widow by her husband) should be construed with a prejudice in favour of the view that only a life-interest was intended. I must say with the greatest respect that no such rule of law can be deduced from the said decision of the Privy Council. On the other hand, so long ago as in 1875 a very learned Judge, Romesh Chunder Mitter, laid down in *Kollany Kooer* v. *Luchmee Pershad* (5) that he was not aware of any provision of Hindu Law that a gift to a Hindu female means a limited gift or carries with it only a limited estate. Even as regards the wife the text of Narada quoted in *Bhujanga Rau* v. *Ramayamma* (2), what has been given by an affectionate husband to his wife she may consume as she pleases when he is dead or may give it away except the immoveable property, does not, in my opinion, mean that a gift even of immoveable property, if accompanied with express power of disposal, cannot confer an absolute estate on the wife—of course Narada was not considering the case of a disposition by Will in favour of a widow to take effect after the testator's death.

In *Bhujanga Rau* v. *Ramayamma* (2) it was held that a gift with the words *putra poutra paryantam* added did not confer on the wife a power of alienation though the land became her *stridhanam*. With the greatest respect I am not prepared to assent to the correctness of that decision, which, in my opinion, requires reconsideration when the same question arises again. So far as the cases in *Annaji Dattatraya* v. *Chandrabai* (6) and *Nanjamma* v. *Nacharammal* (7) are concerned, the decisions rested upon a particular words found in the deeds executed in favour of the female donee; in the one case that she should *enjoy for her maintenance* and in the other case that she could *enjoy for her* life. Their Lordships of the Privy Council have themselves indicated that they did not mean by their decision in *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (1), to lay down any such general rule as is contended for [see *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (8), where even the words indicating that the gift was for maintenance were not held to detract from the absolute character of the estate given by the deed. Also *Surajmoni* v. *Rabi Nath Ojha* (9)]. In *Venkataraju* v. *Kottayya* (10) I ventured to express the opinion that a gift by a female should not be construed less liberally than a gift to a male. [See also *Ramanuja Aiyangar* v. *Satagopacharar* (11)]. As regards the case in *Manika Mudali* v. *Muthachi Kavandan* (12) I respectfully dissent from the opinion of Ayling,

(3) 5 B. L. R. 123; 13 W. R. 285.
(4) 7 B. L. R. 697 at p. 70. ; 24 W. R. 397 (*foot note*).
(5) 24 W. R. 395.
(6) 17 B. 503; 9 Ind. Dec. (N. S.) 327.
(7) 17 M. L. J. 622.
(8) 23 C. 670 (P. C.); 23 I. A. 37; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N. S.) 445.
(9) 30 A. 84: 5 A. L. J. 67; 12 C. W. N. 231 (P. C.); 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17.
(10) 16 Ind. Cas. 139; 23 M. L. J. 223 at p. 229; 12 M. L. T. 230; (1912) M. W. N. 861.
(11) 24 Ind. Cas. 20; 27 M. L. J. 329.
(12) 30 Ind. Cas. 685; 18 M. L. T. 346; 2 L. W. 887.

*See *Syad Mahomed Shumsal Hoda* v. *Shewakram*, 7 B. L. R. 700 *foot note*; 14 W. R. 315—*Ed.*

J., that the words *sarva swathanthrathudan* did not confer an absolute estate on the female donee. The other learned Judge, Tyabji, J. was inclined to differ but naturally felt too diffident to differ, especially as two Hindu Judges in the lower Courts had expressed a contrary opinion. The decision in Appeal No. 26 of 1896 decided by Subrahmania Ayyar and Benson, JJ., was sought to be distinguished by Ayling, J., on the ground that, besides the words *sarva swathanthrathudan*, there were other expressions in the document construed in Appeal No. 26 of 1896 which indicated the intention to grant an absolute estate. I venture to think that "with full proprietary powers", the meaning of *sarva swathanthrathudan*, is the strongest expression that an alienor can employ to confer an absolute estate on the alienee and that the addition of other expressions is superfluous. Mr. Venkatrama Sastri tried to make a point of the fact that only the power of sale was given in the document now construed and not the general power of alienation by sale, gift, etc., words usually found in documents intended to confer an absolute title. I am not much impressed with this argument. The grant of a power of sale, in my opinion, fully and sufficiently indicates the grant of an absolute estate. I, therefore, agree with the lower Courts in their construction of the document Exhibit I.

A minor point was urged that because the father, the 1st defendant, had obtained interest for some time on behalf of himself and the plaintiff on the amount of a mortgage deed which the 2nd defendant executed for the greater portion of the purchase-money mentioned in the sale deed executed to him by the 1st defendant, the plaintiff is not entitled to claim rent till the date of the document executed by the 1st defendant acknowledging receipt of such interest. In the first place this point seems not to have been taken in the first Court, or even in the ground of appeal to the lower Appellate Court. In the next place, the money was obtained by the 1st defendant, not for the benefit of the plaintiff who is the only person entitled to the mesne profits, but was obtained as interest on the amount of a mortgage bond which was a part of the course of transactions created by the 1st defendant with the intention of acting adversely to and creating evidence against the plaintiff's claim as heir of his mother. This contention, therefore, must also be overruled.

In the result I would dismiss the second appeal with plaintiff's costs. The time for removing the superstructure allowed to the 2nd defendant is extended till the expiry of 4 months from this date.

SPENCER, J.—I agree. On the somewhat belated contention that the gift deed in this case, Exhibit 1, which contains the words: "I have gifted this day in lieu of maintenance the undermentioned house with rights of alienation by sale" confers on the wife only a life-estate, I wish to add a few words in deference to the very full arguments we have listened to. In *Toolsi Dass Kurmokar* v. *Madan Gopal Dey* (13) it was laid down by Harrington, J., that one of the tests which may be applied to see whether the estate given is intended to be absolute or not, is to see whether the donee has a power of disposition over it. I respectfully agree with this and adopt this test. In *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (8) the Judicial Committee of the Privy Council has no hesitation in construing a gift deed which contained an express power given to the donees of making alienations by sale or gift as conveying an absolute estate. There were other words in the deed which led to the same conclusion. But the decision supports the view that where words giving powers of alienation or of absolute estate occur in the document, the ordinary implication is that the grant is an absolute one. *Manika Mudali* v. *Muthachi Kavandan* (12) was a decision which turned mainly on the meaning of the words *sarva swathanthrathudan*, which do not occur in the document before us. If in that case there had been a distinct provision for alienation, it is clear from Ayling, J.'s remarks that he would have come to the conclusion that an absolute estate was gifted. But in that case only the words *sarva swathanthrathudan* occurred and the power of sale that occurs in the document before us was not present in that document. In *Annaji Dattatraya* v. *Chandrabai* (6) there were no words giving expressly the power to alienate the property. In *Nanamma* v. *Nacharammal* (7) the question that arose was whether

(13) 28 C. 499.

there was a grant of a life estate or a widow's estate. The learned Judges held that what was given in that case was a life estate, and they came to this conclusion on account of the words "you shall enjoy the same all your life." They commented on the absence of apt words for the purpose of clothing the widow with powers of alienation for purposes of family necessity, and they decided that the mere expression "with power to sell and give away" did not necessarily indicate the grant of a widow's estate. On the construction of the suit gift deed I agree with my learned brother that the District Judge was right in his opinion that an absolute estate passed and that the second appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL REFERENCE No. 5 OF 1919.

February 4, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir John Woodroffe, KT.

In the matter of SECTION 61 (1) OF THE INDIAN STAMP ACT

and

In the matter of AN AGREEMENT BETWEEN

A. M. AMOLIA

versus

IBRAHIM ISHAK.

Stamp Act (II of 1899), Sch. I, Art. 35, cl. (a), sub-cl. (i)—Lease of a shop—Agreement to pay rent daily—Stamp duty payable.

A tenant agreed to pay Rs. 60 per month as rent for a shop and to pay the said rent at Rs. 2 per day:

Held, that the tenancy was a monthly tenancy and that it came within Article 35, clause (*a*), sub-clause (*i*), of Schedule 1 to the Stamp Act and that, therefore, the proper stamp duty payable thereon was eight annas.

Reference made by the Collector of Stamps, Calcutta.

FACTS.—In a suit before the 5th Judge of the Calcutta Small Cause Court a document was produced in evidence whereby the executor agreed to pay Rs. 60 per month as rent for a shop and to pay the said rent at Rs. 2 a day. The question was, whether the document, for the purposes of the Stamp Act, was a lease for a term of less than one year, or whether it was one for an indefinite period. The Judge held that under Schedule I, Article 35 (*a*) (*i*) of the Stamp Act, read with section 105 of the Transfer of Property Act, the document purported to create a monthly tenancy. The Collector of Stamps, however, was of opinion that the document did not purport to be a lease for any definite period and required to be stamped under clause (*iv*) of the Article of the Stamp Act referred to. He accordingly submitted a reference, under section 61 (2) of the Stamp Act, to the High Court.

Mr. *S. R. Das*, for the Collector.

Mr. *D. N. Sen*, for the Lessor.

JUDGMENT.

SANDERSON, C. J.—In this case learned Counsel has conceded, and I think rightly, that the tenancy was a monthly tenancy; and, consequently, it comes within Article 35, clause (*a*), sub clause (*i*) of the First Schedule of the Indian Stamp Act, that is to say, "the lease purports to be for a term of less than one year." Therefore, the proper stamp duty is the same duty as for a bond which is referred to in Article 15 and inasmuch as the amount is above Rs. 50 and does not exceed Rs. 100, the proper stamp duty is eight annas, as the learned Judge has decided.

WOODROFFE, J.—I agree.

Answer accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 918 OF 1917.

August 15, 1918.

Present :—Justice Sir William Ayling, KT., and Mr. Justice Krishnan.

DURUGAMMA POOJARI BHEEMAPPA —DEFENDANT—APPELLANT

versus

DURUGAMMA POOJARI TIMAKKA—PLAINTIFF—RESPONDENT.

Hindu Law—Puja, *performance of*—*Proxy, performance by, for woman*—*Choice of proxy, whether limited to sharers entitled to performance by turns.*

Under Hindu Law a woman can get *puja* performed in a temple by a proper proxy.

The choice of the proxy is not limited to the other sharers who are entitled to perform *puja* in their turn.

BANAMALI SATNATH *v.* ARTARAN MAHAPATRA.

Second appeal against the decree of the Temporary Subordinate Judge, Bellary, in Appeal Suit No. 153 of 1916, preferred against the decree of the Court of the District Munsif, Bellary, in Original Suit No. 171 of 1915.

FACTS appear from the judgment.

Mr. *V. S. Narasimha Ayyangar*, for the Appellant.—The plaintiff cannot choose any proxy she likes. Her choice must be restricted to the other sharers who are entitled to perform the *puja* in their turn. She cannot introduce strangers. See Colebrook's Digest, Book II, Chapter III, section 2, rule 21.

The Hon'ble Mr. *T. Rangachariar*, for the Respondent.—The appellant's case in the lower Court was a special custom in the plaint temple whereby a proxy was to be chosen from among the sharers entitled to perform *puja*. The custom having been found against appellant, he now relies on a positive text of Hindu Law. The text cited does not cover the present question.

JUDGMENT.—The question whether a woman can get *puja* performed in a temple by a proper proxy is now settled by the ruling of the Full Bench in *Annaya Tantri* v. *Ammaka Hengsu* (1).

The appellant contends that the plaintiff's choice of proxy must be limited to the other sharers who were entitled to perform *puja* in their turn. This was put as a matter of special custom in the plaint temple in the lower Appellate Court, but that Court has found against it and we must accept the finding.

It is now argued before us that it is a rule of Hindu Law. Colebrook's Digest, Book II, Chapter III, section 2, rule 21, is relied on. We do not think that rule has anything to do with the choice of proxies at all; nor is it shown to be in force in this Presidency.

The second appeal fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

(1) 47 Ind. Cas. 341; 35 M. L. J. 196; 8 L. W. 301; 24 M. L. T. 163; (1918) M. W. N. 569; 41 M. 986.

PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.

CIVIL REVISION NO. 23 OF 1918.

December 19, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Mullick.

BANAMALI SATNATHI—PETITIONER

versus

Choudhuri ARTARAN MAHAPATRA —OPPOSITE PARTY.

Orissa Tenancy Act (II B. O. of 1913), ss. 193, 210 —"Court having jurisdiction to determine suit for the possession of land," whether includes Civil Court —Jurisdiction of Civil and Revenue Courts—Civil Court, whether can determine rent.

The provisions of section 210 of the Orissa Tenancy Act are general in their application and the words "the Court having jurisdiction to determine a suit for the possession of land" in the section mean any Court which has that jurisdiction, unless it can be shown that that jurisdiction is taken away by some provision in the Act itself. [p. 223, col. 2.]

Therefore, a Civil Court has jurisdiction to determine the rent payable by a tenant under section 210 (1) (*d*) of the Orissa Tenancy Act. [p. 223, col. 1.]

Civil revision from an order of the Munsif, Kendrapara, dated the 15th May 1918.

Mr. *B. Chowdhury*, for the Petitioners.

Mr. *B. N. Das*, for the Opposite Party.

JUDGMENT.

MILLER, C. J.—The question for decision in this case is whether a Civil Court is a Court having jurisdiction to determine a suit for the possession of land within the meaning of section 210 of the Orissa Tenancy Act, 1913. That section provides that such a Court, on the application of either the landlord or the tenant, may determine all or any of the following matters, namely:—

"(*d*) The rent payable by him at the time of the application."

An application was made under that section to a Civil Court presided over by a Munsif and the Munsif came to the conclusion that the rent payable was that contended for by the landlord, which was Rs. 7 odd, and not that contended for by the tenant, which was Rs. 3 odd. That decision is brought before us by way of revision and we are asked to say that the Munsif's Court had no jurisdiction to entertain such an application, and we are referred to section 193 of the Act which provides that

"The following suits and applications shall be cognizable by the Collector, and shall

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be instituted and tried or heard under the provisions of the Act, and shall not be cognizable in any other Court except as provided in this Act, namely:—

"(*a*) All suits and applications under any portion of this Act other than Chapter XI."

The application in question admittedly did not come under Chapter XI and, therefore, *prima facie* it would be under section 193 one of the applications which would be triable by the Collector only and not by the Civil Court, but section 193 only provides that these suits and applications shall not be cognizable in any other Court except as provided in this Act, and the question which we have to determine here is, whether it is provided in section 210 that a Civil Court shall have jurisdiction to determine one of the applications mentioned in that section. The section itself is quite clear and unambiguous. It is taken and repeated *verbatim*, I believe, from section 158 of the Bengal Tenancy Act. It refers to the Court having jurisdiction to determine a suit for the possession of land. That may be either a Civil Court or a Revenue Court as the case may be, but as things are, there is no reason, so far as I am aware, why a Civil Court should be deprived of its ordinary jurisdiction to determine a suit for the possession of land, and if that is so, it is quite clear that a Civil Court is one of the Courts referred to in section 210.

But it is suggested that section 193, which makes all suits and applications under any portion of this Act triable by the Collector only, imports this that all suits of any nature which are referred to or in which any provisions of this Act may be applied are suits under this Act. I confess that I have some difficulty in following that argument. It does not seem to me that an ordinary suit which is triable by the Civil Courts is a suit under this Act at all. There are certain suits and certain applications which undoubtedly are made under this Act, that is to say, the Oriesa Tenancy Act, and there are certain classes of cases which are said by the terms of the Act itself to be triable only in a certain way either by a Civil Court or a Revenue Court or in some other way as the case may be. It seems to me, looking at this section, that there is no ground for holding that an ordinary suit for the possession of land is a suit or application under any portion of this Act at all. It may be, and I believe it is a fact, that certain suits for ejectment against tenants, which of course involve a claim for possession of land, are triable only in a certain way, but the words of section 210 are general in their application and I think that the words there used "the Court having jurisdiction to determine a suit for the possession of land" must mean any Court which has that jurisdiction, in this case the Civil Court, unless it can be shown that that jurisdiction is taken away by some provision in the Act itself. In these circumstances I think this application must be dismissed with costs.

MULLICK, J.—I agree.

Application dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 654 OF 1916.

December 3, 1918.

Present:—Mr. Justice Heaton and Mr. Justice Pratt.

Sahahsaheb SABDURALLI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SADASHIV SUPDE—PLAINTIFF—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *s.* 99, *O. XXXII*, *r.* 1—*Limitation Act* (*IX of* 1908), *s.* 22, *scope of*—*Mortgage, suit on, against some of several heirs of mortgagor, maintainability of*—*Non-joinder of parties, effect of.*

A mortgagee brought a suit to enforce his mortgage by sale of the mortgaged properties against some only of the heirs of the mortgagor. On objection being taken that the suit was bad for non-joinder of the other heirs, the mortgagee refused to join them as the period of limitation as against them had expired:

Held, that the effect of the non-joinder of some of the heirs of the mortgagor was that the mortgagor lost his right to enforce the mortgage charge against that part of the security which was represented by the shares of the excluded heirs, but that the mortgagee was still entitled to enforce his charge against the rest of the property and there was no bar to the jurisdiction of the Court to entertain the suit as framed. [p. 224, col. 2.]

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Per *Pratt, J.*—Section 99 of the Civil Procedure Code refers to misjoinder of parties, but misjoinder includes non-joinder [p. 224, col. 2.]

The test both under Order XXXIV, rule 1, of the Civil Procedure Code and section 22 of the Limitation Act is the same, *viz*, was the suit properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded? [p. 225, col. 2.]

Second appeal from the decision of the Assistant Judge, Khandesh, in Appeal No. 271 of 1914, confirming the decree passed by the Subordinate Judge, Erandol, in Civil Suit No. 16 of 1911.

Mr. *S. M. Kaikini*, for the Appellants.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

PRATT, J.—In this suit the mortgagee, who is respondent in this appeal, sued to recover the mortgage debt by sale of properties mortgaged in 1896 by the deceased Sabdaralli The suit was brought within the extended period of limitation allowed by section 36 of the Indian Limitation Act, 1908, and the original mortgagor having died before the suit, his wife and daughters—the appellants—were made defendants.

Objection was taken in the first Court that the suit was bad for non-joinder of other heirs of Sabdaralli—his brother and sister's children. But the mortgagee did not join them in spite of the objection as the period of limitation as aginst them had expired.

The Subordinate Judge held that the non-joinder of these heirs was not fatal to the suit and decreed the suit as against the interest of the wife and daughters. The lower Appellate Court confirmed this decree and the wife and daughters in this appeal contend that the provisions of Order XXXIV, rule 1, are imperative and that the non-joinder of the heirs admittedly interested in the equity of redemption necessitated the dismissal of the suit.

This is the only point raised in the appeal.

Now the mortgage security is of course indivisible and the mortgagee must sue to realize the whole of his debt out of the property mortgaged. This is the substantive law enacted in section 67 of the Transfer of Property Act. Then Order XXXIV, rule 1, is a rule of procedure that all persons interested in the mortgage security or the right of redemption shall be made parties to the suit. The object of this rule is clearly to avoid multiplication of suits, but does a breach of this rule involve the consequence that the suit should be dismissed? The answer to this question is, I think, supplied by section 99 of the Code. That section refers to cases of misjoinder of parties, but misjoinder includes non joinder: *Ekkanatha Eachara Unni Valia Kaimal* v. *Manakkat Vasunni Elaya Kaimal* (1). According to that section non-joinder of parties, though a breach of the procedure enjoined by the Code, is not a fatal defect unless it affects the merits of the case or the jurisdiction of the Court. Neither of these conditions is fulfiled in the present case. The right to enforce the mortgage charge against the part of the security represented by the shares of the excluded heirs is lost. The joinder of these heirs will not affect the merits of the case, for it is only the right, title and interest of the defendants that can be sold. The mortgagee, though he has lost part of the security, is entitled to enforce his charge against the rest and there is no bar on the jurisdiction of the Court to entertain such a suit.

The terms of section 85 of the Transfer of Property Act (IV of 1882), which corresponded to Order XXXIV, rule 1, were held by the Allahabad High Court in *Mata Din Kasodhan* v. *Kazim Husain* (2) and *Ghulam Kadir Khan* v. *Mustakim Khan* (3) to be imperative, so that failure to join the parties indicated involved dismissal of the suit. These cases proceeded on what was supposed to be the imperative character of the word "must" in section 85. But this word is now dropped out and the section is incorporated in the Code of Civil Procedure, showing that the matter is one of procedure and regulated by section 99. The judgment in *Mata Din's case* (2) said that the imperative construction was necessary in order that "litigants should be made to know and feel the Statute Law." This can hardly be admitted as a valid argument and justifies the criticism of Mr.

(1) 5 Ind. Cas. 774; 33 M. 436; 7 M. L. T. 102; 20 M. L. J. 344.

(2) 13 A. 432 F. B.); 7 Ind. Dec. (N. S.) 276.

(3) 18 A. 109; A. W. N. (1896) 7; 8 Ind. Dec. (N. S.) 778.

Ghose in his work on the Law of Mortgages in India that Courts exist not for the sake of discipline but for determining matters in controversy between the parties. I think the correct construction was that put upon the section in the dissentient judgment of Mahmood, J., in *Mata Din's case* (2). In the absence of words of prohibition the section is not to be read as if it began by saying that: 'No suit shall be entertained unless all parties, etc.' This view is supported by a *dictum* of the Privy Council in *Umes Chunder Sircar* v. *Zahur Fatima* (4). At page 179 of the report their Lordships say—

"Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties."

Evidently their Lordships thought a suit on the mortgage would be competent although assignees of the equity of redemption had not been made parties.

We have next been confronted with cases on section 22 of the Indian Limitation Act, which decide that when necessary parties are not joined within the period of limitation the suit must be dismissed. In *Guruvayya* v. *Dattatraya* (5) it was said that "Such a result must depend upon consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed", for instance, in a suit by one of several joint promisees the other promisees are necessary parties, for no relief can be given to one of them. The suit is not properly constituted unless all the co-promisees join, for the plaintiff can only enforce his claim in conjunction with them: *Ramsebuk* v. *Ramiall* (6). So also a partition suit cannot be constituted unless all the coparceners are made parties. But on the other hand when the suit can be constituted without the other parties and their joinder is only desirable, as in *Guruvayya's case* (5), "for the purpose of safe-guarding the rights as subsisting between them and others claiming generally in the same interest", the suit should proceed and the Court should award such relief as may be given in the suit as framed. That necessary parties mean parties necessary to the constitution of the suit seems to have been the view taken by the Privy Council in the case of *Kishen Parshad* v. *Har Narain Singh* (7). Their Lordships said:—

"By this time the three years allowed by Act XV of 1877, Second Schedule, Article 64, had expired, and it became necessary to determine whether or not the additional plaintiffs were really necessary parties, because if not, the suit had always been properly constituted and the time under the Statute stopped running on the 3rd June, 1904, (the date of the plaint) within the three years."

The distinction between necessary parties and proper parties is made in Order VII, rule 10 (2), where necessary parties are parties "who ought to have been joined" and who are indispensable as without them no decree at all can be made, and proper parties are those whose presence enables the Court to adjudicate more "effectually and completely." This is the distinction made in the passage quoted from Pomeroy on Remedies in *Keshavram* v. *Ranchhod* (8).

Now this suit was properly constituted when the plaint was filed, for I have already shown that the Court could award relief against the interest of defendants. Section 22 of the Indian Limitation Act does not, therefore, necessitate the dismissal of the suit.

The test, therefore, both under Order XXXIV, rule 1, and section 22 of the Indian Limitation Act is the same—was the suit properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded?

My conclusions both as to the effect of Order XXXIV, rule 1, and section 22 of the Indian Limitation Act are supported by a recent decision of this Court in *Virchand* v. *Kondu* (9). I do not, however, express agreement with tha decision in that suit

(4) 18 C. 164 (P. C.); 17 I. A. 201; 5 Sar. P. C. J. 507; 9 Ind. Dec. (N. s.) 110.

(5) 28 B. 11; 5 Bom. L. R. 618.

(6) 6 C. 815; 8 C. L. R. 457; 3 Ind. Dec. (N. s.) 527.

(7) 9 Ind. Cas. 739; 33 A. 272; 21 M. L. J. 378; 15 C. W. N. 321; 8 A. L. J. 256; 13 C. L. J. 345; 13 Bom. L. R. 359; 38 I. A. 45; 9 M. L. T. 343; (1911) 2 M. W. N. 395 (P. C.).

(8) 30 B. 156 at p 161; 7 Bom. L. R. 811.

(9) 31 Ind. Cas. 180; 17 Bom. L. R. 685; 39 B. 729.

that the mortgage decree would be binding on the Muhammadan co-heirs who were not parties. But this point does not arise for decision.

I, therefore, think the lower Courts were right and would confirm the decree and dismiss this appeal with costs.

HEATON, J.—I emphatically agree that the Courts below were right not to dismiss the suit. This is the only matter before us. We are not asked to decide what will be the effect of the decree that has been made; so on that point I say nothing.

A mortgagee's claim, when it is put forward in the form taken in these proceedings, is primarily a claim against property. The claim here, so far as it concerned the property, was made in time, the persons cited as defendants were correctly made defendants but they did not comprise all who should be defendants. Possibly the correct procedure in the trial Court would have been to direct the plaintiff to add the other defendants. But the real attack on the decision of the lower Courts is not on that ground at all. In order to be able to appreciate the true legal position, I will assume that the others were added as defendants and that the claim against them was time-barred. I cannot see how in justice or in law it follows that the whole claim must be dismissed. It is not so provided by Order XXXIV, rule 1, either expressly or, as I think, impliedly. The disadvantages of failing to join in time persons who ought to be defendants are quite serious enough without adding to them by dismissing a suit. There is certainly no other provision in the Procedure Code which supports the view that in such circumstances as these a suit should be wholly dismissed.

If that is the position reached after a study of the law of procedure, it remains unassailed by anything to be found in the law of mortgage, as I understand it.

In the case of *Virchand* v. *Kondu* (9) this Court in circumstances almost identical with those now before us arrived at the same conclusion as that we propose to give effect to. It is true that my learned brother and myself have given reasons a good deal different from those given in that case. But where several different lines of reasoning lead to the same result, one is fortified in the belief that the result is correct.

Decree confirmed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT

June 3, 1918.

Present:—Lord Sumner, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

RAJANI KANTA GHOSE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), *ss.* 5 (5), 103*B*, 104*H* — "Raiyats" — "*Tenure-holders*"—*Test for determining, whether a person is* "raiyat" *or tenure-holder—Record of Rights, entry in—Presumption as to correctness of entry, rebuttal of – Burden of proof.*

In a suit for a declaration that the plaintiffs are "*raiyats*" and not "tenure holders" the question ultimately depends on questions of fact: the Court must look to the attendant circumstances to judge of the purpose for which the land was acquired. [p. 227, col. .]

If in the Record of Rights the plaintiffs are entered as "tenure-holders," the onus is on them to rebut the statutory presumption that such record is correct and if the area held exceeds 100 *bighas*, the further presumption that the holders of it are "tenure-holders."[p. 227, col. 1.]

A person who acquires and reclaims land in order to make money out of it by letting the land to cultivators, while he resides and follows his avocations elsewhere, is neither a cultivator nor a "*raiyat*" in the sense in which that term is used in the Bengal Tenancy Act and a tenure derived from such a person is not a "*raiyati* tenure." [p. 227, col. 2.]

Appeal from a judgment and decree of the Calcutta High Court (Chitty and Teunon, JJ.), passed on the 13th March 1913, reversing a judgment and decree of the Subordinate Judge, Midnapore, dated the 7th March 1910.

Mr. *A. M. Dunne, K. C.*, for the Appellants.

Sir *H. Erle Richards, K.C.*, and Sir *William Garth*, for the Respondent.

JUDGMENT.

LORD SUMNER.—A Record of Rights, under Chapter X of the Bengal Tenancy Act (VIII of 1885), was published on the 2nd September 1908, under which the appellants were entered as "tenure-holders" of Monzah Rupnarayan Chur, which is situated on the river Hugli within the Khas Mahal of the Government in the District of Midnapur. The rent, which had been payable

under the previous settlement, was on this occasion considerably enhanced. Being aggrieved by this increase, the appellants brought the present suit under section 104 (H) of that Act for a declaration that they were "*raiyats*" and not "tenure-holders" and for a reduction of the rent to a fair and equitable sum. Whether they really are "*raiyats*" ultimately depends on questions of fact; one must "look to the attendant circumstances to judge of the purpose" for which the land was acquired: *Debendra Nath Das* v. *Bibudhendra Mansingh Bhramarbar Roy* (1). The trial Judge decided in their favour, but his decision was reversed on appeal.

It lay on the appellants to rebut the statutory presumption that the Record of Rights was correct [section 103 B] and, as the holding exceeded 100 *bighas*, the further statutory presumption that the holders of it were "tenure-holders" [section 5 (5)]. Furthermore, the time and circumstances of the origin of their rights were in this case not mere matter of conjecture or of inference, but were proved in substance and in considerable detail. The evidence is examined at length in the judgment under appeal. Rupnarayan, the plaintiffs' original predecessor-in-title, was not a cultivator. He was by caste a Kayestha and by occupation a petty Government official, a local salt *daroga*. Before his time the Government had no tenant on the land, which had been diluviated and was unoccupied. In the early thirties of the last century he found money—and no small sum either—with which he began to build embankments and other works to reclaim the *chur* lands then re-forming in the river bed. The *chur* afterwards bore his name and eventually the land was brought into cultivation.

It is certain that, at some later date, actual cultivation was being done by peasants, who paid rent to Rupnarayan, as they do still to his successors, and there is no evidence that Rupnarayan or his sons or his servants ever actually cultivated a single *bigha*. He did not reside on the *chur*, but followed his avocation elsewhere. A *roidad* of 1841, relied on by the plaintiffs, which narrates the origin of this reclamation, describes him as having been of Majipara in the district of Nadia. These simple facts led the High Court to the conclusion that he was not what the Bengal Tenancy Act (section 5) calls a "*raiyat*"; he was, in fact, a middleman, and a very useful one. The question is, "For what purpose was the land originally acquired?" The answer is plain: He reclaimed the *chur* in order to make money out of it by letting land to cultivators. In view of these facts, it is impossible to say that the High Court were wrong in holding that he was neither a cultivator nor a *raiyat*, in the sense in which that term is used either in the Bengal Tenancy Act or in ordinary speech. That being so, the plaintiffs' tenure, which was derived from him, was not *raiyati* tenure, and their case failed.

It is true that they produced a series of documents beginning about 1840 and coming down to 1882, and relied on them as showing that this *chur* had been reputed to be of *raiyati* tenure, but until 1879 none used that word. At most they were consistent with *raiyati* tenure, if that tenure could otherwise be established. In themselves they were neutral and obscure. In their Lordships' opinion the learned trial Judge placed on them a value which was higher than they could bear, and appears to have found support for the view which he took of the plaintiffs' documents in the view which he took of the defendants' witnesses, namely, that they were perjurers.

In 1879, forty odd years after Rupnarayan's right had accrued, whatever it really was, someone served the plaintiffs with a notice of enhancement of rent under Act VIII of 1879 as being *raiyats*, and in 1882 the Board of Revenue, in pronouncing on their petition for reduction of the recently settled rental, point out that the petition laid claim to a hereditary and transferable tenure without showing any justification for it, and observe that in 1845 and recently the tenure had been in fact treated as *raiyati*, a view which the documents produced only doubtfully support. After allowing the fullest weight to these official documents as evidence, which is not considerable, their Lordships must observe that the first does not purport to have been prepared by anyone who had knowledge of the facts, and that, if the second rested,

(1) 45 Ind. Cas. 411; 45 C. 805; 5 P. L. W. 1; 27 C. L. J. 543; 22 C. W. N. 674; 16 A. L. J. 522; 23 M. L. T. 384; (1918) M. W. N. 379; 20 Bom. L. R. 743; 35 M. L. J. 214; 45 I. A. 67 (P. C.).

as seems to be the case, on the documents produced by the plaintiffs at the trial, its statements are only doubtfully supported by them, and they are unable to think that those records are sufficient, even in conjunction with the earlier documents produced, to rebut the above mentioned presumptions, or to establish that the appellants' rights are those of occupancy *raiyats*.

Section 19 of the Bengal Tenancy Act saved rights, accrued and existing before it came into force, and no doubt the nature of those rights must be judged in accordance with the law as it stood when they arose unless subsequent changes in the law have operated to alter them. It is contended that not only were the terms "*raiyat*" and "tenure-holder" undefined by any Statute before 1885, but that the definition then given to them did not reproduce the meaning which they had previously borne, and that, in fact, in the middle of the nineteenth century "*raiyat*" would have been the term to apply to Rupnarayan, even though he reclaimed the land merely in order that it might be cultivated by others paying rent to himself and without any intention of cultivating on his own account, and that accordingly he acquired and passed on a *raiyati* holding, which, though not *raiyati* within the Statute for the purposes of its definition, would still be within it for the purpose of the relief given by section 10 *h* H. No decision was produced to this effect; the judgment of Field, J., in the case of *Durga Prosunno Ghose* v. *Kalidas Dut* (2), when carefully examined, has clearly a different import. No universal definition of a *raiyati* interest was there laid down. No instance was cited to their Lordships of such a use of the word "*raiyat*," and the use of the words "cultivated or held" in the general Tenancy Act (X of 1859, section 6) has no such effect, and, therefore, need not be particularly examined.

The appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellants:—Messrs. *W. W. Box & Co.*

Solicitor for the Respondents:—The Solicitor, India Office.

(2) 9 C. L. R. 449.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 219 OF 1913.

December 3, 1918.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Shah.

KRISHNAJI GANESH KULKARNI—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 86—Kurundwad Jahargeerdars, *whether Ruling Chiefs—Suit against Ruling Chief—Consent of Governor-General, whether necessary.*

Kurundwad Jahageerdars are Ruling Chiefs and cannot be sued without the consent of the Governor-General. [p. 232, col. 2.]

Appeal from the decision of the District Judge, Dharwar, in Suit No. 22 of 1912.

Mr. *Dhurandhar* (with him Mr. *A. G. Desai*), for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for Respondent No. 1.

Mr. *Coyajee* (with him Mr. *K. H. Kelkar*), for Respondent No. 2.

JUDGMENT.

SCOTT, C. J.—The plaintiff in this case sued for a declaration that he was a British subject, alleging that he was a resident of Lohakur in the Pachapur Taluka in Dharwar Subha, a village which was in the Peshwa's dominions until 1818, when it was annexed by the British Government and included in the District or Subha of Dharwar. He alleges that, on the 3rd of April 1820, the revenues of the village were assigned to the then Chief of Kurundwad (the ancestor of the 2nd defendant), but the village itself remained in British possession through a misconception of the grant or through oversight or negligence and breach of duty and without any reasonable cause whatever. British authorities ceased to exercise their supreme authority over the village, a course which was blindly followed until now with the result that the Chief of Kurundwad began to exercise sovereign control over the village to the detriment of the plaintiff's rights and privileges of a British subject. The plaintiff had asserted these rights by asking unsuccessfully for a Tagai loan from the Collector of Dharwar and the Commissioner, Southern Division, and for a license for gun-powder and fuses from the District Magistrate of Dharwar. On both

occasions the Government of Bombay upheld the decisions of the local officers who had refused the requests on the ground that Lohakur was not in the Dharwar District. The Collector also declined to enquire into the rights of the British Government over Lohakur. Hence the present suit for a declaration that Lohakur being situate in the District of Dharwar, the plaintiff as a resident and a Kadim Watandar and Inamdar thereof is a British subject. He also prays for a perpetual injunction restraining defendant No. 2 from doing any act of interfering with such rights and privileges of the plaintiff.

The suit is instituted against the Secretary of State for India in Council and the Ruling Chief of Kurundwad. The Patwardhans, the family to which the 2nd defendant belongs, are a Brahmin family which rose to power in the time of the Peshwas and had attained an influence in the Southern Mahratha country which led to a jealous interference on the part of the Peshwas prior to 1812. The Patwardhans in various branches held large Jahageers on condition of supplying troops for the Mahratha Confederacy, and in 1812 the differences arising between them and the Peshwas resulted in the intervention of the East India Company by whose influence articles of agreement were entered into in 1812 between the Poona Government and the Patwardhans.

In 1817, the Peshwas' Government at Poona came to an end with the battle of Kirkee and the East India Company assumed control of the territories theretofore subject to the Peshwas. The territorial acquisitions of the East India Company resulting from the fall of the Peshwas extended southwards beyond Dharwar, and in 1818 as an administrative measure the application of the Regulations theretofore in force within the territories of the East India Company was extended by General Munro for the purpose of governing the territory roundabout Dharwar which he was occupying, but there was no legislative extension of statutory enactments to the Southern Mahratha country until Regulation VII of 1830. At first the British district in the Southern Mahratha country was associated with the name of Dharwar, but subsequently the Dharwar Zillah was broken up into Dharwar and Belgaum. But there is no evidence in the case that the village of Lohakur, of which the plaintiff claims to be a Kadim Inamdar, holding a Kulkarniki Vatan, was included in the Belgaum District, as carved out from the Dharwar District, or in the Dharwar District as originally administered by the East India Company. The village is situated towards the north of the Belgaum District as it now exists, and is very close to Shedbal. Shedbal was a Jahageer given by the Peshwa to Ganpatrao, one of the Kurundwad family, in 1812. It appears now to have lapsed to the British Government. Lohakur lies slightly to the north of Shedbal, and there is no evidence that it was ever administered by the British Government. Its history is connected with the history of the Kurundwad family in its relations with the British Government immediately after the fall of the Peshwas.

In West's Memoir of the States of the Southern Mahratha country at page 38 is to be found an extract from the despatch of the Secretary to the Governor-General, dated the 14th July 1818, to Mr. Mount Stuart Elphinstone expressing the views entertained by Lord Hastings as to the general policy to be adopted towards the Southern Mahratha Chiefs, in which it is stated that his Lordship has no design of introducing into the territories of the Jahageerdars our system of administration in any of its branches. His Lordship conceives the British Government, however, to be entitled to require the establishment by the Jahageerdars themselves of such an internal course of management as by maintaining the peace of their own districts shall prevent them from becoming dangerous to the tranquillity of the neighbouring possessions of the Government.

The terms proposed by the East India Company are set out on page 142 and the following pages of West's Memoir Appendix. The 5th clause of those terms states that "the confirmation, under the guarantee of the British Government, of all lands held under the authority of the Peshwa, was irrevocably pledged to you, as long as you should continue to perform the duties of allegiance, fidelity and attachment. A similar clause is introduced into the present agreement." The first part of this clause referred to in the agreement of 1812

arranged by the East India Company between the Peshwa and the Patwardhans, and on page 146 of the Appendix the 7th term of the agreement proposed on behalf of the Governor General is: "You are responsible for the good Government of your Jahageers and for the protection of the people. As long as the administration of justice and of Police shall be well conducted, the Government will not interfere in the management."

The terms finally granted by the East India Company are to be found on page 280 of the 7th Volume of Aitchison's Treaties. Article 9 is: "You will attend to the prosperity of the *ryots* of your Jahageer, to the strict administration of justice and the effectual suppression of robberies, murders, arsons and other crimes. The Government will not enquire into every complaint that may arise in your Jahageer." Article 11 is: "If any offenders from your Jahageer lands shall come into those of the Government, you will represent the affair, and they shall on enquiry be delivered up to you." That agreement or treaty was signed at Gulgulee on the Krishna on the 6th June 1819.

On the following day Mr. Mount Stuart Elphinstone addressed the Secretary to the Governor General a letter in which he quotes from a document of 1818 as explaining the principle of the agreement which had just been signed with the Patwardhans. It runs as follows (see West's Memoir, Appendix, page 173): "These Jahageerdars must, by our agreement with them, continue to be governed according to the terms of Pandharpur, which are founded on the ancient customs of the Mahratha Empire. They must, therefore, have the entire management of their own Jahageers, including the power of life and death, and must not be interfered with by Government unless in case of very flagrant abuse of power or long continuance of gross misgovernment."

In paragraph 12 of the same letter Mr. Elphinstone observes: "The only general rules that I would suggest for the future regarding the Chiefs are that no alterations regarding the Police, the customs, the mints, and similar branches of the administration of the Jahageers which may be thought to affect the interests of Government may be attempted without the free consent of the Jahageerdars," and in paragraph 12 as well as in paragraph 13 and other paragraphs of his letter he refers repeatedly to the Jahageerdars as the Chiefs.

So far then as the Jahageers of the Kurundwad family are concerned, it is quite evident that sovereign power and full and complete jurisdiction, civil and criminal, in their territories was conferred upon them by the British Government by the settlement of 1819.

The village of Lohakur, which, as I have said, is not indicated in any document referred to in this case as forming part of the British territory known as the Subha of Dharwar, appears to have been ceded by the East India Company to the Jahageerdar according to the arrangements which were maturing during the years 1818 and 1819. It appears that two villages of Sampgaum and Bagewadi which had belonged to the Kurundwad family had been seized by another Chief, the Chief of Kittur, and had not been returned by him. In a report by General Munro to Mr. Mount Stuart Elphinstone on the 28th August 1818, cited at pages 36 and 37 of West's Memoir, it is stated: "The Patwardhans are the only great Jahageerdars with whom an arrangement has not yet been made; but as they are to receive and not to give, no difficulty is likely to be met with beyond what may arise from their discussions among themselves respecting their several shares of the additional allowances in money and land which may be granted by Government. I have not stated to their Vakeels the amount proposed to be given, but they are desirous that, whatever it may be, the division should be left to be made among themselves. The Tasgaum, Chinchnee and Kurundwad Chiefs, from the disposition they showed at an early period to quit the Peshwa, are entitled to greater proportion than the others, and it will, therefore, be necessary that we make the distribution, unless they themselves express a desire that it should be made without our interference. Two lacs of rupees will, I think, be sufficient to satisfy all their expectations. This sum will be made up by a remission of the Daishmook fees paid to the Sirkar, by a transfer of such Sirkar

villages as are insulated among the lands of the Patwardhans, and by making over a part of Rastia's resumed Jahageer on the north bank of the Kristna."

On the 16th August 1819 Mr. Mount Stuart Elphinstone wrote to Mr. W. Chaplin acquainting him with the arrangement which he thought most expedient for completing the grant of land of which hopes had been held out so long to the Patwardhans. The land ought, he conceived, to be granted as personal Tainat, and the amount to be awarded in the shape of land to Keshavrao of Kurundwad was stated to be Rs. 30,000. (See West's Memoir, Appendix, page 184.) This was a reduction from the sum originally proposed to be awarded to Keshavrao of Kurundwad in the shape of land. (See page 147 of West's Appendix, where Keshavrao of Kurundwad was set down as to receive Rs. 40,000 including indemnity for Sampgaum and Bagewadi, the two villages which had been seized by the Chief of Kittur).

In his letter of the 16th August 1819, clause 7 (West's Memoir, Appendix, page 185), Mr. Elphinstone said: "The grant of Rs. 30,000 to Keshav Rao and Rs. 20,000 to Gunpat Rao Konair is a compensation for Sampgaum and Bagewadi, to which the family is fairly entitled. Rs. 10,000 additional is granted to Keshav Rao as the elder branch, who has lost considerably by the partition to which in strictness Gunpat Rao had no claim, although the Peshwa's Sanad is now a bar to any question of his title (that refers to the partition under which Shedbal was given by the Peshwa to Ganpatrao in 1812). It may be stated to Gunpat Rao that as Sampgaum and Bagewadi were never given up to him by the Peshwa, it would perhaps be strict justice to leave those districts with Keshav Rao; that in granting him a share, therefore, the Government feels itself compelled to make a compensation to Keshav Rao by a grant of Rs. 10,000 Tainat."

In clause 8 it is said: "These grants ought, of course, to be made in such a manner as to consolidate the Jahageers of the Patwardhans. It is particularly desirable that their lands should be as little mixed as possible with those of the Raja of Satara, and any villages you may find it necessary to give up for that purpose can be made up by giving villages to the Raja in the sequestrated Jahageers of Rastia and Gokla."

The only documents forthcoming which relate explicitly to the village of Lohakur are Exhibits 25, 26 and 27. Exhibit 25 is a statement of account showing how the Rs. 30,000 is to be made up by the grant of land to Keshavrao. It is dated the 8th January 1820, and one of the items is Rs. 5,527-6-0 for 'detached villages,' or as General Munro had called them, "insulated villages", in the Taluka of Pachapur, in the principal division of which one is Lohakur yielding a revenue gross of Rs. 912-13-0. The Yadi concludes with the words that "the release deeds of those villages may be forwarded." The account was revised on the 3rd April 1820 by the Yadi, Exhibit 26, and there was a further Yadi revising the account in respect of the village of Lohakur in the same year which is exhibited as No. 27. We have not got the release deeds of the village contemplated in Exhibit 25.

It is, however, certain that the Kurundwad Chiefs of the Senior Branch descended from Keshavrao have administered the Lohakur village for close upon a hundred years as part of his estate or Jahageer or State, whichever expression may be deemed most suitable, and they have administered it as sovereign Chiefs. Their sovereignty has been recognised by an agreement with the Government of India in the year 1826 (see page 223 of Aitchison's Treaties, Volume VII), whereby the Kurundwad State ceded to the British Government full jurisdiction, short of sovereign rights, over "the lands within the State then occupied, or which may thereafter be occupied, by the railways comprised in the Southern Mahratta Railway system." As indicative of the status of the Patwardhan Jahageerdars since the taking over of the territories of the East India Company by the Crown, I may refer to the Adoption Sanad granted to the Patwardhans in 1862, page 285 of Aitchison, Volume VII, which states that: "Her Majesty being desirous that the Governments of the several Princes and Chiefs of India who now govern their own territories should be perpetuated, and that the representation and dignity of their houses should be continued; in fulfilment of this desire this

Sanad is given to you to convey to you the assurance that, on failure of natural heirs, the British Government will recognise and confirm any adoption of a successor made by yourself or by any future Chief of your State that may be in accordance with Hindu Law and the customs of your race. Be assured that nothing shall disturb the engagement thus made to you so long as your house is loyal to the Crown and faithful to the conditions of the treaties, grants or engagements which record its obligations to the British Government."

So much for the history of the Kurundwad State and the connection of the village of Lohakur with that State. It is contended on behalf of the plaintiff that although the East India Company may have thought that it was ceding the village of Lohakur to the Kurundwad State, it had no power to cede territory without the sanction of Parliament, and that Parliament's sanction was not obtained, and, therefore, the cession is of no avail and presumably the argument would be that there is a resultant return to the British Government of the village of Lohakur, and it must, therefore, be taken to be part of the Dharwar Collectorate for the purposes of the suit, although the Collectorate of Belgaum intervenes between Lohakur and Dharwar. The argument is founded upon the dictum in *Damodar Gordhan* v. *Ganesh Devram* (1), which was dissented from or disapproved of by the Privy Council on appeal in the judgment in *Damodar Gordhan* v. *Deoram Kanji* (2). As pointed out by Counsel for the respondent, the Bombay High Court in the judgment in *Damodar Gordhan's case* (1) overlooked the Charter of the East India Company, dated 1758, which provides that: "The East India Company shall and may, by any treaty or treaties of peace, made or to be made between them, or any of their officers, servants or agents, employed on their behalf, and any of the Indian Princes or Governments, cede, restore, or dispose of any fortresses, districts or territories acquired by conquest from any of the said Indian Princes or Governments, and which shall be acquired by conquest in time coming."

(1) 10 B. H. C. R. 37.

(2) 1 B. 367 (P. C.); 3 I. A. 102; (1876) 1 A. C. 332; 25 W. R. 261; 3 Suth. P. C. J. 277; 3 Sar. P. C. J. 543; 1 Ind. Dec. (N. S.) 245.

So far as it is material for the purpose of this case, the power so conferred upon the East India Company may be said not to have been interfered with by any of the Regulating Acts, namely, 13 of Geo. III, c. 63 and 24 of Geo. III, c. 25. The 15th section of the latter Act empowered the Board of Commissioners for the Better Government of the East Indies, if they considered the subject-matter of their deliberations concerning the levying of war or making of peace, or treating or negotiating with any of the Princes or States in India to require secrecy, to send secret orders and instructions to the secret committee of the Court of Directors who shall thereupon transmit their orders according to the tenor of the said orders and instructions of the said Board to the respective Governments and presidencies in India and that the said Governments and presidencies shall pay a faithful obedience to the orders and instructions so conveyed to them. It is not suggested that any secret orders or instructions or any orders or instructions of any kind were sent to the Governor-General to prevent the cession of territory as part of the peace treaties with the Mahratha Confederacy in the years 1818 to 1820.

It follows from what has been said as to the powers and status of the Kurundwad Jahageerdars that they are Ruling Chiefs and cannot be sued without the consent of the Governor-General, which has not been obtained in this case. The suit, therefore, against the second defendant is bad on that account, and it is unnecessary to go into the question whether the suit is also bad on the ground that they are Sirdars and cannot be sued in any Court except in the Court of the Agent to the Sirdars. It appears to us that no cause of action has arisen to the plaintiff against the defendant No. 1 or the defendant No. 2 on account of the refusal by the Collector of Dharwar to grant him what he asks as stated in the plaint. We are of opinion that all the issues found by the learned District Judge have been correctly found and that the suit has been rightly dismissed. We, therefore, affirm the decree and dismiss the appeal with costs. Separate sets of costs.

SHAH, J.—I concur.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 444 TO 449 OF 1918.

January 17, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

ENDAY ALI HOWLADAR AND OTHERS—PLAINTIFFS—PETITIONERS

versus

BENODINI DUTT AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXII, r. 10—Assignment of interest during pendency of suit—Substitution of assignee's name—Assignment disputed—Court, power of, to decide dispute.

There is nothing in the Civil Procedure Code to indicate that the provisions of Order XXII, rule 10 of the Code are applicable only to cases of admitted assignment, creation or devolution of interest. A Court has power to enquire into and decide the question of the assignment, creation or devolution of interest, where any such assignment, devolution or creation is disputed [p. 234, col. 2]

Rules against the order of the Subordinate Judge, Barisal, dated the 12th June 1918.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy*, (with him Babu *Anilendra Nath Roy Chowdhuri*), for the Petitioner, contended that the order of the learned Subordinate Judge passed in appeal allowing the opposite parties to be substituted in place of the petitioner was without jurisdiction, inasmuch as the provision of Order XXII, rule 10, of the Civil Procedure Code was applicable only to cases where the assignment was not disputed by the assignor. If the assignor objected to the substitution of the assignee on the ground that the assignment in question did not, for some reason or other, confer upon the assignee any interest in the subject-matter of the suit it was not open to the Court under Order XXII, rule 10, of the Civil Procedure Code to decide the dispute. In this case the objection of the petitioner was that the Kobala in question had been tampered with and that the petitioner did not convey the properties to the opposite parties, and such an objection could not be decided by the Court at that stage of the suit. In this connection reference might be made to Order XXII, rule 5, which expressly gives the Court power to determine questions as to legal representatives. The learned Subordinate Judge should not have interfered with the discretion exercised by the Court of first instance in refusing to substitute the opposite parties in place of the petitioner. The Legislature did not contemplate that Order XXII, rule 10, would apply to a case where the title of the assignee to the subject-matter of the suit was disputed by the assignor, and that would be clear from the omission of the words "given either with the consent of all parties or after service of notice in writing upon them and hearing their objections" from Act V of 1908.

Further, the Court below should not have set aside the order of the primary Court, especially when the tenants-defendants were not made parties to the appeal.

Dr. *Sarat Chandra Basak* (with him Babu *Urukram Das Chackerbutty*), for the Opposite Parties, submitted that in case of an assignment of any interest during the pendency of a suit the Court could under Order XXII, rule 10, enquire into all disputes regarding assignment or devolution of interest, especially when there is no provision in the Code to the contrary. If that were not so, there would have been no provision in the Code for preferring an appeal against an order under Order XXII, rule 10, Civil Procedure Code. The order passed on appeal in the case was quite within the jurisdiction of the Appellate Court. The fact that the tenants-defendants were not joined as parties to the appeal did not vitiate the order, inasmuch as it appeared that they did not in the first Court contest the assignees' right. Further as there was no question of jurisdiction involved in the case, the petitioner could not get any remedy in revision under section 115, Civil Procedure Code.

Babu *Jogesh Chandra Roy* briefly replied.

JUDGMENT.—These Rules were granted in connection with an order of the Subordinate Judge of Barisal granting an application under Order XXII, rule 10, Civil Procedure Code.

The petitioner brought certain rent suits and pending these rent suits, he executed a conveyance in favour of the opposite parties in respect of certain properties. The opposite parties applied for substitution of their names in the place of the petitioner in the rent suits, on the ground that the petitioner had sold his interest in the tenure which included the land in respect of which the rent suits were instituted. The application was opposed by

the petitioner on the ground that the Kobala had been tampered with and that he had not sold the properties in suit to the opposite parties.

The Court of first instance held that it could not rely on the Kobala as purporting to convey the interest of the petitioner in the suit to the opposite parties and accordingly dismissed the application for substitution on the 28th May 1917. The rent suits were then tried and decreed in favour of the petitioner on the 18th June 1917. The opposite parties in the meantime appealed against the order of the Munsif, dated the 28th May 1917 and on appeal the learned Subordinate Judge held that the tenure in question was sold to the opposite parties and ordered them to be substituted in place of the petitioner.

The petitioner thereupon obtained this Rule and it is contended on his behalf that the provision of Order XXII, rule 10, applies only to cases where an assignment, creation or devolution of any interest is admitted.

There is, however, nothing in the Code to indicate that the rule is applicable only to cases of admitted assignment, creation or devolution of interest. On the contrary the fact that an appeal is allowed against an order under rule 10, Order XXII, giving or refusing to give leave, indicates that the primary Court has the power to inquire into the question of the assignment, creation or devolution. An appeal against an order under Order XXII, rule 10, would be meaningless if the order under that rule could be made only in cases where the assignment, etc., was admitted.

It is contended that the provision for an appeal is necessary for cases where the other party to the original suit (for instance, the contending defendants in the present case), disputed the right of the persons setting up the assignment, creation or devolution of interest; but in such cases also the question of the assignment, creation or devolution may have to be gone into if the other party raises it, and we do not see sufficient reason for holding that the inquiry as to the assignment, creation or devolution is restricted only to cases between the assignee and the other parties to the suit.

Reliance is placed upon the omission of the words "given either with the consent of all parties or after service of notice in writing upon them and hearing their objections if any" from Order XXII, rule 10, of the present Code as indicating that the rule applies only when the assignment, etc., is admitted.

But if that is so, there does not seem to be any reason for omitting the words "with the consent of the parties." It seems to us that the words were omitted because they were thought to be unnecessary.

It is pointed out that Order XXII, rule 5, expressly gives power to the Court to decide the question as to whether a person is or is not the legal representative of a deceased party, whereas no such power is given to the Court under Order XXII, rule 10.

Section 366 of the old Code directed that the question as to who is the legal representative of a deceased plaintiff should be decided by the Court at or before the hearing of the suit, or the Court may stay the suit until the fact has been determined in another suit. In the present Code the provision for having such dispute determined in another suit has been omitted.

But there was nothing in the old Code, nor is there anything in the present, to prevent the Court from deciding the question of assignment, creation or devolution of interest under Order XXII, rule 10, if any such assignment, etc., is disputed. If a party applies to be substituted or added on such a ground, and it is disputed, we think, in the absence of a provision to the contrary, the Court has the power to decide such dispute.

The assignment may be of the whole subject-matter of the suit. In such cases the assignor has no further interest in the litigation, the assignee being the only person interested in the result: and the assignee is bound by the result of the litigation. If the contention of the petitioner be upheld, the assignee cannot come in to protect his interest in the suit and is out of Court as soon as the assignment is denied by the assignor. Having regard to the provision of the

section and to the considerations mentioned, we are of opinion that the Court has the power to decide the question of assignment, creation or devolution of interest under Order XXII, rule 10.

The next question is, whether the lower Appellate Court was wrong in setting aside the order of the Munsif as the tenants-defendants had not been made parties to the appeal.

It appears that the tenants-defendants did not oppose the application in the Court of first instance, the petitioner being the only person who opposed it. In these circumstances it was unnecessary to make the tenants-defendants parties to the appeal. It is true that the opposite party did not get the trial of the suits stayed pending the hearing of the appeals. But they had applied to the Munsif to stay the trial of these suits on the ground that they were going to appeal. That application was rejected by the Munsif, presumably at the instance of the petitioner.

Then it is contended that the Court of first instance having refused leave in the exercise of its discretion, the learned Subordinate Judge ought not to have interfered in the matter. But the Munsif refused leave, not in the exercise of his discretion in the matter, but because he could not rely upon the Kobala as purporting to convey to the applicants for substitution the interest of the petitioner in these suits. That finding was reversed on appeal upon the evidence. The opposite parties had one month allowed by law to appeal and they had asked the Munsif to stay the hearing of the suit, but the Munsif as stated above rejected the application upon the objection of the petitioner. But if the learned Subordinate Judge has not properly exercised his discretion in the matter, we cannot interfere with his order in revision on that ground.

In these circumstances we think that we should not interfere with the order of the learned Subordinate Judge passed on appeal, and these Rules are accordingly discharged with costs—two gold *mohurs* in all.

Rules discharged.

PUNJAB CHIEF COURT.
FULL BENCH.

MATRIMONIAL CASE NO. 3 OF 1918.

November 15, 1918.

Present:—Mr. Justice LeRossignol, Mr. Justice Broadway and Mr. Justice Martineau.

LEHNA MAL SADIK—PLAINTIFF—PETITIONER

versus

Musammat HAKIM BIBI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Divorce Act (IV of 1869), ss. 12, 14, 17—Petition for dissolution of marriage, not opposed—Court, duty of, to make enquiry—Delay—Collusion.

A decree for dissolution of marriage cannot be legally granted merely on the ground that the respondent does not oppose the petition.

The Court must satisfy itself that there was good reason for the delay, if any has occurred, in suing; that there was no connivance and that there has been no condonation.

Case referred by the District Judge, Gurdaspur, with his letter No. 339 of 19th April 1918.

JUDGMENT.—The petitioner is present in person but the respondent and co-respondent have not been served.

We see, however, no advantage in postponing the matter, for the District Judge's decree cannot be confirmed on the present record.

A decree for dissolution of marriage cannot be legally granted merely on the ground that the respondent does not oppose the petition.

The District Judge must satisfy himself that there was good reason for the delay in suing; that there was no connivance, and that there has been no condonation. Not only has he failed to give any consideration to these matters, but he has not even examined the petitioner.

We remand the proceedings to the Court below for disposal according to law.

Case remanded.

WALLACE SITHA BOI *v.* WALLACE RADHA BOI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 35 OF 1918.

October 8, 1918.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Krishnan.

WALLACE SITHA BOI—RESPONDENT—PETITIONER

versus

WALLACE RADHA BOI—PETITIONER—RESPONDENT

Guardians and Wards Act (*VIII of* 1890), *ss.* 4 (2), 7 (2), 41 (3), 45 (1) (c), 48—De facto *guardian, whether guardian under s.* 4 (2 —*Statutory guardian, appointment of, effect of, on position of* de facto *guardian—Jurisdiction of Court to direct* de facto *guardian to deliver property to statutory guardian—'Orders made under the Act' in s.* 48, *whether include requisition under s.* 41 (3).

A *de facto* guardian is a guardian within the meaning of section 4 (2) of the Guardians and Wards Act.

The appointment of a statutory guardian under the Guardians and Wards Act *ipso facto* removes a *de facto* guardian from guardianship under section 7 (2) of the Act.

It is competent to the Court to require a *de facto* guardian under section 41 (3) to deliver the minor's property in his possession to a guardian appointed or declared under the Act.

Section 48 of the Guardians and Wards Act, which refers to 'orders made under the Act', does not cover the case of a 'requisition' under section 41 (3) of the Act.

Peti ion, under section 115 of Act V of 1908 and section 48 of Act VIII of 1890, praying the High Court to revise the order of the District Court, Tanjore, in Interlocutory Appeal No. 363 of 1917 (in Original Petition No. 775 of 1916)

FACTS.—The mother of a minor, having been appointed as the latter's guardian under Act VIII of 1890, applied to the Court under section 41 (3) for delivery to her by the grandmother of the minor of some of the minor's properties in the latter's possession. The grandmother contended that the property had been settled on her by her deceased son and that an application under section 41 (3) did not lie. The District Court overruled the objection and directed delivery of the property. The grandmother moved the High Court in revision under section 115, Civil Procedure Code.

Mr. *B. Narasimha Row*, for the Petitioner.—The Court had no jurisdiction to pass the order under section 41 (3) of Act VIII of 1890. The petitioner is not a guardian within the meaning of section 4 (2).

Messrs. *K. V. Krishnaswami Aiyar* and

GANGA PERSHAD *v.* MEGH RAJ.

C. A. Seshagiri Sastri, for the Respondent.—The petitioner is a guardian within the meaning of section 4 (2). The effect of the appointment of a statutory guardian is to remove petitioner from guardianship. The Court has the power to pass the order under section 41 (3). If petitioner feels aggrieved by the order she can only contest its legality by a separate suit.

JUDGMENT.—In this petition we are asked to interfere in revision with the proceedings of the District Judge of Tanjore requiring a *de facto* guardian (grandmother) of a minor under section 41 (3) of the Guardians and Wards Act to hand over a house as one belonging to the minor. We can find no ground for interference. The term "guardian" in the sections must be understood in the light of the definitions in section 4 (2) and would include the present petitioner. The latter was *ipso facto* removed from guardianship under section 7 (2) by the Court's order appointing the minor's mother to be guardian. The District Judge has not exceeded his jurisdiction and petitioner must be referred to a suit to establish, if she can, her title to the house. We may remark that section 48 of the Guardians and Wards Act, which refers to "orders made under the Act" would not cover the case of a "requisition" under section 41 (3) of the Act: *vide* reference to the latter in section 45 (1) (*c*).

The petition is dismissed with costs.

Petition dismissed.

M.C.P.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 45 OF 1915.

May 30, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

GANGA PERSHAD—DEFENDANT—PETITIONER

versus

MEGH RAJ—PLAINTIFF—RESPONDENT.

Temple birt, *suit to recover share of, whether maintainable.*

A suit to recover a definite sum of money alleged to be due to the plaintiff as his share in the offerings of a temple is maintainable. [p. 237, col. 2,]

DALCHAND *v.* NARAYAN.

Civil revision of the decree of the Senior Subordinate Judge, Kangra, dated the 12th October 1914.

Mr. *Hari Chand*, for the Petitioner.

Mr. *Ganpat Rai*, for the Respondent.

JUDGMENT.—In this case Megh Raj, plaintiff-respondent, sued Ganga Pershad, defendant-petitioner, for the sum of Rs. 110, alleging that to be due to him on account of his share in the *birt* of the Nagarkot temple at Bhawan. He averred that he, the defendant, and a *Musammat* Ishri had been co-sharers in the said *birt* up to the death of *Musammat* Ishri, which took place in the earthquake in 1905; that subsequent to her death he and the defendant had been co-sharers in the said *birt* and had been taking their respective shares, but that from May 1909 to May 1912 the defendant alone had been realising the offerings and had not paid the plaintiff his moiety. The plaintiff estimated the three years' income at Rs. 300 and, allowing Rs. 80 as expenditure, he claimed Rs. 110 as his half share.

The Courts below held—

(1) that the parties were co-sharers in this *birt*, and (2) that the defendant had realised the offerings during the period in suit which amounted to Rs. 300 but had not paid plaintiff his half share.

The plaintiff was accordingly granted a decree for the amount he claimed.

Ganga Pershad has preferred this petition of revision against the said decree and the only point for determination is whether the present suit lay. Counsel for the petitioner has referred us to *Kanshi Chandra* v. *Kailash Chandra* (1), *Gour Mani Debi* v. *Chairman of Panihati Municipality* (2), *Dwarka Nath Misser* v. *Ram Protap Misser* (3) and *Mugjoo Paudaen* v. *Ram Dyal* (4). These decisions are, however, clearly distinguishable inasmuch as in them it was held that a suit for a declaration that a person was entitled to a share in religious offerings of this nature did not lie. In the present case Megh Raj does not ask for such a declaration but claims a definite amount due to him as a co sharer in the said *birt*. The Courts below having held that he was a co sharer during the period in question, we are of opinion that the suit lies.

This petition for revision is accordingly dismissed with costs.

Revision dismissed.

(1) 26 C. 356; 3 C. W. N. 279; 13 Ind. Dec. (N. S.) 831.

(2) 6 Ind. Cas. 864; 12 C. L. J. 74; 14 C. W. N. 1057.

(3) 10 Ind. Cas. 41; 13 C. L. J. 449; 16 C. W. N. 347.

(4) 15 W. R. 531; 8 B. L. R. 50.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 326 OF 191

March 19, 1918.

Present:—Mr. Findlay, Officiating A. J. C.

DALCHAND AND ANOTHER—PLAINTIFFS APPELLANTS

versus

NARAYAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. III—Execution proceedings before Collector—Dismissal for default—Collector, power of, to restore case—Jurisdiction want of, whether can be cured by consent of parties.

A Collector has no jurisdiction to restore an execution case to his file after it has been dismissed by him in default of the decree-holder. Subsequent proceedings in respect of the case in the Collector's Court are, therefore, void. [p. 238, col. 2.]

Where certain questions have been removed from the jurisdiction of a Court, they cannot be brought under jurisdiction on the plea of the Court having jurisdiction to do what justice may require for the parties before it. [p. 238, col. 1.]

A defect of jurisdiction cannot be cured by consent of parties. [p. 238, col. 2.]

Maha Prasad Singh v. *Ramani Mohan Singh*, 25 Ind. Cas. 451; 27 M. L. J. 459; 42 C. 116; 16 Bom. L. R. 824; 18 C. W. N. 994; 16 M. L. T. 105; (1914) M. W. N. 565; 20 C. L. J. 231; 1 L. W. 619; 41 I. A. 197 (P. C.) and *Jose Antonio* v. *Francisco Antonio*, 7 Ind. Cas. 950; 35 B. 24; 12 Bom. L. R. 712, followed.

Appeal from the decree of the District Judge, Nagpur, in Appeal No. 3 of 1917, dated the 17th March 1917.

Mr. *V. V. Chitale*, for the Appellants.

Mr. *W. H. Dhabe*, for the Respondents.

JUDGMENT.—The main question with which I am concerned in this second appeal concerns the legality or otherwise of the Collector's orders in execution proceedings dated the 15th January 1913, *vide* Exhibit P-3. It may be as well to state exactly what occurred on that date. First of all an order was passed to the effect that the parties were absent and

the case was struck off in default without being satisfied and it was added that the Civil Court was to be informed accordingly. This order was duly signed by the Collector and apparently at some stage in the day's proceedings subsequent to this, the decree-holder's agent appeared and thereupon the Collector set aside his previous order and restored the execution proceedings. The lower Appellate Court has dealt with the legality or otherwise of the above orders at considerable length, but it eventually held that the later order re-opening the proceedings was passed with jurisdiction. The view which the learned District Judge adopted was that as no rights had been vested, determined or acquired by the earlier order passed in the absence of the parties, it could not be said that the Court was divested of its jurisdiction, at any rate, until it had risen for that day. With reference to the Court's rising on that day I may at once dispose of it, for that seems to me to introduce an element of confusion into the case. The officer in question is presumably an Executive Officer who sits in various capacities and there is nothing to show, and indeed it is extremely improbable, that he continued to sit on the day in question in his capacity of a Collector executing a decree on behalf of the Civil Court.

As regards the order not having vested or acquired any rights I am unable to concur with the finding of the lower Court for, when the Collector deliberately dismissed in default the application, the rights of the decree-holder so far as that particular application was concerned were determined.

The lower Appellate Court has apparently held that the Court acting under its inherent powers vested in it by section 151 of the Civil Procedure Code restored the application to the file, but I do not think that this view can be accepted. The statutory law has deliberately refrained from giving the Collector the power to make any such restoration and, according to well established principles, when certain questions have been removed from the jurisdiction of a Court, it is impossible to allow them to be brought under that jurisdiction on the mere plea the Court has inherent jurisdiction to do what justice may seem to require for the parties before it. Such plea, if given effect to, in reality extends to an unreasonable extent the jurisdiction of the Court. *Cf. Jethabhai Nursey* v. *Chapsey* (1). Still further the learned District Judge has to some extent formed his decision on the point involved on the consideration that judgment debtor himself appears to have condoned that fact by pleading to the Collector's jurisdiction after the default. Leaving aside the question whether it be fair and reasonable to fully enforce such a legal plea against an ignorant judgment-debtor, I need only point out that if there was a defect of jurisdiction, as seems to me to be established beyond question, any such defect of jurisdiction cannot be cured by consent. *Cf. Maha Prasad Singh* v. *Ramani Mohan Singh* (2) and also *Jose Antonio* v. *Francisco Antonio* (3). The decision of their Lordships of the Privy Council in *Debi Bakhsh Singh* v. *Habib Shah* (4) is clearly distinguishable from the present case.

I need hardly point out that even if the Collector's procedure had not been void of jurisdiction, as I hold it to be, his action in restoring the case to file was the more highly irregular in that it was passed at the back of the judgment-debtor, who should at least have received notice in such a case, even if it had been open to the Collector to restore the application to file. For the above reasons I am constrained to hold that the Collector's order for the restoration of the execution case to file was without jurisdiction and illegal and it follows that the subsequent proceedings in the Collector's Court are void.

This finding does not, however, necessarily conclude the case between the parties. The plaintiffs have come to Court alleging clearly, *vide* paragraphs 2 and 6 of the plaint, fraud on the part of the defendants, *vide* also plaintiffs' Pleader's oral statement dated 12th January 1916. Before

(1) 4 Ind. Cas. 108; 34 B. 467 at p. 483; 11 Bom. L. R. 1014.

(2) 25 Ind. Cas. 451; 27 M. L. J. 459 at p. 474; 42 C. 116; 16 Bom. L. R. 824; 18 C. W. N. 994; 16 M. L. T. 105; (1914) M. W. N. 565; 20 C. L. J. 231; 1 L. W. 619; 41 I. A. 197 (P. C.).

(3) 7 Ind. Cas. 950; 35 B. 24; 12 Bom. L. R. 712.

(4) 19 Ind. Cas. 526; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 35 A. 331; 16 O. C. 194; 40 I. A. 150 (P. C.).

the rights and liabilities of the parties in this suit can be finally decided, it is essential that the lower Appellate Court should, on the evidence on record, record its finding as to whether fraud on the part of the defendants has been proved or not. Counsel on both sides in this Court have agreed that the case must necessarily be remanded to the lower Court for a decision on this and connected matters, even although my decision on the question of the want of jurisdiction of the Collector's proceedings disposes to a certain extent of the main question agitated between the parties. The failure of the learned District Judge who tried the case to give on the evidence a detailed finding on the question of fraud necessarily involves this course.

The lower Appellate Court's judgment and decree are accordingly reversed and the appeal is remanded to that Court for a second decision with advertence to the above remarks. The appellants will receive a refund of Court fees. Other costs of this appeal will follow the event. The cross-objection is dismissed with costs on respondent Narayan.

Decree reversed;
Appeal remanded.

PUNJAB CHIEF COURT.
MISCELLANEOUS CIVIL APPEAL No. 3221 OF 1917.
May 30, 1918.
Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

LALLI AND ANOTHER—DEFENDANTS—APPELLANTS
versus
SAIN DITTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Civil Procedure Code (Act V of 1908), O. XLI, r. 30—Appeal heard and judgment reserved—Order not communicated to parties—Limitation for second appeal, commencement of—Extension of time—Sufficient cause.

An appeal was argued before a District Judge on 24th May. Judgment was reserved and was ultimately issued under date the 2nd July. It appeared that the provisions of Order XLI, rule 30, of the Civil Procedure Code were not complied with and that no intimation was sent to the parties of the pronouncement of the order. It was not till the 13th October that the appellant's Pleader discovered what the decision of the Court was and thereupon he promptly communicated with his client, applied for copies and filed an appeal in the Chief Court on the 26th of November:

Held, (1) that, under the circumstances, time should be taken to run only from 13th October and that, therefore, the appeal was within limitation; [p. 240, col. 1.]

(2) that in any event the facts disclosed constituted sufficient cause within the purview of section 5 of the Limitation Act and justified an extension of the period prescribed. [p. 240, cols. 1 & 2.]

Miscellaneous second appeal from the order of the District Judge, Lahore, dated the 2nd July 1917.

Diwan *Mehr Chand*, for the Appellants.
Mr. *Tirath Ram*, for the Respondents.

JUDGMENT.—The facts of this case are these:—Hira and Thakar Singh were brothers, being the sons of one Chanda. Thakar Singh apparently managed the affairs of the family and after the death of Chanda, which occurred in *Sambat* 1952, the moveable property was divided but the lands remained joint. Certain land in the village of Thati Farid, Kasur *Tahsil*, had been taken on mortgage on the 16th of February 1894. This mortgage was effected in the name of Thakar Singh, but the entire family enjoyed the profit thereof. Thakar Singh died in October 1913 and subsequently his sons, the present defendants, sold their mortgage rights to defendants Nos. 3 to 5 by a registered deed of sale, dated the 3rd of September 1914. The plaintiffs, who are the sons of Hira, instituted this suit claiming possession of half of the land on the ground that it belonged to the entire family. The trial Court held that the mortgage had been effected with ancestral funds and that the plaintiffs had been taking a share of the produce of the land and accordingly were entitled to possession of one half. A decree was, therefore, granted to the plaintiffs for possession of half of the land mortgaged, but it was also ordered that defendants Nos. 3 to 5 could avoid surrendering possession by paying to the plaintiffs the sum of Rs. 1,500 within one month. Against this decree the sons of Thakar Singh preferred an appeal to the District Judge, who agreed with the findings arrived at by the lower Court as to the land having been acquired out of

ancestral funds and the plaintiffs having taken a share of the produce of the land, but held that the decree for possession in default of the payment of Rs. 1,500 was not in accordance "either with the plaint or law." He also held that if the sale to defendants Nos. 3 to 5 were held to be *bona fide*, it would be for the defendants Nos. 1 and 2 to pay the money. He accordingly remanded the case to the trial Court under Order XLI, rule 23, Civil Procedure Code.

Against this order of remand the defendants Nos. 1 and 2, the sons of Thakar Singh, have filed this appeal through Diwan Mehr Chand, and we have heard Mr. Tirath Ram on behalf of the respondents-plaintiffs. Mr. Tirath Ram took a preliminary objection to the effect that the appeal to this Court was barred by time as having been filed more than 90 days after the order of remand. It appears that the appeal in the lower Appellate Court was argued on the 24th of May 1917. Judgment was reserved and was ultimately issued under date the 2nd July 1917. The appeal to this Court was filed on the 26th of November 1917, *i. e.*, a considerable period beyond the prescribed 90 days. The appellants have, however, filed two affidavits (1) sworn to by Lala Gobind Ram, their Pleader in the lower Appellate Court, and (2) by Lalli, one of the appellants. According to these affidavits, it appears that the order appealed against was never pronounced in accordance with law. Lala Gobind Ram some time in July learnt that his appeal had been accepted and the case remanded. It was not, however, till the 13th of October 1917 that he discovered what the exact decision of the lower Appellate Court was. Thereupon he promptly communicated with his client, applied for copies and filed this appeal. A reference to the record shows that the provisions of Order XLI, rule 30, Civil Procedure Code, had not been complied with, and further that no intimation had been sent to the parties as to the pronouncement of the order. In these circumstances, we are of opinion, that time should only begin to run from the 13th of October 1917 and that the appeal is, therefore, within limitation. In any event, we are of opinion that the facts disclosed constitute sufficient cause within the purview of section 5 of the Limitation Act which would justify an extension of the period prescribed. In these circumstances, we hold that the appeal is within time.

The next point for determination is whether the order of remand is justified. As to this it is perfectly clear that the decision of the trial Court was not on any preliminary point but disposed of the case in its entirety. With the principal findings the lower Appellate Court expressed its agreement and directed an enquiry on a matter which it was competent to dispose of itself. We accordingly accept this appeal and set aside the order of remand. The case will go back to the District Judge, who will rehear the appeal and come to a definite finding on the various points raised. The District Judge will, of course, be entitled to remand any matter under Order XLI, rule 25, Civil Procedure Code, should he consider such a course necessary. Costs in this Court will follow the event. The attention of the District Judge is drawn to the fact that the decree drawn up by the trial Court is not in accord with the judgment. The trial Court in its judgment held that defendants Nos. 3 to 5 could avoid giving possession of the land by paying the plaintiffs the sum of Rs. 1,500, whereas in the decree the plaintiffs are declared liable to pay Rs. 1,500 as a condition precedent to obtaining possession.

Appeal accepted

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 569 OF 1918.

March 7, 1919.

Present:—Mr. Justice Kumaraswami Sastri.

M. SANKARAM IYER—PLAINTIFF—PETITIONER

versus

THIRAVIYA NADAN—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 20—Suit on pro-note barred on face of it—Payment pleaded to save bar—Special appropriation, absence of, effect of—Contract Act (IX of 1872), ss. 59, 60, 61.

MOHESH GHOSE v. UMESH CHANDRA GHOSE.

In a suit on a pro-note which was barred on the face of it, the plaintiff alleged two different payments by defendant as saving the bar. The only debts due by the defendant on the dates of the payments were the suit note and another hypothecation bond. The note was the earlier of the two. The plaintiff had appropriated the payments generally towards defendant's debts:

Held, that no special appropriation towards the suit note was necessary and that the suit was in time.

Soumia Narayana Iyengar v. *Alagirisawmy Iyengar*, 14 Ind. Cas. 580; (1912) M. W. N. 754; 11 M. L. T. 429 and *Hingu Miya* v. *Heramba Chandra Chakravarti*, 8 Ind. Cas. 81; 13 C. L. J. 139, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, Tinnevelly, in S. C. S. No. 1694 of 1917.

FACTS appear from the judgment.

Mr. *S. Ramaswami Aiyar*, for the Petitioner.—The suit is not barred. The two payments made by the defendant save limitation.

It was not necessary that plaintiff should expressly appropriate the payments towards the suit debt. The only other debt was a hypothecation. If the appropriation was generally towards the defendant's accounts, both the debts will be saved. Even otherwise, as the suit note was the earlier debt, the appropriation must be deemed to have been made towards that debt.

Mr. *M. Govindarajulu Naidu*, for the Respondent.—To save the bar of limitation the payment must have been applied in discharge of the suit debt. As that has not been done, the suit is barred.

JUDGMENT.—The Subordinate Judge disbelieves the plea of discharge. He finds the two payments alleged by the plaintiff to be true, but dismissed the suit on the ground that it was barred by limitation as the plaintiff did not make a special appropriation towards the defendant's accounts. The only transactions outstanding when the payments were made were the promissory note and the hypothecation. The note was the earlier of the two. If the appropriation was generally towards the sum due on both transactions, both will be saved. See *Soumia Narayana Iyengar* v. *Alagirisawmy Iyengar* (1) and *Hingu Miya* v. *Heramba Chandra Chakravarti* (2). I set aside the decree of the lower Court and pass a decree for plaintiff for the amount claimed. The respondent will pay the petitioner's costs in this and the lower Court.

M. C. P.

Decree set aside.

(1) 14 Ind. Cas. 580; (1912) M. W. N. 754; 11 M. L. T. 429.
(2) 8 Ind. Cas. 81; 13 C. L. J. 139.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2024 OF 1917.

February 13, 1919.

Present :—Mr. Justice Teunon and Mr. Justice Walmsley.

MOHESH GHOSE—DEFENDANT—APPELLANT

versus

UMESH CHANDRA GHOSE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 132—Mortgage—Hypothecation of properties as security for return of paddy borrowed or its money value—Limitation.

Article 132 of Schedule I to the Limitation Act is applicable to a suit to enforce a mortgage bond by which certain immoveable properties are hypothecated as a security for the return of paddy borrowed or of the money value thereof. [p. 242, col. 1.]

Appeal against the decree of the Additional District Judge, Bankura, dated the 12th July 1917, reversing that of the Munsif, 3rd Court at that place, dated the 13th May 1916.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitter* (with him Babu *Manindra Nath Banerjee*), for the Appellant.—This was a suit to enforce a mortgage bond. The defence raised was that the suit was barred by limitation. The lower Court has held that in the present case twelve years' limitation applies, but I contend that six years' rule applies. See *Kandarpa Naran Mandal* v. *Sridhar Roy* (1) and *Nilmoney Sinha* v. *Hurdhan Das* (2). I particularly rely upon *Rish Bihari Das* v. *Kunjabihari Patra* (3). The suit does not relate to payment of money charged on immoveable property as is covered by Article 132 of the Schedule of the Indian Limitation Act. He sues only for the realisation of paddy.

Babu *Karunamoy Bose*, for the Respondent, was not called upon.

(1) 44 Ind. Cas. 518.
(2) 2 Ind. Cas. 111.
(3) 37 Ind. Cas. 895; 24 C. L. J. 345

MAINA BIBI v. WASI AHMAD.

JUDGMENT.

TEUNON, J.—This appeal arises out of a suit brought to enforce a mortgage bond. The bond recites that the executant of the bond had borrowed 14 *maps* of paddy, and further provides for the payment of interest year by year at the rate of 2 *salis* of paddy per *map*. It further recites that for the realization of the said paddy, that is to say, the balance of paddy due after payment properties mentioned are mortgaged as security.

In reliance upon the decision of a Divisional Bench of this Court reported as *Rashbihari Das* v. *Kunjabihari Patra* (3), it is contended on behalf of the appellant that the suit is not one to enforce payment of money charged on immoveable property within the meaning of Article 132 of the Schedule to the Limitation Act and that therefore the rule of limitation applicable is the six years' rule to be found in Article 116 or Article 120. Speaking for myself, I may say that I am not prepared to accept or follow the view of Article 132 taken in the case which I have just cited. But even if I were, I should distinguish the bond in the present case from the bond then under consideration. In this bond there is a specific provision, that if the borrower fails to return the whole paddy according to agreement, then whatever be the balance of paddy due the price thereof shall be calculated at the rate of six rupees per *map* and that the mortgagee should be competent to realise that amount of money at once by suit by sale of the mortgaged properties. Thus reading the bond as a whole, it is clear that the mortgaged properties are given as security not purely for the amount of paddy that might be found due but also of the money value thereof. In my opinion in this case the Article applicable is clearly Article 132 and this appeal will, therefore, be dismissed with costs.

WALMSLEY, J.—I agree that the appeal should be dismissed. I wish to say that I do so only on the ground that the learned District Judge appears to be correct in the construction which he has put on the terms of the bond.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 88 OF 1916.

March 12, 1919.

Present:—Mr. Justice Rafique and Mr. Justice Lindsay.

Musammat MAINA BIBI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Chaudhari WASI AHMAD AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS

Muhammadan Law - Dower—Widow, right of, to possess estate of husband in lieu of unsatisfied dower—Widow, whether can alienate estate.

Where a Muhammadan widow obtains possession of her husband's estate lawfully, *i. e*, without force or fraud, she is entitled as against the other heirs to retain possession of the entire estate till her claim for dower is satisfied, subject to an obligation to account for profits, and the co-heirs cannot eject her without payment of that portion of the dower debt which is chargeable to their share of the estate. In this sense and to this extent the right of the widow is analogous to that of a usufructuary mortgagee. She, however, cannot set up any such right of possession against creditors claiming to have the debts owing to them from the husband satisfied out of the estate. She is not a secured creditor, her claim for dower debt ranks equally with the claims of other creditors of her husband. [p. 247, col. 2; p. 248, col. 1.]

The heirs of a Muhammadan brought a suit against his widow to recover his estate which the widow was holding in lieu of unsatisfied dower; the amount of the dower was ascertained, an account of the profits received by the widow was taken, and the plaintiffs were given a decree for possession of their share of the estate on payment, within a specified time, by them of their share of the dower debt, failing which the suit was to stand dismissed. The plaintiffs failed to pay, whereupon the widow made a gift of the entire estate to the sons and daughter of her sister's son, and the heirs then sued for possession of their share after her death:

Held, (1) that the suit was maintainable and was not barred by the rule of *res judicata*; [p. 249, col. 1.]

(2) that a Muhammadan widow in possession of her husband's estate in lieu of unsatisfied dower cannot, under the Muhammadan Law, alienate the estate, though she may transfer her dower debt or her right to retain possession of the estate. [p. 249, col. 2.]

Second appeal against the decision of the Sub-Judge, Allahabad, dated the 18th March 1916

Dr. *S. M. Sulaiman* and Dr. *Surendra Nath Sen* and the Hon'ble Mr. *Motilal Nehru*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, Messrs. *Iqbal Ahmad*, *Hyder Mehdi* and *Mukhtar Ahmad*, for the Respondents.

MAINA BIBI *v.* WASI AHMAD.

JUDGMENT.—The following pedigree will explain the right under which the parties to the appeal are disputing:—

SHAIKH SHAMSHER ALI

Shaikh Aminuddin=Khairunnisa Bibi, | Shaikh Kazim Ali,

Barkatunnisa=Maulvi Maslahuddin Ahmad, | Shaikh Minuddin=Maina Bibi, defendant No. 1.

Chaudhari Wasi Ahmad, plaintiff No. 1. | Chaudhari Wakil Ahmad, plaintiff No. 2. | Chaudhari Zubair Ahmad, plaintiff No. 3. | Ummahani Bibi=Mir Riyait Husain. | Muhibunnissa Bibi=Shaikh Mohd. Fakhir, defendant No. 7, | Muizunnissa Bibi=Hakim Ahmad Hasan.

Shaikh Muhammad Nazir, defendant No. 8. | Shaikh Muhammad Shakir, defendant No. 9.

Muinuddin died on the 6th of May 1890 possessed of immoveable property the inheritance to which is in dispute in the present case. He died leaving him surviving his widow, *Musammat* Maina, and his cousin, *Musammat* Barkatunnissa. *Musammat* Maina entered into possession of the entire estate and professed to remain in possession in lieu of her unsatisfied claim for dower. *Musammat* Barkatunnissa died on the 27th of June 1892 and her husband Maslahuddin died on the 17th of August 1897. Her mother *Musummat* Khairunnissa died on the 22nd of December 1895. We refer to the husband and the mother of *Musammat* Barkatunnissa as under the Muhammadan Law they and her children would be her heirs on her death. After her death and that of her mother and husband her sons became entitled to 72 *sihams* and her three daughters to 36 *sihams* in the estate of Muinuddin. *Musammat* Maina, the widow, was entitled to the remaining 36 *sihams*. On the 13th of May 1899 two of her daughters, namely, *Musammats* Ummahani Bibi and Muizunnissa Bibi instituted a suit for the recovery of their share in the inheritance, namely, 24 *sihams*, impleading *Musammat* Maina and the other descendants of *Musammat* Barkatunnissa as defendants in the case. One of the pleas on behalf of *Musammat* Maina was that at the time of the death of Muinuddin, his aunt and his step aunt were alive and Barkatunnissa was not an heir under the Muhammadan Law to Muinuddin. She further pleaded that her dower debt was Rs. 51,000 and in lieu of it Muinuddin before his death had gifted the immoveable property to her. The pleas in defence were disallowed. The Court held that *Musammat* Barkatunnissa was an heir of Muinuddin; that the dower debt of *Musammat* Maina was Rs. 51,000; and that no gift had been made by Muinuddin of the property in question in lieu of dower. The claim of the two ladies was decreed for the recovery of 24 *sihams* on the payment of Rs. 3,943 12-10, the proportionate amount of dower payable by them. The money was paid and the two ladies recovered possession of their share. On the 25th of April 1902 the three sons of Barkatunnissa and her third daughter, *Musammat* Muhibunnissa, brought a suit for the recovery of 84 *sihams* impleading as defendants in the case *Musammat* Maina Bibi, *Musammat* Ayesha Bibi and *Musammat* Ummahani Bibi and *Musammat* Muizunnissa Bibi. The last two were *pro forma* defendants. *Musammat* Ayesha Bibi was impleaded as a defendant in the case on the allegation that her right to succeed to the property left by Muinuddin was set up by *Musammat* Maina in the suit of 1899. The plaintiffs alleged in their plaint that the dower of *Musammat* Maina was *fatmi* dower, that is Rs. 107 which had been realised by her from the income of the estate, and that they were entitled to immediate possession without payment of any sum. They, however, said that in case the Court found that any part of the dower

had not been paid, they were willing to pay the amount determined by the Court. They accordingly prayed for possession of 7/12th of the property without payment or in the alternative on payment of such sum as the Court might find due. *Musammat* Maina was the chief contesting defendant in the case. She pleaded that the dower was Rs. 51,000; that the entire property of Muinuddin was gifted by him to her in lieu of her dower; that the whole amount of the dower was still due; that she was entitled to interest on her dower at the rate of 1 per cent. per mensem. She also advanced a plea of *jus tertii* by stating that *Musammat* Ayesha Bibi was the step-aunt of Muinuddin and that the descendants of a real aunt were alive at the time. We may also mention that one Abdul Shakur and some others had brought, about the same time, suits to recover the property left by Muinuddin, on the allegation that they were his cousins. *Musammat* Ayesha Bibi had also brought a suit for the recovery of her share in the property by right of inheritance on the ground that she was the step-aunt of Muinuddin. All the suits including the one of the three sons of *Musammat* Barkatunnissa were transferred for trial to the Judge of the Small Cause Court. The suits of *Musammat* Ayesha Bibi and others in which the descendants of *Musammat* Barkatunnissa were also defendants with *Musammat* Maina were decided first and the learned Judge held that neither *Musammat* Ayesha Bibi nor Abdul Shakur and others were entitled to inherit the property left by Muinuddin, as they had failed to prove their alleged relationship. When the case of the sons of *Musammat* Barkatunnissa came to be tried, their title had already been settled by the decision of the other suits and the only points for determination were the amount of the dower, the alleged gift of the property in lieu of dower and the rate of interest. The learned Judge held that the dower of *Musammat* Maina Bibi was Rs. 51,000 and not the *fatmi* dower; that Muinuddin had not made a gift of the property in suit in lieu of dower; that *Musammat* Maina Bibi was in possession of her deceased husband's estate in lieu of her dower; and that 3 per cent. per annum should be allowed to her by way of interest. He further held that she was liable to account for the profits received since the death of her husband. The accounts were taken and the proportionate amount due from the plaintiffs was found to be Rs. 25,337-5-5. A decree was accordingly passed in favour of the plaintiffs on the 25th of November 1903 for possession of 84 *sihams* out of 144 *sihams* on payment of the said sum within six months, and in default the claim of the plaintiffs was to stand dismissed with costs. The plaintiffs appealed to this Court and *Musammat* Maina Bibi filed cross-objections. The only point urged in appeal related to interest. Both the appeal and the cross objections were dismissed and the decree of the first Court was affirmed on the 3rd of July 1905. The plaintiffs did not pay the sum of Rs. 25,337-5-5 and did not recover possession of the 84 *sihams*. *Musammat* Maina Bibi executed two deeds of gift in respect of the property in question on the 15th of March 1907 and the 12th of June 1907 respectively in favour of Khalilur Rahman, Obaidur Rahman, Shafiur Rahman and *Musammat* Humairah Bibi, sons and daughter of Muhammad Isa, her nephew, that is, her sister's son. On the 5th of March 1908 Khalilur Rahman and Obaidur Rahman made a Wakf of a portion of the gifted property and appointed their father Muhammad Isa as Mutwalli. On the 22nd of July 1915 the suit out of which this appeal has arisen was instituted by Wasi Ahmad, Wakil Ahmad and Zubair Ahmad, the three sons of Barkatunnissa, for the recovery of 72 *sihams* out of 144 *sihams* in the estate of Muinuddin. *Musammat* Muizunnissa had died in the meantime. The plaintiffs impleaded in the case as defendants *Musammat* Maina Bibi, her donees, Muhammad Isa, the Mutwalli, and the husband and the two sons of *Musammat* Mohibunnissa. The last three were *pro forma* defendants. In their plaint the plaintiffs after reciting the former litigation of 1902 stated that a considerable part of the sum of Rs. 25,387-5-5 had been realised by *Musammat* Maina from the income of the estate, and that she having parted with possession of the property, the plaintiffs were entitled to possession of the 72 *sihams* without payment. In case the Court was of opinion that they could not get possession without payment, they were willing to pay whatever sum was found

due by the Court in respect of the balance of the dower debt payable by them. They stated their cause of action to have arisen on the 18th of March 1907 and the 12th of June 1907, the dates on which the two deeds of gift were executed and possession passed out of the hands of *Musammat* Maina, and on the 1st of July 1915, the date of refusal by the donees to make over possession to them, the plaintiffs. The contesting defendants raised various pleas in defence. We need mention three of them only which have been pressed here before us, namely, that the claim was barred by *res judicata*; that the plaintiffs could not recover possession without payment of the proportionate sum found due for dower and that interest at 12 per cent. per annum should be allowed on the dower debt. The Court of first instance repelled all the pleas in defence. The objection based on the plea of *res judicata* was disallowed on the ground that "the position of *Musammat* Maina Bibi who was in possession in lieu of her dower was analogous to that of a mortgagee, and that position was not altered or affected in any way by the decree (of 1902). What was done in the former suit was that the account was settled between the parties up to a certain date and the plaintiffs were given the option of paying the amount found due by a certain date if they wanted to recover immediate possession." The second objection that the plaintiffs could not get possession without payment was rejected for the reason that *Musammat* Maina Bibi was no more in possession in lieu of her dower and the donees from her were not the donees of her dower debt. As to interest, the rate allowed in the former suit, *viz.*, 3 per cent. per annum was maintained. The Judge, however, recorded a finding on the proportionate amount of dower payable by the plaintiffs after taking into consideration the profits of the estate received by *Musammat* Maina Bibi. He came to the conclusion that the sum of Rs. 16,297-15-3 was due to her. The claim of the plaintiffs for possession was decreed without payment of any sum to *Musammat* Maina or her donees. The latter and the Mutwaili preferred the present appeal to this Court and *Musammat* Maina died during the pendency of the appeal.

The decree of the lower Court is challenged on three grounds only which we have already mentioned above. In support of the first ground, *viz.*, that of *res judicata*, it is urged that the lower Court and the plaintiffs are under a misapprehension in thinking that the position of a Muhammadan widow in possession of the estate of her deceased husband in lieu of dower is analogous to that of a mortgagee or that a suit by his heirs against the widow for the recovery of possession of their share in his estate is similar to a redemption suit. It may be that in some cases her possession is described, for want of a better expression and in a loose way, as that of a mortgagee, but the incidents appertaining to the position of a mortgagee are wanting in her case. The case of *Ghulam Ali* v. *Sagir-ul-nissa Bibi* (1) is cited in support of the argument. In that case it was laid down that there was nothing to prevent a Muhammadan widow, who was in possession of the property of her late husband in lieu of dower, from suing to recover her dower from the heirs of her deceased husband. If the analogy of a mortgagee were applicable to a Muhammadan widow in possession of her husband's estate in lieu of dower, she could not sue for the recovery of her unsatisfied dower even by offering to surrender or surrendering her possession of the estate. The remarks of the learned Judges who decided the case of *Mirza Mohammad Sharafat Bahadur* v. *Shazadi Wahida Sultan Begum* (2) are relied upon to show that the suit by a widow for the recovery of her unsatisfied dower or by the heirs against her for the recovery of their share in the estate of her deceased husband is really in the nature of an administration suit. And where a decree in an administration suit is not executed and is allowed to be barred by lapse of time, no second suit would lie. It is further contended that if the position of a Muhammadan widow in possession of her husband's estate in lieu of her unsatisfied dower is analogous to that of a mortgagee, no second suit by the heir

(1) 23 A. 432; A. W. N. (1901) 124.

(2) 28 Ind. Cas. 191; 19 C. W. N. 502; 21 C. L. J. 319.

who shares in the inheritance would lie as was held in *Sheikh Golam Hussein* v. *Musammot Alla Rukhee* (3) and *Muhammad Zakariya* v. *Muhammad Hafiz* (4). In any case the present suit is barred by the condition attached to the decree of 1903 to the effect that in case of default the suit was to stand dismissed. Reliance is placed on the case of *Lachman Singh* v. *Madsudan* (5). For the plaintiffs-respondents the reply is that as far as this Court is concerned, it has been held more than once that the position of a Muhammadan widow in possession of her late husband's estate in lieu of her unsatisfied dower is analogous to that of a mortgagee, *vide Azizullah Khan* v. *Ahmad Ali Khan* (6), and *Sita Ram* v. *Madho Lal* (7) is cited as authority for the proposition that a second redemption suit would lie where the right to redeem is not barred by act of the parties or by an order of Court. The case of *Lachman Singh* v. *Madsudan* (5) is distinguished on the ground that in that case the decree provided that if the redemption was not made within the time specified, the right to redeem would be barred. The learned Counsel for the plaintiffs-respondents contends that his right to inherit the property left by Muinuddin was not in dispute in the litigation of 1902. All that was in dispute in that case was whether the then plaintiffs could recover their share in the property without payment or if on payment, on the payment of what sum. The amount of dower as also the rate of interest were in dispute in that case. The amount of dower, the rate of interest and the amount payable at the time of the decree were determined by the Court and are questions which cannot be re-opened. In the present case the plaintiffs are asking for an adjudication on the accounts since 1903. Their cause of action for the present suit is quite distinct from that in the suit of 1902. As to the conditions attached to the decree, that in case of non-payment within six months the suit should stand dismissed, the order did not extinguish the right of inheritance but only the right to get immediate possession.

In order to decide the point under discussion we must first have a clear idea of the position of a Muhammadan widow in possession of her deceased husband's estate in lieu of dower. Under the Muhammadan Law her position is described by Macnaghten in his well-known book of Principles and Precedents of Muhammadan Law. Case X, at page 356 is as follows:

"*Question* 1.—A man dies being indebted to his wife for her dower. Has she a lien on the personal property left by her husband in satisfaction of such dower, in preference to the other heirs?

Reply 1.—If the other heirs pay the widow the amount of her dower, she has no claim on the property left by her husband, except for her legal share of the inheritance; and if they do not pay her the amount of her dower, she has, in the first instance, a prior claim on account of her dower on the property left by her husband, whether real or personal. The residue, after her claim of dower is satisfied, will be divided between her and the other heirs, according to their respective shares of inheritance."

The same question in another form is given in Case No. XXIV at page 275:—

"*Question*.—Is the debt claimed by the defendant legally proved and if so, the whole of the property, real and personal, of her deceased husband being absorbed in such debt is it to belong of right to his widow, or is it to be distributed among the heirs generally?

Reply.—It has been proved, by the testimony of three competent witnesses, that the debt due to the defendant from her deceased husband on account of dower amounted to ten thousand gold *mohurs* and twenty-five thousand rupees, and a debt legally proved cannot be satisfied but by compromise or liquidation; so long as the debtor lives he is responsible in person, and on his death, his property is answerable but there is this distinction between money and other property in cases of dower, namely, that the widow is at liberty to take the former description of property, over which she has absolute power, but as to the other property, she

(3) 3 N. W. P. H. C. R. 62.
(4) 41 Ind. Cas. 233; 15 A. L. J. 557; 39 A. 506.
(5) 29 A. 481; 4 A. L. J. 447; A. W. N. (1907), 137.
(6) 7 A. 353; A. W. N. (1885) 54; 4 Ind. Dec. (N. S.) 574.
(7) 24 A. 44; A. W. N. (1901), 194.

is entitled to a lien on it as security for the debt and it does not become her property absolutely, without the consent of the heirs or a judicial decree. Where the debt is large and the estate small, the former necessarily absorbs the latter, in spite of any objection urged by the heirs, who, until they pay the debt, have no legal claim against the creditor in possession to deliver up the estate."

After some conflict of authority in the case-law in the second quarter of the last century, the position described above was conceded to the Muhammadan widow. In the case of *Musammat Janee Khanum* v. *Musammat Amatool Fatima Khanum* (8) it was laid down that the widow of a Muhammadan in possession of her husband's estate under a claim for dower has a lien upon it as against those entitled as heirs and is entitled to possession as against them till her claim for dower is satisfied. The same view was taken in the case of *Ahmed Hossein* v. *Musammat Khodeja* (9). In that case too, the learned Judges said that a Muhammadan widow in possession of her late husband's estate in lieu of her dower has a lien on the property as against the other heirs of her husband. The same point came up for decision before their Lordships of the Privy Council in the case of *Musammat Belee Bechun* v. *Sheikh Hamid Hossein* (10). Their Lordships held that a Muhammadan widow was entitled to retain possession of her late husband's estate in lieu of her dower as against his heirs. As to the nature of her possession, they observed as follows: "It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in the case of *Ahmed Hossein* v. *Musammat Khodeja* (9). Whatever the right may be called, it appears to be founded on the power of the widow as a creditor for her dower to hold the property of her husband of which she has lawfully and without force or fraud obtained possession until her dower debt is satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received. This expression of opinion has been uniformly and consistently followed by the Courts in this country since. We have referred to the text and the case-law applicable to Sunnis. The parties to this appeal belong to the Sunni sect. The same view has, however, been adopted in the case of Shias also, *vide Ameeroonnissa* v. *Mooradoonnissa* (11).

From the authorities quoted above and from the various treatises on Muhammadan Law it appears that the position of a Muhammadan widow with respect to the right to retain possession of her deceased husband's estate is a peculiar one.

Where she has obtained possession lawfully, *i. e.*, without force or fraud, she is entitled as against the other heirs to retain possession of the entire estate until her claim for dower is satisfied. On the other hand she cannot set up any such right of possession against creditors claiming to have the debts owing to them from the husband satisfied out of the estate. She is not a secured creditor, her claim for her dower debt ranks equally with the claims of other creditors of her husband.

It may be that the use of expressions like "lien" and "security" in describing the right of the widow against the co-heirs to which we have just referred is calculated to produce confusion and it may be that these expressions as used in works on Muhammadan Law do not import all that is meant when they are used by English lawyers. And it may certainly be conceded that the widow's position with regard to her co heirs is not in all respects that of a usufructuary mortgagee.

But it is not to be denied that in some respects her position does resemble that of a mortgagee in possession and whatever language may have been used from time to time for the purpose of describing her position compendiously, it cannot be doubted that as against the co heirs she has the right to remain in possession till her claim for dower is satisfied subject to an obligation to account to them for profits, and the co-heirs cannot eject her without payment

(8) 8 W. R. 51.

(9) 10 W. R. 368: 3 B. L. R. A. C. J. 28 *note*.

(10) 14 M. I. A. 377; 17 W. R. 113; 10 B. L. R. 45; 2 Suth. P. C. J. 531; 3 Sar. P. C. J. 39; 20 E. R. 828 (P. C.).

(11) 6 M. I. A. 211; 1 Sar. P. C. J. 533, 19 E. R. 79.

of that portion of the dower debt which is chargeable to their share of the estate.

In this sense and to this extent the right of the widow is analogous to that of a usufructuary mortgagee.

Bearing this position in mind, let us examine the former litigation and compare it with the present one. In the suit of 1902 the findings were that *Musammat* Maina Bibi was in possession in lieu of dower; that her dower was Rs. 51,000; that she was entitled to interest at 3 per cent. per annum on the dower debt; and that the proportionate amount due to her from the then plaintiffs was Rs. 25,387-5-5. The claim was decreed subject to the condition of payment of Rs. 25,000 odd within 6 months of the date of the decree. The decree further provided that in case of default in payment within the prescribed time, the claim should stand dismissed with costs. The proprietary title of the plaintiffs now before us or of those in the suit of 1902 was never in dispute in either case. The plaintiffs were admittedly heirs entitled by inheritance to a share in the estate of Muinuddin. The right of the plaintiffs to recover possession from the widow was not disallowed but was allowed conditionally, that is, on the payment of the sum found due to the widow. In the litigation of 1902 the plaintiffs were held to be entitled to secure possession on the payment of Rs. 25,000 odd. Since then the situation has considerably altered. *Musammat* Maina Bibi was a party to the present suit, but she was not in possession of the estate of her deceased husband in lieu of her unsatisfied dower. She had parted with possession to her donees about eight years prior to the institution of the suit. The heirs seek possession of the property and that can only be obtained from the donees of *Musammat* Maina. The right to retain possession has not been transferred (according to the contention of the plaintiffs) to the donees, but the property itself has been transferred and this according to the Muhammadan Law and the case-law the lady could not do. The cause of action, therefore, is distinctly different from that in the former suit and the principle of *res judicata* does not apply.

If on the other hand it be said that the transfer by *Musammat* Maina Bibi to the descendants of her nephew was a transfer of her dower debt, still, in our opinion, the present suit is maintainable. In the case of 1902 the amount of the dower, the rate of interest and the sum payable by the plaintiffs before obtaining possession, up to the date of the decree, were determined. These three points are not in issue in the present case and if either party raised them in the pleadings in the Courts below, they must be considered to be *res judicata*. In the present case if accounts have to be gone into, they would have to begin from the date of the decree in the former suit, namely, the 28th of November 1903. In other words, the present suit seeks for an adjustment of accounts since the decree in the first suit. The decree of 1902 did not extinguish the right of the plaintiffs to inherit the estate of Muinuddin, and, therefore, they can maintain the present suit for the ascertainment of the sum now payable by them. Some cases were cited on behalf of the plaintiffs-respondents in support of this view, which we may note here. *Roy Dinkur Doyal* v. *Sheo Golam Singh* (12), *Sita Ram* v. *Madho Lal* (7) and *Rama Tulsa* v. *Bhagchand* (13).

All the three cases arose out of redemption suits. The cases relied upon by the learned Counsel for the appellants do not cover the facts of the present case. The case of *Shaikh Gholam Hussein* v. *Musammat Alla Rukhee* (3) was a case where a mortgagor sued for redemption and obtained a decree. It was found by the Court that the whole of the mortgage money had been satisfied and that the mortgagor was entitled to immediate possession. The mortgagor did not put the decree into execution and after it had become barred by time brought a fresh suit. The Court held that a second suit did not lie and for a very good reason, namely, that the relationship of mortgagor and mortgagee had been determined in the first suit, because of the finding that the mortgage had been satisfied. The case of *Muhammad Zakariya* v. *Muhammad Hafiz* (4) is also distinguishable. The facts of that case were that "a mortgage bond provided, among other things, that interest would be paid to the creditor monthly

(12) 22 W. R. 172.
(13) 27 Ind. Cas. 249; 39 B. 41; 16 Bom. L. R. 687.

and if for any reason the interest was not paid for six months, the creditor would be competent to realise by suit without waiting for the expiry of the term either the unpaid interest or the principal and interest with costs." It was further stipulated that if the bond was not paid within the period fixed, then the whole amount, principal and interest, would be realised by the creditor by suit. The mortgagee first sued for the recovery of interest only as default was made in the payment of it. He obtained a decree without contest. Subsequently he sued for the recovery of money, principal and interest, due on the mortgage-deed and one of the pleas in defence was that the claim was barred by Order II, rule 2, Civil Procedure Code. The Court held that the claim was so barred. In the appeal before us no such omission was made by the plaintiffs and Order II, rule 2, Civil Procedure Code, has no application. As to the case of *Lachman Singh* v. *Madsudan* (5), we think it is also inapplicable to the present case. We have already remarked above that the right of the plaintiffs to inherit the property of Moinuddin was not extinguished by any order in the decree of the 28th of November 1903. The words in the decree were "that in case of non payment within the prescribed time, the suit shall stand dismissed." Similar words were used in the case of *Sita Ram* v. *Madho Lal* (7), where the decree said that in case of non-payment of the redemption money within the prescribed time, the decree will be considered non-existent. We, therefore, find that the present claim of the plaintiffs is not barred by the principle of *res judicata*.

The next point urged is that the plaintiffs cannot recover possession of their share of the property without payment of a proportionate amount of the dower debt. It is contended on behalf of the appellants that the right of a Muhammadan widow in possession of her husband's estate in lieu of dower is heritable and that a suggestion has been thrown out in some cases of this Court that it is also transferable. It is true that *Musammnt* Maina by her deeds of gift transferred the property describing herself as the owner of it, but, it is argued, the larger right includes the lesser one and if she had no right of ownership in the property she at least had the right to retain possession of it and she should be taken to have transferred whatever rights she had in the property. The case of *Ali Bakhsh* v. *Allahdad Khan* (14) is relied upon. We have examined the language of the two deeds of gift and we find that *Musammat* Maina did not profess to transfer her dower debt or her right to retain possession of the property of her husband in lieu of her dower, to the donees. She describes herself in the two deeds as the owner of the property for two reasons, *viz.*, first, that the property in question had been gifted to her by her husband in lieu of her dower during his lifetime, and secondly, a default having been made in the payment of the decree of 1902, she had become the absolute owner of the property. It is, therefore, quite clear that she did not transfer nor did she mean to transfer her dower debt or her right to retain possession of the property to her donees. We are not prepared to accede to the contention of the learned Counsel for the appellants that because she transferred the whole property believing herself to be the owner of it, she should be taken to have transferred her dower debt and her right to retain possession in lieu of it. Under the Muhammadan Law it is distinctly laid down that a Muhammadan widow in possession of her husband's estate in lieu of unsatisfied dower, cannot alienate the estate, *vide* Wilson, paragraph 162. A similar point arose in another case before this Court. In the case of *Mohammad Husain* v. *Bashiran* (15) a Muhammadan widow, who was in possession of her husband's property in lieu of dower, had made a gift of the property in favour of her son. The heirs sued for possession of their share after her death. They were met with the plea that they could not obtain possession without payment of the dower debt. They replied that the donee was the donee of the property and not of the dower debt, and, therefore, could be sued for possession. A learned Judge of this Court after

(14) 6 Ind. Cas. 376; 32 A. 551; 7 A. L. J. 567.
(15) 26 Ind. Cas. 109; 12 A. L. J. 1141.

reviewing the authorities on the point came to the conclusion that the gift by the widow being a gift of the property and not a gift of the dower debt, the donee could not resist the suit of the heirs. Assuming that the right of a Muhammadan widow to remain in possession of her husband's property in lieu of her dower is a transferable right which can only be transferred along with the dower debt, we think that on the language of the deeds of gift in this case, no such transfer of the dower debt or of the widow's right to remain in possession of her husband's property was made. The defendants-appellants cannot, in our opinion, resist the present claim on the ground that the plaintiffs-respondents should pay their proportionate share of the dower debt of *Musammat* Maina.

The last point urged on behalf of the appellants is about the rate of interest. In view of our finding that the plaintiffs are entitled to possession without payment, the question really need not be decided, but we think it better to express an opinion on the point raised. The question of the rate of interest was in issue between the present plaintiffs and *Musammat* Maina in the litigation of 1902 and was decided against *Musammat* Maina. The appellants derive their title through her and, therefore, they are bound by the findings arrived at in 1902, and even if the finding is not binding upon the appellants, we think that no case has been made out to make us differ from the lower Court and allow a higher rate of interest than 3 per cent. per annum. The result is that the appeal fails and the decree of the first Court is upheld. We dismiss the appeal with costs, including fees in this Court on the higher scale.

Appeal dismissed.

[PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 834 OF 1915.

May 31, 1918.

Present:—Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

PANNA LAL-LACHHMAN DAS—DEFENDANT—APPELLANT

versus

HARGOPAL-KHUBI RAM—PLAINTIFF—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), ss. 1, 7, 48—Hundi—*Acceptance, whether must be in writing—Usage, local—Transfer of instrument—Assignment, oral, validity of—Endorsement and assignment, distinction between.*

The definition of the word "acceptor", as contained in section 7 of the Negotiable Instruments Act, leaves no doubt that an acceptance must be in writing, but, having regard to the provisions of section 1 of the Act, so far as regards instruments in an oriental language, a mercantile usage may be proved which makes an acceptance by word of mouth as effectual against the drawee as an acceptance in writing. [p. 251, col. 2.]

An endorsement is not the only mode by which a negotiable instrument may be transferred. It may be assigned otherwise, and the assignee can sue in his own name, the only difference being that an assignee has only the right, title and interest of the assignor, while an endorsee has all the rights of a holder in due course. [p 251, col. 1.]

An assignment need not necessarily be in writing and may be oral. [p. 251, col. 1.]

Where it was found that the plaintiff was the real beneficiary under a *hundi* to whom the money was to be ultimately paid, that he was the holder of the *hundi* and that the nominal endorsee did not claim any interest adverse to him:

Held, that it must be presumed that there was an oral assignment of the *hundi* in favour of the plaintiff and that he had a right to sue upon it. [p. 251, col. 1.]

Second appeal from the decree of the District Judge, Delhi, dated the 26th February 1915.

The Hon'ble Pandit *Sheo Narain* and the Hon'ble Bakhshi *Sohan Lal*, for the Appellant.

Messrs. *Manohar Lal* and *Cooper*, for the Respondent.

JUDGMENT.—This was an action brought by the firm of Hargopal Khubi Ram against the firm of Panna Lal-Lachhman Das for the recovery of a certain sum of money on the basis of a *hundi*. The *hundi* was drawn upon the defendant firm by Mathra Das-Sada Nand of Bombay in favour of Jaswant Rai and Company, who sent it to the firm of Mangal Sain Kundan Lal of Delhi with an endorsement, the meaning of which is a matter in controversy between the parties.

The bill was presented to the drawees, who on the 17th July 1913 marked it as seen, and on the 23rd July paid Rs. 3,100 out of Rs 6,000, the amount due thereon. On or about the 25th of July the defendants discovered that the firm of the drawers had become insolvent, and they consequently declined to pay the balance, with the result that the plaintiffs brought the present action for the recovery of the remaining amount due on the instrument. The Courts below have concurred in decreeing the claim, and the first point raised on appeal preferred by the defendants is that the plaintiffs, Hargopal Khubi Ram, are neither the endorsees nor the assignees of the *hundi* and that consequently they are not entitled to maintain the suit. Now, we have considered the terms of the endorsement, and find that not only the firm of Mangal Sain-Kundan Lal but also that of Hargopal-Khubi Ram figure therein. It is difficult to ascertain the exact meaning of the language used by the endorser; but one thing is absolutely clear, and that is that the plaintiffs, if they were not the actual endorsees, were certainly the persons on whose behalf Mangal Sain-Kundan Lal were to realise the money due on the instrument.

Now, it is conceded by the learned Advocate for the appellants that an endorsement is the not only mode by which a negotiable instrument may be transferred. It may be otherwise assigned, and the assignee may sue in his own name; the only difference being that the assignee will have only the right, title and interest of the assignor, while the endorsee will have all the rights of a holder in due course; *vide, inter alia, Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar* (1). The learned Advocate for the appellants further admits that an assignment need not necessarily be in writing and may be an oral one. Now, considering that the plaintiffs were undoubtedly the beneficiaries to whom the money was to be ultimately paid, that they are the holders of the instrument, and that Mangal Sain-Kundan Lal do not claim any interest adverse to them, we are of the opinion that the plaintiffs have succeeded in establishing their contention that the *hundi* was assigned to them. Indeed, as pointed out by the learned District Judge, the plaintiffs' right to sue as holders was not challenged in the Court of first instance; and there can be no doubt that if the defendants had questioned their *locus standi*, the plaintiffs could have conclusively proved an oral assignment in their favour by producing a member of the firm of Mangal Sain Kundan Lal as a witness to depose to that effect. It is beyond question that one of the two firms was entitled to sue, and considering that Mangal Sain-Kundan Lal never asserted their own title, we concur in the conclusion of the lower Appellate Court that the plaintiffs' *locus standi* to maintain the suit has been established.

The only other matter, which has been urged before us and which requires determination, is whether the drawees, who have not signed their assent on the bill, can be charged with liability thereon. The Courts below have found on the evidence adduced by the plaintiffs that the drawees orally accepted the bill, and the question is whether an oral acceptance has the effect of making the drawees liable. Now, the definition of the word "acceptor" as contained in section 7 of the Negotiable Instruments Act leaves no doubt that the acceptance must be in writing, but section 1 of the Act prescribes that nothing contained therein shall affect any local usage relating to any instrument in an oriental language. The plaintiffs contend that there is a mercantile usage at Delhi which makes an acceptance by word of mouth as effectual as an acceptance in writing, so far as the liability of the drawee is concerned. In this connection our attention has been invited to the evidence of three witnesses produced by the plaintiffs, and also to that of the defendant's witness Kishori Lal. The learned Counsel for the plaintiffs has placed his special reliance on the conduct of the defendants in making part payment on the *hundi* in question which they had accepted only orally. Having regard to the fact that the usage relied upon by the plaintiffs is a matter of considerable importance to the mercantile community of Delhi, we consider it necessary that further enquiry into the question should be made in order to enable us to come to a satisfactory conclusion.

Accordingly we direct the Court of first instance to record further evidence upon

(1) 28 M. 544; 15 M, L. J. 384.

the question whether there is a mercantile usage at Delhi which renders a drawee, who has accepted a *hundi* orally, liable on the instrument, and to certify the evidence to this Court. It is necessary that instances of payments by drawees in pursuance of oral acceptance should be examined, and both the parties afforded an opportunity to adduce their evidence on the issue. The Subordinate Judge is directed to return to this Court the evidence with his finding thereon through the District Judge, who should also express his opinion upon the existence or otherwise of the usage.

Case remanded.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 153 OF 1918.

March 7, 1919.

Present:—Mr. Justice Phillips.

PONNUSAMI *alias* PERIANA KONE AND OTHERS—PLAINTIFFS—PETITIONERS

versus

PALAYATHAN AND ANOTHER—DEFENDANTS RESPONDENTS.

Contract Act (IX of 1872), s. 23—Money bond—Contract for labour in lieu of interest for specified term, whether slavery—Public policy—Bond, whether enforceable.

A stipulation in a bond whereby the debtor contracts to work for a specified term in lieu of payment of interest is not opposed to public policy and is enforceable. There is little difference between such contract and one of apprenticeship.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Melur, in Small Cause Suit No. 1169 of 1917.

FACTS appear from the judgment.

Mr. *K. V. Krishnasawmy Aiyar*, for the Petitioners.—The lower Court's view of the law is erroneous. The contract between the parties was that, instead of interest, the debtor was to work for five years. At the end of five years the debtor was free to leave the creditor's service and the latter could only enforce payment of the principal amount. Such a contract does not amount to slavery and is not void as being opposed to public policy. The agreement that the debtor should continue in the creditor's service is treated as consideration equivalent to interest.

Respondent was not represented.

JUDGMENT.—This case is by no means identical with *Ram Sarup Bhagat* v. *Bansi Mandar* (1), in which the debtor bound himself to serve until the debt was repaid and in default to pay exorbitant interest. Here the debtor only undertakes to work for five years, and this undertaking is accepted by the creditor in lieu of interest. There is nothing to prevent the debtor leaving service at the end of five years, and if he commits default he has to repay the advance with 25 per cent. interest. This can by no means be called a contract of slavery, for the work done by the debtor is to be paid for at the ordinary rates and the agreement to continue in service is treated by the employer as consideration equivalent to interest. Respondents are not unfortunately represented in this Court, but there seems to me very little difference between such a contract and one of apprenticeship or indenture and, therefore, it cannot be treated as opposed to public policy. It appears that respondents completed their contract so far as the labour was concerned and plaintiff can only claim his principal amount subject to limitation or any subsequent contract. The decree is set aside and the suit remanded for disposal in the light of the above remarks. Costs will abide the result.

M. C. P.

Petition allowed.

(1) 50 Ind. Cas. 955; 42 C. 742; 19 C. W. N. 1118.

ALAGAPPA CHETTIAR *v.* LAKSHMANAN CHETTIAR.

MADRAS HIGH COURT.

APPEAL SUIT No. 62 OF 1917

AND

CIVIL MISCELLANEOUS APPEALS NOS. 173 AND 306 OF 1917.

March 14, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Aiyar.

IN A. S. No. 62 OF 1917

N. P. R. M. V. R. M. ALAGAPPA CHETTIAR—PLAINTIFF—APPELLANT

versus

N. P. R. M. L. S. T. LAKSHMANAN CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

IN C. M. A. No. 173 OF 1917

ALAGAPPA CHETTIAR AND ANOTHER—RESPONDENTS NOS. 1 AND 2—APPELLANTS

versus

THE OFFICIAL RECEIVER, TINNEVELLY AND ANOTHER—PETITIONER AND RESPONDENT No. 3—RESPONDENTS.

IN C. M. A. No. 306 OF 1917

ALAGAPPA CHETTIAR—RESPONDENT—APPELLANT

versus

THE OFFICIAL RECEIVER, TINNEVELLY—PETITIONER—RESPONDENT.

Trusts Act (*II of* 1882), *ss.* 5, 6—*Trust—Trustees empowered to sell moveables and immoveables and collect outstandings—Words of transfer, absence of, effect of—Security, whether created in respect of moveables—Transfer of Property Act* (*IV of* 1882), *s.* 130.

Under section 5 of the Trusts Act, a document purporting to be a deed of trust must contain words of transfer in order to operate as a trust and vest the property in the trustee as the legal owner, although no particular form of expression is necessary. Mere intention to create a trust, however, is not sufficient. [p. 255, cols. 1 & 2.]

Where a document which was described as a trust deed was executed in favour of a person empowering the latter to sell all moveable and immoveable properties of the executant and to recover the outstandings and distribute the assets rateably among the creditors, but the deed contained no words of transfer:

Held, (1) that the document did not create a trust under sections 5 and 6 of the Trusts Act; [p. 255, cols. 1 & 2.]

Kondu Kanhuji Dhavde v. *Vishnu Moreshvar Bhat*, 17 Ind. Cas. 176, 37 B. 53; 14 Bom. L. R. 801, explained.

(2) that as the document was one and indivisible, it did not create any rights of trusteeship even in respect to moveable property; [p. 255, cols. 1 & 2.]

(3) that no security or charge was created in respect of the moveable property in favour of the trustee. [p. 255, col. 1; p. 256, col. 1.]

Quære.—Whether the trustee could sell the properties of the executant?

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in Original Suit No. 56 of 1915.

Appeal against the order of the District Court, Tinnevelly, dated the 5th February 1917, in Original Petition No. 574 of 1916.

Appeal against the order of the District Court, Tinnevelly, dated the 28th July 1917, in I. A. No. 344 of 1917, in I. P. No. 34 of 1914.

FACTS appear from the judgment.

Mr. *C. V. Anantha Krishna Aiyar*, for the Appellants.—The document describes itself as a trust-deed and it is clear from the recitals contained in it that the insolvent, who executed it, intended to create a trust in favour of his creditors. See *Kondu Kanhuji Dhavde* v. *Vishnu Moreshvar Bhat* (1), where it is laid down that words of conveyance are not necessary to create a transfer. See also the observations of the Privy Council in *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (2), where their Lordships do not attach importance to the form of expressions used in deeds of trust. The intention to create a trust is clear and is easily deducible from the language of the document.

The document creates a trust, in any any event, in respect of the moveables.

Lastly, all documents and title-deeds and account books have been handed over to the trustee in pursuance of the trust. A charge or security must, at any rate, be deemed to have been created.

Messrs. *T. R. Venkatarama Sastri* and *K. V. Krishnaswami Aiyar*, for the Respondents.—Section 6 of the Trusts Act expressly requires that a document, to operate as a trust, should contain express words of transfer. In *Kondu Kanhuji Dhavde* v. *Vishnu Moreshvar Bhat* (1) and *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (2) what was laid down was that particular forms of expression are not necessary. In the present case there are no words making over the properties to the trustee. A mere direction to sell is not sufficient. Nor is it enough that the intention to create a

(1) 17 Ind. Cas. 176; 37 B. 53; 14 Bom. L. R. 801.
(2) 6 M. I. A. 393; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 25; 1 Sar. P. C. J. 552; 19 E. R. 147.

trust can be gathered from the document. Even if the intention could be read it is inoperative unless it is accompanied with words of transfer.

No distinction can be made between moveables and immoveables. The deed is one and indivisible and cannot be split up in that way. If there are no words of transfer in respect to the one, there is nothing there to convey the other.

No charge or security is created in respect of moveable property. The mere handing over of title-deeds and account books does not have that effect.

JUDGMENT.

ABDUR RAHIM, J.—The common question in all these appeals relates to the interpretation of Exhibit I, which is described as a deed of trust. The contest is between the Official Receiver appointed in the insolvency of Pachaperumal Chetty, and some of his creditors who are said to have been appointed trustees of the property of the insolvent for the benefit of all the creditors. The lower Court has held that the Official Receiver is entitled to possession of the assets of the insolvent as they had vested in him, and not the person described as trustees in Exhibit I. Exhibit I was executed on the 25th October 1913, and Pachaperumal Chetty was adjudicated an insolvent on his own application in April 1915. So, if there was a valid trust for the benefit of his creditors created by Exhibit I, the claim of the trustees will prevail against that of the Official Receiver.

It is necessary for the creation of a trust that the property should be transferred to the trustee. But reading Exhibit I, it is quite clear that there are no words of transfer to be found in it, either with respect to the immoveable property or the outstandings or movables. What Exhibit I does is to give power to the person named therein to sell all the properties belonging to the insolvent and to recover the outstandings, and to distribute the assets rateably among the creditors. The document, as already mentioned, is described as a trust deed and it was duly registered. But the appellant has not been able to point out any expression in the document which could possibly be construed as creating a transfer or assignment of the properties in favour of the so-called trustees. The mere description of the deed as a trust-deed can have no effect, if as a matter of fact the deed does not purport to transfer or assign the property to the so-called trustees. We have been referred to a decision in *Kondu Kanhuji Dhavde* v. *Vishnu Moreshvar Bhat* (1), where it is laid down by Mr. Justice Chandavarkar: "Words of conveyance, it has been held, are not absolutely necessary to create a transfer." The learned Judge, however, does not mention any authorities, where it has been so held; and Mr. Ananthakrishna Aiyar was not in a position to produce any in support of this proposition. He relies on a passage in the well-known judgment of the Privy Council in *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (2), which I shall notice presently. It seems to me with the utmost respect to the learned Judge who decided *Kondu Kanhuji Dhavde* v. *Vishnu Moreshvar Bhat* (1) that it is a novel proposition that a deed of transfer does not require any words of conveyance. If all that was meant was that no particular words or forms or conveyance are necessary, there would be no difficulty in accepting such a statement. And that is all that is stated by the Privy Council in the judgment alluded to. What they say is: "Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses." But although a particular form of expression is not necessary, some expression must be there which could be construed as being intended to create a transfer. But where there are absolutely no words of transfer, no question of construction arises at all for there is nothing to be construed. If we were to say that Exhibit I in this case created a transfer in favour of the persons named therein, we should be so holding without any sort of language to support such a construction. Section 6 of the Trusts Act requires for the creation of a trust that the trust property should be transferred to the trustee. It is in these words: "Subject to the provisions of section 5, a trust is created when the author of the trust indicates with reasonable certainty by any

words or acts (*a*) an intention on his part to creat thereby a trust, (*b*) the purpose of the trust, (*c*) the beneficiary and, (*d*) the trust property, and (unless the trust is declared by Will or the author of the trust is himself to be the trustee) transfers the trust property to the trustee." Mr. Ananthakrishna Aiyar has argued that if we can possibly hold that the executant of the deed intended to create a trust, then that would be sufficient although words of transfer were wanting. But the question of intention is dealt with in the section with reference to whether a trust was intended to be created, and not as doing away with the necessity for a transfer of the properties to the trustees. If the intention to create a trust is existent, then the Act requires that there must be a transfer of the property to give effect to it, but merely an intention to create a trust is not sufficient except in the two cases mentioned. It would be going against well established law regarding transfer of property to say that mere intention to transfer is sufficient without compliance with the requirements for a valid transfer. I think, therefore, it is perfectly clear that we cannot regard Exhibit I as validly creating a deed of trust in favour of the creditors.

Mr. Ananthakrishna Aiyar sought to distingnish the case of outstanding and moveable property. But the document deals with both properties and the same language is used with respect to all the properties; and there is nothing, as already pointed out, in that language which could possibly be construed as transferring the rights of the insolvent in his properties, either moveable or immoveable, to the persons mentioned in the deed.

His next argument upon this document was that we must hold it to have the effect of creating a security in his client's favour. Here again there are no words of transfer. The mere handing over of certain documents, books of accounts and so on would not create any security; at any rate outside the Presidency towns.

We have not dealt with the question whether Mr. Ananthakrishna Aiyar's client has any rights to sell the property of the insolvent under Exhibit I, apart from the question whether the property has vested in his client as trustee. That question does not arise in these appeals.

In the result, all the appeals are dismissed with costs. There will be two sets of costs in Appeal No. 62 of 1917 and there will be costs for the Official Receiver alone in the two miscellaneous appeals.

SESHAGIRI AIYAR, J.—I agree. I am inclined to think that the intention of the parties was to create a deed of trust. It is engrossed on a stamp paper for Rs. 15 which is the usual stamp for executing a trust deed, and the document is styled a "trust deed". Apparently the parties intended that there should be a trust deed. But that is not enough under section 5 of the Trusts Act to create a deed of trust. The intention to declare a trust may be spelled out of the document. But there must be words of conveyance before the property itself vests in the trustee as legal owner. In the document Exhibit I those words of conveyance are not to be found; and, therefore, it is incapable of vesting the property in the trustee and of defeating the rights of the trustee in bankruptcy. As pointed out by my learned brother, if Chandavarkar, J., intended to lay down that no words of conveyance are necessary to effectuate a transfer, I am respectfully unable to agree with the learned Judge. If what he meant to say was that no particular forms of words are necessary to connote a conveyance, I entirely agree. But if the judgment in *Kondu Kanhuji Dhavde* v. *Vishnu Moreshwar Bhat* (1) goes further, I respectfully dissent from it.

As regards the contention of Mr. Ananthakrishna Aiyar that Exhibit I is capable of conferring rights of trusteeship in regard to moveable property, one answer is this, that the document is one and indivisible and it was never the intention of the parties that moveable property should be taken without the immoveable property. That to my mind is conclusive upon this question, because if there are no words conveying immoveable property, you cannot say that there is anything in the document which would convey moveable property.

As regards the argument that the document created a security or charge in respect of moveable property in favour of the trustees, I would draw attention to the case in *Mulraj Khatau* v. *Vishwanath Prabhuram*

Vaidya (3) where the Judicial Committee point out that, where a policy of insurance was deposited, that would not be enough under section 130 of the Transfer of Property Act to confer on the person with whom the deposit was made the rights of an assignee of a chose in action. The same reasoning applies to the present case. The mere fact that he has been given the document of title would not, under section 130, enable him to be the legal owner of the property.

For all these reasons, I agree with my learned colleague that the appeals must be dismissed.

M. C. P.

Appeals dismissed.

(3) 17 Ind. Cas. 627; 12 M. L. T. 652; 40 I. A. 24; (1912) M. W. N. 1247; 11 A. L. J. 7; 24 M. L. J. 60; 17 C. W. N. 209; 15 Bom. L. R. 9; 17 C. L. J. 162 37 B. 198 (P. C.).

PATNA HIGH COURT.

CIRCUIT COURT CUTTACK.

MISCELLANEOUS CIVIL APPEAL NO. 12 OF 1918.

April 14, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Roe.

MADANMOHAN PANIGRAHY—APPELLANTS

versus

BANDU BARIK AND ANOTHER—RESPONDENTS.

*Under-*raiyati *interest, whether transferable—Sale in execution of money decree Under-*raiyat, *whether can object—Appeal, second—Question of law, whether can be raised.*

An under-*raiyat* has no transferable interest in his holding unless it is proved by custom to be transferable.

An under-*raiyat* can object to the sale of his under-*raiyati* interest in execution of a money decree against him.

In second appeal the High Court cannot deal with a question of law the determination of which is based upon a question of fact not raised in the Courts below.

Appeal from an appellate order of the District Judge, Cuttack.

Mr. *S. N. Sen Gupta*, for the Appellant.

Mr. *G. C. Ray*, for the Respondents.

JUDGMENT.

ROE, J.—The appellant in this case is dissatisfied with an order of the District Court of Cuttack decreeing an appeal made by the judgment-debtor against an order of the Munsif, 1st Court of Cuttack, putting up to sale his occupancy right and under-*raiyati* holding in execution of a money decree. It is accepted by the learned Vakil for the appellant that in view of the recent decisions of this Court the order regarding the occupancy right as made by the District Court was a correct order but it is contended that the District Court was wrong in preventing the sale of the under-*raiyati* holding held by the judgment-debtor. It is further urged that the appeal to the District Court was *ab initio* incompetent by reason of the fact that it was out of time, the order of the Court below not having been filed along with the memorandum of appeal.

We may deal shortly with the latter contention. There is nothing whatever upon the order sheet of the learned Judge to indicate the basis of the ground here taken. There is nothing in the argument before the learned Judge to indicate the nature of the defect now urged before us, and it is impossible for this Court to deal with a question of law the determination of which is based upon a question of fact which has not been ventilated in the Court below.

With regard to the question, whether an under-*raiyati* holding can be sold in execution of a money decree, it is the universally accepted view that an under-*raiyat* has no transferable interest in his holding unless it be definitely proved by custom to be transferable. No evidence was offered upon this point in the Court below and we must, therefore, accept the position that this under-*raiyati* holding is subject to the general custom that an under-*raiyat* has no transferable interest therein. This appeal is dismissed with costs.

MILLER, C. J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

CRIMINAL APPEALS NOS. 35 AND 37 OF 1918.

July 3, 1918.

Present:—Mr. Justice Heaton and Mr. Justice Hayward.

WAMAN DINKAR KELKAR AND ANOTHER —ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476, scope of—Magistrate making enquiry requiring help of Police—Reference to District Magistrate, legality of—Delay in instituting proceedings, effect of.

A case came before an Assistant Collector on appeal against the decision of the Revenue Court of a *mamlatdar*: the Assistant Collector being suspicious that a forged *kabuliyat* had been used by the plaintiff, an *inamdar*, called on him for an explanation which he received along with a report by the *mamlatdar*. The Assistant Collector then applied for the assistance of the Criminal Investigation Department from the District Magistrate, and a full report was submitted to him by the Deputy Superintendent of Police. He then referred the matter for inquiry to the nearest First Class Magistrate, which resulted in both the *inamdar* and the *mamlatdar* being committed to the Court of Session where they were convicted, the former under sections 209, 471, 219 and 109 of the Penal Code, and the latter under sections 466 and 219 of the Code. On appeal to the High Court it was objected—(*a*) that even if the offence was brought under notice in the judicial proceedings of the Assistant Collector as regards the *inamdar*, it was not so brought to notice as regards the *mamlatdar*, (*b*) that the whole of the preliminary inquiry should have been made by the Assistant Collector who, after his reference to the District Magistrate, was *functus officio* and consequently his order under section 476 of the Criminal Procedure Code was without jurisdiction, (*c*) that there was delay in proceeding under section 476 and the delay was fatal:

Held, (1) that under section 476 of the Criminal Procedure Code it was the case which was to be sent for inquiry to the nearest Magistrate and not necessarily all the offenders who might be concerned in the commission of the offence, the subsequent clause of the section referring only to such offender or offenders as might at that time be known and be within the grasp of the inquiring officer; [p. 258, col. 2.]

(2) that the reference to the District Magistrate did not deprive the Assistant Collector of jurisdiction, as the reference was made merely to that officer as the executive controller of the Police and not to him in his judicial capacity as the District Magistrate; [p. 258, col. 2.]

(3) that although it was expedient that speedy action should be taken, there was nothing in the section itself or in the reasons for its enactment to hold that officers acting under it were bound to make their inquiry in the actual course of the judicial proceeding, or so shortly thereafter as to make it a continuation of those proceedings; the section was enacted not with the intention of protecting offenders against public justice from prosecutions by the Courts, but to facilitate, wherever and whenever those offences might come to notice, such prosecutions by Courts. [p. 259, col. 2.]

Criminal appeals from convictions and sentences passed by the Sessions Judge, Satara.

Messrs. *Binning* and *N. V. Gokhale*, for the Mamlatdar.

Mr. *G. S. Rao*, for the Inamdar.

Messrs. *Velinkar* and *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HAYWARD, J.—These are two appeals against convictions recorded at a trial with Assessors by the Sessions Judge of Satara. One appellant is the Inamdar of Patan. The other appellant was the Mamlatdar of Patan. The Inamdar has been convicted of having brought a false claim for rent against his tenants, certain Chambhars, in the Revenue Court of the Mamlatdar. He has also been convicted of having used as genuine a *kabuliyat* which had been altered by forgery for the purpose of establishing his claim against those Chambhars in the proceedings in the Revenue Court. He has also been convicted of having abetted a corrupt judgment which had been passed against those Chambhars by the appellant Mamlatdar in that Court. The convictions were concurred in by both the Assessors and he was sentenced to concurrent sentences, which had the practical effect of sending him to prison for five years' rigorous imprisonment under sections 209, 471, 219 and 109 of the Indian Penal Code. The appellant Mamlatdar has been convicted of forgery in that he altered the statement as made by the appellant Inamdar on the first hearing of the revenue case for the purpose of supporting the claim based on the forged *kabuliyat*. He has also been convicted of having delivered a corrupt judgment against the Chambhars in those proceedings in his Revenue Court. These convictions were concurred in by both the Assessors and he was sentenced to concurrent sentences, which had the practical effect of sending him to rigorous imprisonment for five years under sections 466 and 219 of the Indian Penal Code.

The appellants raised a preliminary objection to the trial which was, however, overruled by the Sessions Judge. They have repeated that objection here. Their objection is based on these facts. The

offences which have been the subject of trial arose, as has already been indicated, out of judicial proceedings in the Revenue Court of the Mamlatdar. There was an appeal from that decision on the 8th of March 1916 to the Assistant Collector and the decision was, owing to suspicions raised in his mind by the condition of the forged *kabuliyat*, reversed by him on the 18th of July 1916 as the Appellate Revenue Court. The Assistant Collector in consequence of the suspicions so raised proceeded, on the 28th of July 1916, to call for the explanation of the appellant Inamdar, and, accordingly, on the 10th of October 1916, a report on the matter was submitted to him by the appellant Mamlatdar. The Assistant Collector appears, after consideration of the explanation and the report, to have considered the matter serious and damanding further and closer inquiry. He, accordingly on the 7th of March 1917, applied for the assistance of the Criminal Investigation Department from the District Magistrate. This assistance was granted and on the 2nd of July 1917 a full report was submitted to him by the Deputy Superintendent of Police. After considering all the matters before him he then passed an order referring the matter for inquiry to the nearest First Class Magistrate under section 476 of the Criminal Procedure Code. The result was that the appellants were committed to take their trial before the Sessions Court of Satara.

The appellants upon these facts urge in support of their objection that even if the offence was brought under notice in the judicial proceeding of the Assistant Collector as regards the appellant Inamdar, it was not brought to notice as regards the appellant Mamlatdar. It has further been urged that the whole of the preliminary inquiry ought to have been made by the Assistant Collector and that he was *functus officio* after having made his reference to the District Magistrate and had no longer any jurisdiction to pass an order under section 476 of the Criminal Procedure Code. It has also been urged that there was delay in proceeding under that section and that that delay was fatal to his jurisdiction in accordance with certain rulings which have been quoted before us of the Madras and Calcutta High Courts.

It seems to me, however, that there is no substance in any of these arguments. It is to be noticed with regard to the first argument that what is provided for is that after making preliminary inquiry into any offence brought to notice, the case may be sent for inquiry to the nearest Magistrate of the first class, that is to say, it is the case which is to be sent and not necessarily all the offenders who may be concerned in the commission of the offence. The subsequent clause providing the sending of the offender in custody is permissive and would appear to me to refer only to such offender or offenders as might at that time be known and be within the grasp of the enquiring officer. It seems to me, therefore, that no solid objection can be taken to the jurisdiction on the ground that the criminality of the appellant Mamlatdar was only discovered afterwards in the course, not of the judicial proceedings in the revenue matter, but in the course of the preliminary inquiry into the suspected criminal offence.

Nor does there seem to me to be any more substance in the second argument that the whole inquiry should have been made by the Assistant Collector. It is to be observed that the preliminary inquiry to be made is only such inquiry as may be necessary, and it cannot be denied in this case that some inquiry at least was made by the Assistant Collector himself. It does not, therefore, appear to me to be a defect which could deprive him of the jurisdiction that he took the precaution of making a more careful and deliberate inquiry with the assistance of the Criminal Investigation Department. It seems to me that that was all he did and that his reference to the District Magistrate was merely to that officer as the executive controller of the Police and not to him in his judicial capacity as the District Magistrate. It is difficult in any case to see how the reference to the District Magistrate could have deprived the Assistant Collector of jurisdiction under section 476 of the Criminal Procedure Code.

With regard to the third argument as to delay it has first to be observed that there was, as a matter of fact, no undue

or unreasonable delay. The Assistant Collector's decision in the revenue proceedings was passed on the 18th of July 1916 and he took action within ten days on the 28th of July 1916. The rest of the time was occupied in the preliminary inquiry and it cannot, in my opinion, be said to be unreasonable looking to the complicated nature of the case which he had before him. But this third argument is supported by authority, and that authority requires respectful consideration. It has been held in the case of *Rahimadulla Sahib* v. *Emperor* (1) that it is essential to the jurisdiction conferred by the section that the order should be made either at the end of the judicial proceedings or so shortly thereafter that it may reasonably be said that the order is part of those proceedings. It was apparently felt that the last sentence required some modification to make it clear, and it was accordingly held in the later case of *Aiyakannu Pillai* v. *Emperor* (2) that the power conferred by the section ought to be exercised either in the course of the judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of those judicial proceedings. These two decisions were decisions by the Full Bench but were not unanimous. They were, however, followed by the Calcutta High Court in the case of *Begu Singh* v. *Emperor* (3), in which it was held that the power conferred by the section ought to be exercised immediately after conclusion of the trial. It was followed again in another case by the Calcutta High Court in the case of *Bahadur* v. *Eradatullah Mallick* (4), in which it was laid down that action must be prompt and expeditious in order to be within the jurisdiction conferred by the section. On the other hand there are some *obiter dicta* of Chandavarkar, J., to the contrary in the case of *In re Lakshmidas Lalji* (5) and those *dicta* were followed by the Sessions Judge. It seems to me, with every respect to the contrary decisions of the majority of the learned Judges of the Madras and Calcutta High Courts, that the *dicta* of Chandavarkar, J., in this matter are correct and that to hold otherwise would be to read into the section words of limitation which have not been placed there by the Legislature. It is no doubt expedient that action under that section should be taken with as much promptitude as possible. But there does not appear to me to be anything in the wording of the section or in the reasons for its enactment to hold that officers acting under it are bound to make their inquiry either in the actual course of the judicial proceedings or so shortly thereafter as to make it really a continuation of those proceedings. The section appears to have been enacted, not with the intention of protecting offenders against public justice from prosecutions by the Courts, but on the contrary to facilitate, wherever and whenever those offences might come to notice, such prosecutions by the Courts.

[After discussing evidence His Lordship observed as follows :—]

It seems to me for these reasons that the appeals of both the Inamdar and the Mamlatdar ought, on the charges so far discussed, to be dismissed and the convictions and sentences confirmed. But there were other charges against them in respect of another tenant named Dnyanu Gopal. The appellant Inamdar was acquitted of having made a false claim against this tenant Dnyanu Gopal but convicted of having abetted a corrupt judgment against him by the appellant Mamlatdar. The appellant Mamlatdar was convicted of forgery in altering the statement of this tenant Dnyanu Gopal and of having delivered a corrupt judgment against him in the Mamlatdar's Revenue Court. The Assessors concurred in the acquittal and in the convictions but were divided in opinion as to the forgery of the statement of Dnyanu Gopal. The acquittal was accepted and sentences concurrent with the rest of the sentences were recorded in respect of the convictions by the Sessions Judge. But it is difficult, in view of the acquittal of the appellant Inamdar of having made a false claim against this tenant Dnyanu Gopal, to support his conviction for abetting

(1) 31 M. 140 (F. B.); 17 M. L. J. 584; 3 M. L. T. 79; 7 Cr. L. J. 54.

(2) 1 Ind. Cas. 597; 32 M. 49 (F. B.); 19 M. L. J. 42; 4 M. L. T. 404; 9 Cr. L. J. 41.

(3) 34 C. 551 (F.B.); 11 C. W. N. 568; 5 C. L. J. 508; 2 M. L. T. 298; 5 Cr. L. J. 398.

(4) 6 Ind. Cas. 801; 37 C. 642 at p. 649 (F. B.); 14 C. W. N. 799; 12 C. L. J. 45; 11 Cr. L. J. 407.

(5) 32 B. 184; 10 Bom. L. R. 28; 3 M. L. T. 116; 7 Cr. L. J. 35.

a corrupt judgment against this tenant by the appellant Mamlatdar. It is similarly difficult to support the convictions of forgery in respect of the statement of this tenant Dnyanu Gopal and of having delivered a corrupt judgment against him recorded against the appellant Mamlatdar. It seems to me, therefore, that the convictions on these charges ought to be reversed in the case both of the appellant Inamdar and the appellant Mamlatdar.

HEATON, J.—* * * * * * I should like to add one word about the legal point which was argued. I make it very brief, because I am glad to think that legislation will shortly wipe out the present sections 195 and 476 of the Criminal Procedure Code and in so doing will abrogate the medley of conflicting decisions which we have on those sections. I cannot, after giving the matter my best consideration, hold that section 476 limits the jurisdiction of a Court in the manner suggested in the Madras and Calcutta cases. There is no limitation of jurisdiction in the words of the section. The limitation is to be found, if it is found at all, by implication. Arguments as to implication in a case of this kind are always such that some will appeal to one mind, some to another. I confess that I myself see more force in the view taken by the two Judges of this Court who have expressed themselves than by the Judges of the Calcutta and Madras High Courts.

Then as to the word 'offence in' section 476. Of course where you have an offence, you must have an offender, though you may not know who the offender is. But it seems to me that the section not only intends to, but is expressly worded so that it may confer on a Court a power to inquire into a case and to take action, whoever may prove to be the offender, although months or even years may elapse before it becomes known with any degree of certainty who the offenders are.

I agree to the order proposed by my learned brother.

Convictions and sentences confirmed.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS REVISION No. 50 OF 1918.

January 21, 1919.

Present:—Mr. Justice Mullick.

DOHRA AHIR AND ANOTHER—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 110—Notice omitting to specify nature of evidence—Cross-examination of witnesses—Accused taken by surprise.

Where in a notice to an accused person under section 110 of the Criminal Procedure Code it is not possible to give detailed information as to the nature of the evidence which the prosecution intend to adduce at the trial, the omission to give such details is not an irregularity sufficient to vitiate the proceedings. If the evidence takes the accused by surprise, he has a right to ask the Magistrate for sufficient time, after the evidence has been disclosed to commence his cross-examination. But where cross-examination is indulged in at great length and a large number of witnesses is cross-examined, the accused cannot object that he was taken by surprise. [p. 261, col. 1.]

Criminal revision against the order of the Sub-Divisional Officer, Shahabad, dated the 30th July 1918, drawing up proceedings under section 110, Criminal Procedure Code.

Mr. *R. L. Dutt*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application relating to a proceeding under section 110, Criminal Procedure Code, against 11 persons. The petitioners before me are two, Dhora Ahir and Rupdhari Ahir. They attack the proceeding on the ground that the notice issued upon them is indefinite and does not comply with the provisions of section 110, Criminal Procedure Code. It is contended by Mr. R. L. Dutt, who appears on behalf of the petitioners, that it was the duty of the Magistrate to detail in the notice each of the particular offences in respect of which the petitioners were suspected and he relies upon the case of *Kripasindhu Naiko* v. *Harikrishna Naiko* (1) in support of his contention. Now the notice charges the petitioners with having been habitual robbers, receivers of stolen properties, habitually practising theft, and habitually committing offences involving a breach of the peace; in my opinion it is not

(1) 47 Ind. Cas. 277; (1918) M. W. N. 751; 8 L. W. 461; 19 Cr. L. J. 905.

possible in respect of charges such as these to give detailed information as to the nature of the evidence which the prosecution intend to adduce at the trial. If the evidence takes the petitioners by surprise, then clearly the petitioners have a right to ask the Magistrate for sufficient time, after the evidence has been disclosed, to commence their cross-examination. In the present case I find that no application for time was made, but on the contrary the Mukhtar of the petitioners entered into cross-examination at great length and actually cross examined 40 witnesses before the present application for revision was made. Therefore, the objection that the petitioners were taken by surprise does not appear to me to be well-founded.

Then it is contended that in the notice there was no mention of the charge that the petitioners were of a desperate and dangerous character. Now it appears that after the first witness for the prosecution had been examined, a witness was called for the prosecution who stated that there was material in the Police report for a charge under this head. It is not known whether the trying Magistrate intends to proceed against the petitioners under clause (*f*), section 110, Criminal Procedure Code, and till an order under this clause is made, it is not open to the petitioners to take the objection that a joint trial in respect of a charge under this head is illegal; it may be that the Magistrate is proceeding only in respect of those clauses which permit a joint trial of several accused; therefore, it appears to me that there is no error of jurisdiction. The proceeding having been regularly instituted, the question is, whether the Trying Magistrate has shown bias against the petitioners so as to render himself incompetent to proceed with the trial. Now an affidavit has been filed by the petitioners charging the Magistrate with having illegally stopped cross-examination. It is said that the Mukhtar for the petitioners was obliged to retire from the case because the Magistrate declined to allow him to cross examine. The Magistrate's reply to the affidavit has been submitted to us by the District Magistrate, and it does not appear from that reply, which I accept as true and correct, that the Magistrate has been guilty of any display of animus against the accused. He cautioned the Mukhtar at the beginning of the trial against irrelevant cross examination. The Mukhtar declined to go on with the case and the Magistrate persuaded him to reconsider his decision and to proceed. At a later stage again the Mukhtar committed the same offence and upon the Magistrate's declining to permit irrelevant cross examination the Mukhtar withdrew from the case.

It is contended by Mr. R. L. Dutt that the Magistrate has declined to record material questions and material answers. It is impossible for me to judge upon this point, but from the report of the Magistrate this does not appear to be a correct statement of fact. If the Magistrate has irregularly shut out cross-examination, I understand that the petitioners have already placed upon the record several petitions detailing particular questions which he has declined to allow, and in the event of the petitioners being bound down, they will have an opportunity of moving the District Magistrate under section 125, Criminal Procedure Code, and showing him the irregularity in the proceedings of the trial Court. But at the present stage I am quite unable to accede to the prayer that I should intervene and hold that there has been in fact such an irregularity in procedure that the case must be transferred from the file of the trying Magistrate to that of some other Magistrate.

The learned Vakil for the petitioners has also drawn attention to an incident which occurred in Court between the Mukhtar and the Court Sub-Inspector in respect of a note-book. He states that this book contained Police papers, and that he asked the Court to examine this book in connection with the trial. There is nothing whatsoever to show that this book contained Police papers, and the learned Vakil was unable to make a definite reply when I asked him whether or not he knew as a fact that there were Police papers in that book. It does not appear that the Magistrate has been guilty of any irregularity in this matter.

I have to observe in conclusion that even in this Court the petitioner's Vakil has not hesitated to criticise adversely the improper conduct of the trying Magistrate,

He has not hesitated to state in open Court before me that the Magistrate is under the thumb of the Police. Now this observation has been made without any foundation whatsoever, and I did not expect it from a senior lawyer of the standing of the learned Vakil.

The application is dismissed.

Application dismissed.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 262 OF 1918.

September 25, 1918.

Present:—Mr. Justice Heaton and Mr. Justice Hayward.

THE GODHRA MUNICIPALITY—

APPLICANT

versus

HARILAL LALLUBHAI SONI—

OPPONENT.

Bombay District Municipalities Act (III of 1901), s. 96—Permission to build—Time-limit, power of Municipality to impose.

Accused obtained permission from the complainant Municipality to re-build his house. The permission purported to be limited in effect to six months. The accused was found building his house three years after the date of the permission:

Held, that there being no proof that the work was not begun within six months from the date of the permission, the accused was not guilty of any offence. [p. 263, col. 1.]

Per *Heaton, J.*—A Municipality has power to say that a work to which it gives permission under section 96 of the Bombay District Municipalities Act shall be begun within a certain time, but it is doubtful whether it has power to say that a work must be finished within a given time. [p. 263, col. 1.]

Per *Hayward, J.*—A time-limit was not contemplated by the Legislature in enacting section 96 of the Bombay District Municipalities Act, and, therefore, such a limit contained in a permission to build is *ultra vires*. [p. 263, col. 2.]

Criminal application for revision against an order of acquittal passed by the Bench of the Magistrates at Godhra.

FACTS of the case appear from the following order delivered on 1st August 1918 by Heaton and Hayward, JJ.

HEATON, J.—We have decided to grant a Rule in this case, but as it is most unusual in this Court to grant a Rule in the case of a revisional application against an acquittal, I will state briefly the reasons which have induced me to assent to the issue of the Rule.

The accused in this case was tried for disobeying the law as contained in a section of the Bombay District Municipalities Act in that he built a house without permission from the Municipality. He pleaded that he had in fact obtained the permission of the Municipality. But it appears from the judgment of the lower Court that this permission was limited to building within a certain time, and thereupon a point of law was raised whether the Municipality had not power to impose such a time-limit. If it had the power, then on the judgment of the Magistrates the man ought to be convicted. If the Municipality had not the power, he was rightly acquitted. Whether or not the decision of the Magistrates was erroneous is, of course, a matter as to which one cannot express any opinion without hearing both sides argued. But it is clear on the face of the judgment that the Magistrates have pronounced on what may prove to be a difficult and is certainly a very important point of law; important because it affects probably every Municipality in the Presidency and also because it may affect a very large number of house holders in Municipal Districts. There is no question of evidence in the case. Our decision, whatever it may be, will not in any way be governed by a question of evidence or by a consideration whether evidence has been rightly or wrongly appreciated. The matter involves this important point of law and this only.

Therefore it is that I assent to the issue of a Rule to show cause why the order of acquittal passed by the Magistrates should not be set aside and the Magistrates be directed to dispose of the case according to law.

HAYWARD, J.—I concur. I think the Rule ought to be issued on the principles laid down in the case of *Faredoon Cowasji Parbhu, In re* (1).

Mr. *G. N. Thakor*, for the Applicant.

(1) 40 Ind. Cas. 316; 19 Bom. L. R. 354; 18 Cr. L. J. 668; 41 B. 560.

AMRIT SONAR *v.* EMPEROR.

Mr. *K. M. Munshi* (with him Mr. *M. H. Mehta*), for the Opponent.

JUDGMENT.

HEATON, J.—In this case, my learned colleague and myself are both agreed that a case is not made out for interfering with the order of acquittal. For myself I will express my opinion but I do not propose to give detailed reasons for it, as I think that the point discussed, should it arise again, will have to be decided by a more definite consensus of opinion. I am disposed to think that the Municipality has power to say that a work to which it gives permission under section 96 of the Bombay District Municipalities Act (Bombay Act III of 1901) shall be begun within a certain time. But I am doubtful whether the Municipality has power to say that a work must be finished within a given time. It is not proved in this case that the work was not begun within the time stated. It follows, therefore, that, in my opinion, the order of acquittal was correct. I would discharge the Rule.

HAYWARD, J.—The accused obtained permission to re build his house on the 22nd October 1915. This permission purported to be limited in effect to six months. It was granted by the Godhra Municipality. It appeared that he was re-building his house a considerable time after the lapse of the period limited, *viz.*, on the 3rd January 1918. He was accordingly prosecuted for re-building without permission, but he was acquitted on the ground that the limitation of the period was illegal by the Bench of Honorary Magistrates, Godhra. The substantial question before us is, whether the period of limitation was legally imposed by the Godhra Municipality under section 96 of the Bombay District Municipalities Act (Bom. Act III of 1901).

Now it was held that such limitation was illegal in the case of *Queen-Empress* v. *Thakordas* (2) under section 33 of the old Municipal Act (Bom. Act VI of 1873). It has, however, been contended that that ruling should not be applied here because of the words "the Municipality may issue such order as they think proper with reference to the work proposed and etc." in clause 2 of section 96 of the Bombay District Municipalities Act III of 1901. It might, of course, be held that the imposition of a period of limitation would literally fall within these words; but it would appear to me, after reading the whole section with its many clauses, sub-clauses and sub paragraphs, that such a power was not contemplated. The main object apparently was to secure that there should be a speedy decision as to the conditions under which re-building should be allowed in order to interfere as little as possible with the vested rights of owners. It was similarly held that no variation could subsequently be made in the conditions granted by Sir Stanley Batchelor in the case of *Kareem Ranjan* v. *Emperor* (3). It would, at the same time, be too much in my opinion to say that there could arise no circumstances whatever, under which a permission once granted might not reasonably be held to have lapsed but if express power to impose limitation by time should be thought necessary, that would, in my opinion, be a matter for express enactment by the Legislature.

We ought, therefore, in this view to hold that the Bench of Magistrates rightly disregarded the time limitation contained in the permission to re-build as *ultra vires* and a limitation not contemplated by the Legislature in enacting in its present form section 96 of the Bombay District Municipalities Act III of 1901.

Rule discharged.

(2) (1893) Rat. Unrep. Cr. C. 684.

(3) 39 Ind. Cas. 298; 19 Bom. L. R. 67; 18 Cr. L. J. 458.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 22 OF 1919.

March 25, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

AMRIT SONAR—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 235, 243—Counterfeit coins, possession of—Hindu joint family—Coins found in verandah of joint house—Presumption—Possession of manager.

AMRIT SONAR *v.* EMPEROR.

In order that coins may be counterfeit, it is not essential that they should exactly resemble genuine coins, or that they should be of silver and not of some other inferior metal. It is sufficient if they are of the same size as the King's coins and bear the imitation of the Crown and surrounding decorations as are found in a genuine coin. [p. 265, col. 2, p. 266, col. 1.]

Some counterfeit coins and a mould for counterfeiting were found buried under the floor of the verandah of a house occupied by a Hindu joint family and the father as the head and managing member of the family was convicted of being in possession of the articles found. It appeared that the verandah was used by the son of the accused as a shop, while the father looked after cultivation, and, excepting the discovery of the articles, there was no evidence to account for their presence, or of the accused having been seen in possession of counterfeit coins or instruments for coining, or that he had ever used the verandah or carried on business in the shop:

Held, that, in the circumstances, the presumption that the managing member of a Hindu family must be held to be in possession of articles found in the family dwelling-house could not be used against the accused, because (*a*) although as head of the family he was supposed to have control over the house, it was impossible for him to know of tiny things placed by a junior member of the family in a place which was not shown to have been under his direct control, and (*b*) the evidence did not exclude the possibility of the articles having been surreptitiously introduced by a stranger. [p. 267, cols. 1 & 2]

Criminal appeal against the order of the Sessions Judge, Bhagalpur, dated the 18th December 1918, convicting the accused under sections 235, 243, Indian Penal Code, disagreeing with both assessors.

FACTS of the case are fully set out in the judgment of Mr. Justice Jwala Prasad.

Mr. *Khurshed Husnain*, for the Appellant.—The shop room being open on two sides, it would not be difficult for an enemy to put the moulds in that place. There is evidence of enmity which cannot be discarded. The possession must be exclusive in order to saddle me with criminal liability. Reads Best on Evidence and Gour's Commentary on the Indian Penal Code; quotes *Baman* v. *Emperor* (1) and relies on the observation of Batty, J., in *Emperor* v. *Hari Maniram Sonar* (2).

The coins in this case are not counterfeit coins. And there is no offence in keeping them than otherwise it would be an offence to have chocolate rupees, or impression of rupees on other kinds of sweets which are daily sold in the market.

Mr. *Manohar Lall*, Assistant Government Advocate, for the Crown.—The leading case on the question of possession, the case of joint family, is *Jagjiban Ghose* v. *Emperor* (3); see also *Queen-Empress* v. *Sangam Lal* (4), *King-Emperor* v. *Ali Husain* (5) and *Emperor* v. *Budh Lal* (6). The evidence is that father and son both work in the shop as goldsmiths, therefore, *prima facie* the possession of the articles found in the shop, verandah would be that of the father and he must be presumed to be aware of their existence. The onus is on the accused to show that he knew nothing about it, but the accused deny that the articles were found there. The shop room is no doubt open, but the articles were found 18 inches deep in the floor and it is not possible for an outsider to put the moulds at such a depth without being detected either by the owners and occupants of the house or by close neighbours.

The evidence of enmity is not strong. The moulds show the impression of the coins found in them. The coins found are fair imitations of genuine coins, are much below weight and have not the ring of the genuine coin. Therefore, they are, undoubtedly, counterfeit and the moulds, being kept in the cases held together by iron springs of a crude character, were evidently used for preparing the counterfeit coins.

JUDGMENT.

JWALA PRASAD, J.—The appellant Amrit Sonar has been convicted by the Sessions Judge of Bhagalpur on charges under section 235, Indian Penal Code, of being in possession of certain instruments, to wit, moulds for the purpose of using the same for counterfeiting King's coins and under section 243, Indian Penal Code, of being fraudulently in possession of King's coins, namely, two whole rupees and one 1 anna piece, having known at the time when he became possessed of them that they were counterfeit.

(1) 1 P. R. 1903 Cr.: 47 P. L. R. 1903.
(2) 6 Bom. L. R. 887; 1 Cr. L. J. 860.

(3) 2 Ind. Cas. 681; 13 C. W. N. 861; 9 C. L. J. 665; 10 Cr. L. J. 125.
(4) 15 A. 129; A. W. N. (1893) 45; 7 Ind. Dec. (N. S.) 800.
(5) 23 A. 306; A. W. N. (1901) 103.
(6) 29 A. 598; A. W. N. (1907) 187; 6 Cr. L. J. 23.

AMRIT SONAR *v.* EMPEROR.

The facts are simple. On receipt of certain information the Sub-Inspector of Partapganj Police Station came to the village of the accused with two Dafadars and two constables, on the evening of the 23rd August, and stayed that night at the Gola of one Khair Singh (P. W. No. 4). He gave confidential instructions to the Defadars to watch the house of the accused at night. The next morning, the 24th August, he directed one Ganga Prasad, Dafadar of the village, and the Choukidars to surround the house, and made a search of the house of the accused in the presence of some witnesses of the village, namely, Khair Singh (P. W. No. 4), Bheju Labh and Rup Lal Singh. Nothing suspicious was found in the portion of the house intended for the residence of the accused and his family. The Sub-Inspector then dug the floor of an open verandah and found a small piece of dirty cloth buried underneath the floor. In the cloth there were two moulds, Exhibits 1 and 2, each containing a coin—one a counterfeit rupee, Exhibit 1 (*a*), and the other a counterfeit one anna, Exhibit 2 (*a*), a third counterfeit rupee, Exhibit 3, was also found in the cloth. The cloth was buried about one cubit deep. There were other instruments found buried in another spot in this verandah, namely, a hammer and a crucible, Exhibit 4. The two places were near each other.

Upon the above facts the appellant Amrit Sonar and his son Kapur Chand Sonar were committed to the Court of Session. The appellant is aged 50 years and his son is aged 38 years. The trial was conducted witn the aid of two assessors who returned a verdict of not guilty, being of opinion that the counterfeit coins and the moulds were placed in the accused's shop by some one else. Accepting the verdict of the assessors the learned Sessions Judge acquitted Kapur Chand Sonar, whereas disagreeing with them convicted the father Amrit Sonar, appellant, and sentenced him to two years' rigorous imprisonment under each count, the sentences to run concurrently. For the conviction of the appellant the learned Sessions Judge recorded the following finding:—

"There is nothing in the trial in this Court to suggest how and when the articles could have been placed under the shop floor by others than the accused themselves, or by one of them. The moulds are instruments for counterfeiting coins and were found in possession of the accused, who, I think, should be held to be equally guilty. The coins are counterfeit King's coin and anyone must have known when he became possessed of them that they were counterfeit. Their possession was fraudulent. If the possession of the son Kapur Chand be considered distinct from the possession of his father Amrit, he should be given the benefit of the doubt. It is stated by one witness that the father looks after the cultivation and the son works in the shop, but the evidence on the whole is that both work in the shop and this is probably the truth. *Prima facie*, the possession of articles found in the shop would be that of the father, and I do not consider from the circumstances he was not aware of their existence. The son in the absence of any special proof may be exonerated."

The finding of the Sessions Judge that the coins are counterfeit and that the moulds were used for preparing counterfeit coins may be accepted. Prosecution witness No. 5, Bhado Mandal, Potedar of the Bhagalpur Treasury, whose duty is to search for counterfeit coins, says that the said coins are conterfeit and that the rupees are not of silver and are below weight and that they appear to be of lead, and that the one anna piece also appears to be of lead.

The coins and the moulds were called for and produced in this Court for inspection. The inspection has confirmed the view taken by the learned Sessions Judge, which is also supported by the evidence on the record. It is not essential for coins to be counterfeit that they should be exact resemblance of genuine coins. It is sufficient that they are such as to cause deception and may be passed for genuine coins within the definition of counterfeit under section 28, Indian Penal Code: *Pirbhu* v. *Queen-Empress* (7) and *Public Prosecutor* v. *Kona Thirumala Reddi* (8) It is also immaterial that they are not of silver but are of some other inferior metal. The coins bear the

(7) 4 P. R. 1899 Cr.
(8) 1 Weir 219.

impression of 1906 and are of the same size as the King's coins and bear the imitations of the Crown and the surrounding decorations as are to be found in a genuine coin. The moulds are also apparently capable of turning out the counterfeit coins. One of the rupees and the one anna piece were actually found in the moulds held together by iron springs. There can, therefore, be hardly any doubt that the coins in question are counterfeit and that the moulds were used for preparing the counterfeit coins. There can also be no doubt as to the articles having been found by the Sub-Inspector at the search under the floor in the verandah.

The only question, therefore, to be decided in this case is whether upon the above finding the accused can be said to be in possession of the said counterfeit coins and the moulds. In order to determine this point, it is necessary in the first instance to consider the position of the verandah in which the said articles were found. The verandah is separate from but close to the residential huts of the accused and his family. No plan of the verandah and the house containing the huts has been placed on the record. It may, however, be gathered from the evidence of the Sub-Inspector, P. W. No. 1 that the verandah is in the bazar and it faces south and a part of it is closed on that side with a mat two cubits high nearly reaching the eaves. There is a village path outside. There is a road on the west. P. W. No. 2 says that the verandah is 15 to 20 cubits long and that it is an open one. The *hat* of the bazar is a few paces off from it. The inner apartments are enclosed. The verandah in question is used as a shop for the purposes of carrying on goldsmith's business.

Excepting the discovery of the articles buried under the floor of the verandah which was used as a shop, there is no evidence as to how the articles came to be there, or of the accused having been seen in possession of any counterfeit coin or instrument for counterfeiting coin. There is also no evidence on the record of the accused having ever been seen using the verandah, or carrying on any business in the shop. The Sub-Inspector got certain information which led him to make the search in question. The informant might have probably given some information upon this point, but he has not been examined. Of course the Sub-Inspector was not bound to examine him. The village people who are supposed to be the neighbours have not said anything in their evidence as to whether the accused was seen working in the shop, or was ever in control or possession of the articles in question. The statement of prosecution witness No. 3, Bhai Lal, that the accused (meaning both the accused and his son) are goldsmiths and work in the same shop as being father and son, as well as the statement of prosecution witness No. 4, Khair Singh, that the accused are goldsmiths and have a shop, are too vague to prove that the accused was in actual possession of the shop or carried on business there. The learned Sessions Judge himself does not definitely hold that the accused was in direct possession of the shop. He simply says that "the evidence on the whole is that both work in the shop and this is probably the truth." On the other hand witness No. 6 for the prosecution, Ram Lal Sahu, has definitely stated that Kapur Chand, the son of the appellant, works in the shop and that the appellant looks after the cultivation and that the appellant has 32 *bighas* of cultivation besides cattle. The learned Sessions Judge has simply stated this evidence but has not clearly rejected it, nor has he given any reason for not accepting it. Kapur Chand, son of the accused, is an elderly person, being 38 years of age, and it is not unreasonable or unusual that he should have been in exclusive charge of the shop, particularly when the cultivation of the accused is an extensive one, consisting of 32 *bighas* of land. Except the evidence of P. W. No. 6, which I have no reason to discard, the shop must be held to be in exclusive possession and control of the son of the accused and that it has not been proved that the accused had anything to do with the shop. The learned Sessions Judge himself has held the appellant responsible for the articles in question only upon the presumption that "*prima facie* the possession of the articles found in the shop would be that of the father." The observation of their Lordships of the Allahabad High Court in the case of *Queen-Empress* v. *Sangam Lal* (4) may possibly lend support to the view that presumption as to possession and control of articles found in a house may be made against

the house-master. Their Lordships, however, declined to lay down an inflexible rule, as is clear from the following observation:—"We do not lay down as an invariable rule that where weapons are found in a house occupied by a Hindu joint family living jointly, possession is necessarily that of the managing member, and the managing member only; but we do lay down that in all cases where it is sought to establish that possession and control are with some member of the family other than the managing member, there must be good and clear evidence of the fact before we can, in an act of this kind, arrive at such a conclusion. The act is one highly penal and one which must be strictly construed." *Vide* also *Jogjiban Ghose* v. *Emperor* (3). In the Allahabad case the conviction of Sangam Lal being in possession of arms without license was set aside, inasmuch as the room in which the almirah containing the arms was placed was in the occupation of the accused and Ram Chand, the managing headman of the family, where other persons also had access. There were in the room a *masnad* and other pieces of furniture which showed that the managing member Ram Chand was in the habit of using that room. In the case before us nothing was found in the shop to indicate that the accused Amrit Lal, father of accused No. 2, was also using the shop, rather the positive evidence is that the appellant's son, Kapur Chand, used to work in the shop. The presumption that a managing member must be held to be in possession of the house is rebutted in the present case. It depends on the circumstance of each case. Where the articles found are large properties and placed in a conspicuous place to which the managing member may have access and over which he could exercise control and which could not be overlooked by him, the presumption against the managing member may fairly be made, as observed by Betty, J., in *Emperor* v. *Hari Maniram Sonar* (2). But in a case where the articles are small ones, like those in the present case, the presumption cannot be properly raised. Although the managing member as the head of the family is supposed to have control over the house, it is impossible for him to know of tiny things placed by a junior member in a place which is not shown to have been in direct control of the managing member. The case of *Emperor* v. *Hari Maniram Sonar* (2) appears to be similar to the present case, and the evidence in that case also appears more or less to be like what we have got in the present case. The learned Judges Betty and Aston in that case, while not agreeing as to the legal connotation of the word 'possession' in sections 235 and 243, Indian Penal Code, held that the evidence was not sufficient to bring home the guilt to the accused, and set aside the conviction. Aston, J., at page 897, observed: "The evidence cannot be said to exclude the possibility of the articles having been surreptitiously introduced by a stranger." This remark appears exactly to apply to the present case.

In the case of *Nga San Nyein* v. *Emperor* (9), where the articles were found in the eaves of the kitchen and the side wall of the main building and there was some enmity, it was held that it was not improbable that the moulds were planted out of revenge and the accused knew nothing about them. In the present case there is equal, if not greater, reason to raise a suspicion that the articles found in the shop were planted there by some enemies of the accused. It is admitted by the witnesses for the prosecution, P. W. No. 4 Khair Singh and P. W. No. 6 Ram Lal, that the accused was on bad terms with certain persons in the village, notably Ram Prasad and Ganga Prasad Dafadar, who was deputed by the Sub-Inspector to watch the house the night before the search and also to surround it at the time of the search. The verandah is an open one with village path to the south of it and a road to the west, and does not open into the inner apartments of the accused which are enclosed. It would not have been difficult for anybody to plant the articles in the shop without the knowledge of the accused or his son.

The evidence in the present case also shows that the moulds were rusty and, therefore, were not in use recently. This would show that some rusty old moulds with the counterfeit coins were newly buried in the accused's shop, as is obvious

(9) 28 Ind. Cas. 152; 8 Bur. L. T. 131; 16 Cr. L. J. 264.

from the earth being loose at the places where the articles were found. This enhances the suspicion as to the articles having been buried by somebody other than the accused or his son. The assessors have taken this view and there is no reason why the finding of the assessors should not be accepted.

In the circumstances of the present case I am not prepared to hold that the appellant Amrit Sunar had possession of the articles or had control over them or that he had any knowledge that the articles were buried in the shop.

I would, therefore, set aside the conviction and acquit the accused. The conviction is accordingly set aside and the accused discharged from his bail.

MULLICK, J.—Although the case is one of great suspicion, I agree that it has not been established beyond all doubt that the articles in question could not have been put at the place where they were found by some person other than the accused.

I agree, therefore, that the appellant should be acquitted.

Conviction set aside.

PATNA HIGH COURT.
CRIMINAL REVISION No. 78 OF 1919.
April 7, 1919.
Present :—Mr. Justice Das.
THAKUR SINGH AND OTHERS—ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 367—Judgment, contents of—Failure to comply with provisions of section, effect of.

An accused person is entitled to have an independent judgment of the trying Court, and such judgment must be prepared in accordance with, and contain the particulars required by, section 367 of the Criminal Procedure Code, otherwise it is no judgment at all. [p. 269, col. 1.]

Where a Second Class Deputy Magistrate, thinking that a severer punishment should be inflicted on the accused than what he was authorised to award under the Code, recorded his full opinion and forwarded the proceedings under section 349 to the Sub-Divisional Magistrate, and the latter convicted the accused and wrote the following judgment, "I have perused this judgment, I agree with the findings arrived at by the learned trying Magistrate and convict all the eleven accused persons for being members of an unlawful assembly with the common object of committing theft as stated in the charge":

Held, that upon the test laid down by section 367 of the Criminal Procedure Code this was not a judgment at all. [p. 269, col. 1.]

Criminal revision against the order of the Sessions Judge, Gaya, dated the 10th March 1919, dismissing the appeal of the petitioners against their conviction and sentence by the Sub-Divisional Magistrate, 1st Class, Aurangabad, dated the 17th February 1919.

FACTS appear from the judgment.

Mr. *A. Majid* (with him Mr. *Jitendranath Sen Gupta*), for the Petitioners argued that the judgment of the Sub-Divisional Magistrate was no judgment at all under section 367, Criminal Procedure Code. The Sub-Divisional Officer simply adopted the finding of the trying Court, he did not even suggest that he had read the evidence and weighed it.

Mr. *Manohar Lall* (Assistant Government Advocate), for the Crown.—The trying Magistrate has written a long and exhaustive opinion. The Sub Divisional Magistrate, to whom the trying Court submitted the proceedings, adopted his findings. The order of the Sub-Divisional Magistrate ought to be read along with the fully considered opinion of the trying Court. The Sub-Divisional Magistrate was certainly in fault in not recording a judgment as required by section 367, but the accused have not been prejudiced at all, inasmuch as the learned Sessions Judge has himself recorded an elaborate judgment in which he has considered all the points in the case. Therefore the irregularity is amply cured by section 537, Criminal Procedure Code.

JUDGMENT.—The petitioners were tried before a Deputy Magistrate having 2nd Class powers, under sections 143 and 379 of the Indian Penal Code. The learned Deputy Magistrate thought that a severe punishment should be inflicted on the petitioners than what he was entitled to inflict under the Code. In this view he recorded a very full opinion and under section 349 of the Code of Criminal Procedure he submitted his proceedings to the Sub-Divisional Magis-

trate to whom he was subordinate. The Sub-Divisional Magistrate in his judgment says only this: "I agree with the findings arrived at by the learned trying Magistrate and convict all the 11 accused persons for being members of an unlawful assembly with the common object of committing theft as stated in the charge." It is argued before me that this is not a judgment at all. I agree with this contention. Section 367 of the Code of Criminal Procedure says what a judgment is, and it is quite clear to me that if the test laid down by section 367 is to be applied, the judgment of the Sub-Divisional Magistrate is not a judgment at all. The matter came up before the Sessions Judge of Gaya. He agreed with the contention that the judgment of the Sub-Divisicnal Magistrate was not a judgment at all, but he thought that the accused were not prejudiced and he, therefore, refused to interfere. In my opinion the petitioners were entitled to have the independent judgment of the Sub-Divisional Magistrate and I, therefore, remand the case to the Sub-Divisional Magistrate of Aurangabad for disposal according to law. The Sub-Divisional Magistrate will hear the parties before he proceeds to write out a judgment in the case.

The petitioners will remain on the present bail until they furnish fresh bail to the satisfaction of the District Magistrate of Gaya.

Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 220 OF 1918.

November 29, 1918.

Present:—Mr. Batten, A. J. C.

SHANKAR—APPLICANT

versus

BHAYAJI—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 145, 439—Proceedings under s. 145—Order of Civil or Criminal Court, evidentiary value of—Revision—Jurisdiction, want of, effect of.

In investigating the question of actual possession in a proceeding under section 145 of the Criminal Procedure Code, any previous order of a Civil or Criminal Court relating to the property in dispute may throw light upon the matter, but the evidentiary value to be attached to any such piece of evidence depends upon the particular circumstances of each case. If one of the parties to the proceedings was in actual possession of the property in dispute and lost that possession by the execution of a decree of the Civil Court, then it lies heavily on him to show that he has since regained possession. But if he was not a party to the civil decree and if it is not shown that either of the parties to the civil decree was in actual possession, then the former civil proceedings would be of no evidentiary value against him. [p. 270, cols. 1 & 2]

Although the Judicial Commissioner will ordinarily not interfere in revision in a proceeding under section 145, Criminal Procedure Code, he will do so where a Magistrate has acted without jurisdiction. An order placing a person in possession in proceedings under section 145 of the Criminal Procedure Code who has been long out of possession is an order made without jurisdiction and is, therefore, liable to be set aside in revision. [p. 270, col. 2; p. 271, col. 1.]

Mr. *P. S. Kotwal*, for the Applicant.

Mr. *D. T. Mangalmoorti*, for the Non-Applicant.

The Hon'ble Mr. *G. P. Dick*, Standing Counsel, for the Crown.

ORDER.—In this case the Sub-Divisional Magistrate has held in proceedings under section 145, Criminal Procedure Code, that the applicant Shankar has been in possession of the two occupancy fields in dispute since about April 1917 and that the present non-applicant Bhaya has for that period at least never been in possession. He, however, has held that according to the decree of a Civil Court under section 9 of the Specific Relief Act obtained against one Fastya, Bhaya ought to be in possession. The Magistrate's order runs as follows:—

"It appears to me that the successful party in the Civil Court should be maintained in possession against a person who, though not a party to the decree, derives his title from the unsuccessful party. In spite, therefore of the above finding on the facts that Bhaya only held symbolical possession and never exercised rights of ownership, whereas Shankar was in actual physical possession, I declare Bhaya to be entitled to possession and I hereby order that he be left in possession and I

forbid any disturbance of such possession until he is evicted therefrom in due course of law by a competent Court."

It should be explained that Fastya's father was the occupancy tenant and that Bhaya originally got possession as against Fastya by foreclosing a mortgage which Fastya's father had executed in his favour. Several months after getting possession under the foreclosure decree, Bhaya was evicted by astya, but succeeded in getting a decree for possession against Fastya in a suit brought under section 9 of the Specific Relief Act. Before Bhaya got possession under this second decree Fastya surrendered the fields to Shankar, who is the *malguzar* and who was not a party either to the foreclosure suit or to the suit under section 9 of the Specific Relief Act. The Magistrate seems to regard Shankar as holding under Fastya who is his tenant by reason of the surrender. This is hardly a correct description of a landlord who has obtained a surrender from his tenant. Although Shankar was not a party to the suit under section 9 of the Specific Relief Act, the Magistrate has held himself bound to give effect to the decree in that suit even as against Shankar. As authority for this course he cites the cases in *Gordon Sims* v. *Johurry Lal* (1) and *Krista Alhadini Dasi Radha Syam Panday* (2). The latter case is entirely irrelevant; the case of *Gordon Sims* v. *Johurry Lal* (1) does support the Magistrate's view, but that ruling has been criticised and its effects decidedly limited in the case reported as *Kulada Kinkar Roy* v. *Danesh Mir* (3), where it is observed at page 47: "In the investigation of this question (actual possession), any previous order of a Civil or Criminal Court relating to the property in dispute may throw light upon the matter, but the evidentiary value to be attached to any such piece of evidence must obviously depend upon the particular circumstances of the individual case." In other words, if one of the parties to the proceedings under section 145 was in actual possession and lost that possession by the execution of the decree, then it lies heavily on him to show that he has since regained possession. But if he was not a party to the civil decree and if it is not shown that either of the parties to the civil decree was in actual possession, then the former civil proceedings would be practically of no evidentiary value against him. It is urged for the applicant that a person who has not been for a considerable period in physical possession cannot be put in possession by the Magistrate under section 145 as such a procedure would be directly contrary to sub-section 6 read with sub-section 4. This contention is, in my opinion, undoubtedly correct. I would specially refer to the observations of Jenkins, C. J., in *Pandurang Govind Pujari In re* (4) and to the case reported as *Kochai Fakir* v. *Romesh Chandra Biswas* (5).

It is objected by the learned Standing Counsel and by the Pleader for the non-applicant in this Court that I have no jurisdiction to interfere in revision, and reference is made to the case reported as *Murat Singh* v. *Musammat Paika Bai* (6) and reliance is also placed on *Matukdhari Singh* v. *Jaisari* (7). As regards the latter case it is impossible to say from the report what was the nature of the irregularities alleged against the Magistrate. In Criminal Revision No. 176 of 1915, Drake-Brockman, J. C., following the cases reported as *Dewan Chand* v. *Queen-Empress* (8), *Dhani Ram* v. *Bhola Nath* (9) and *Bhana* v. *Emperor* (10), held that this Court has power to interfere in revision where a Magistrate purporting to act under section 145, Criminal Procedure Code, has really acted without jurisdiction. To decide a case on the question of title rather than on the question of actual possession is certainly, in my opinion, to act without jurisdiction, and this is what was held in *Kochai Fakir* v. *Romesh Chandra Biswas* (5). The order of the Magistrate is one that puts a person who has been long out of

(1) 5 C. W. N. 563.
(2) 7 C. W. N. 118.
(3) 33 C. 33; 10 C. W. N. 257; 2 C. L. J. 271; 2 Cr. L. J. 670 (F. B.).
(4) 25 B. 179; 2 Bom. L. R. 755.
(5) 35 C. 795; 12 C. W. N. 773; 8 Cr. L. J. 28.
(6) 17 C. P. L. R. 133; 1 Cr. L. J. 877.
(7) 41 Ind. Cas. 652; 39 A. 612; 15 A. L. J. 576; 18 Cr. L. J. 828.
(8) 2 P. R. 1899 Cr. (F. B.).
(9) 23 P. R. 1902 Cr; 135 P. L. R. 1902.
(10) 4 Ind. Cas. 860; 12 P. R. 1909 Cr.; 105 P. L. R. 1909; 11 P. W. R. 1909 Cr.; 11 Cr. L. J. 61.

possession in possession, and I hold that the Magistrate's order was without jurisdiction and set it aside. I have no power in revision to substitute an order that some one else should be put in possession, and I, therefore, remand the case for a fresh order by the Sub-Divisional Magistrate, which should be passed in accordance with law contained in sub-sections 4 and 6 of section 145, Criminal Procedure Code.

Case remanded.

PATNA HIGH COURT.

CRIMINAL REVISION APPLICATION No. 55 OF 1919.

March 14, 1919.

Present:—Mr. Justice Coutts.

NAND KISHORE LAL AND ANOTHER —PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 369—Revision, judgment passed in—Review, whether competent—High Court, power of.

The High Court has no power to review its judgment pronounced in revision in a criminal case. [p. 272, col. 2.]

F. W. Gibbons, In re, 14 C. 42 (F. B.); 7 Ind. Dec. (N. S.) 29, *Queen-Empress* v. *C. P. Fox*, 10 B. 176 (F. B.); 5 Ind. Dec. (N. S.) 502 and *Queen-Empress* v. *Durga Charan*, 7 A. 672; A. W. N. (1885) 177; 4 Ind. Dec. (N. S.) 867, followed.

Bibhuty Mohun Ray v. *Dasimoni Dassi*, 3 Ind. Cas. 393; 10 C. L. J. 80; 10 Cr. L. J. 287, doubted.

FACTS.—An order adverse to one Nand Kishore Lal and another having been passed under section 144, Criminal Procedure Code, by a Subordinate Court, they obtained a Rule from the High Court on the ground that the order complained of was entirely without jurisdiction. On the date fixed for the hearing of the Rule no one appeared for the petitioners and the High Court passed the following

ORDER.—No one appears on behalf of the petitioners and the learned Government Advocate points out that more than two months have elapsed since the date of the order passed under section 144 of the Code of Criminal Procedure. The order is, therefore, no longer in force. The application is dismissed.

Later on the Counsel for petitioners prayed for a review of this order of 11th March 1919 and the matter was heard on 14th March 1919.

Mr. *Sultan Ahmad*, Government Advocate, for the Crown, took the preliminary objection that the review was incompetent. Your Lordship cannot review your order of the 11th March having once signed it: *F. W. Gibbons, In re* (1), *Queen-Empress* v. *C. P. Fox* (2), *Queen-Empress* v. *Durga Charan* (3) and *Hale* v. *Emperor* (4).

There is unanimity as to this view in all the High Courts in India.

Mr. *S. Sinha*, for the Petitioners.—I do not dispute my learned friend's contention. This is sound law. My submission is that your Lordship never decided the case on the merits. Quotes *Bibhuty Mohun Roy* v. *Dasimoni Dassi* (5).

Your Lordship's order of the 11th March is no judgment. Your Lordship did not have in your mind the facts of the case. It was merely said that two months had expired. This High Court has interfered with orders under section 144, Criminal Procedure Code, even after the expiry of two months.

[COUTTS, J.—The point is whether I can review the order of the 11th; whether it is correct or incorrect is another matter.]

Reads Sohoni's Criminal Procedure Code definition of 'judgment.' The scope of the rule was "that the order was without jurisdiction." Your Lordship did not consider this point at all. The Government Advocate's pointing out that two months had expired was no argument. No argument on the facts was addressed to your Lordship on either side. I am not asking for a review at all, because there was no judgment. Penal Statutes should be construed liberally. I am damaged materially and have suffered great hardship.

The Government Advocate, for the Crown.—Your Lordship's power of interference in criminal revision is purely discretionary, even if the petitioners' case is

(1) 14 C. 42 (F. B.); 7 Ind. Dec. (N. S.) 29.
(2) 10 B. 176 (F. B.); 5 Ind. Dec. (N. S.) 502.
(3) 7 A. 672; A. W. N. (1885) 177; 4 Ind. Dec. (N. S.) 867.
(4) 1 Ind. Cas. 506; 9 Cr. L. J. 306; 1 P. R. 1909 Cr; 6 P. W. R. 1909 Cr.
(5) 3 Ind. Cas. 393; 10 C. L. J. 80; 10 Cr. L. J. 287.

good in law. In case of revisions no judgment need be written. The final authority can pass its order in one line.

Bibhuty Mohun Roy v. *Dasimoni Dassi* (5) deals with a case of default only, but here your Lordship also considered that two months had expired after the date of the order. Besides *Bibhuty Mohun Roy* v. *Dasimoni Dassi* (5) has been dissented from by a Full Bench of the Madras High Court in *Ranga Row* v. *Emperor* (6).

There is no law which enjoins your Lordship to pass an elaborate judgment. Section 367, Criminal Procedure Code, does not apply to the High Courts.

Mr. *S. Sinha*, in reply.—I concede all this. If your Lordship's order is a judgment its length is not material. The question is, did your Lordship direct your mind to the point at issue in this Rule, *viz.*, that the order complained of was without jurisdiction.

[*N. B.*—The ruling in *Raijab Ali* v. *Emperor* (7) was not cited at the Bar.]

JUDGMENT.—The learned Government Advocate raises a preliminary point that I have no power to review my order of the 11th March 1919 and in support of his contention he refers to the rulings in *F. W. Gibbons, In re* (1), *Queen-Empress* v. *C. P. Fox* (2) and *Queen-Empress* v. *Durga Charan* (3). In the first case cited it was held by a Full Bench of the Calcutta High Court that a verdict and judgment of a Division Bench of the High Court was final and that as soon as they had been pronounced and signed, neither the Court nor any Bench of it had power to revise the decision or to interfere with it in any way. In *Queen-Empress* v. *C. P. Fox* (2) it was held that a Division Bench of the High Court had no power to review its judgment pronounced in revision in a criminal case and the decision was the same in the case of *Queen-Empress* v. *Durga Charan* (3). In each of these cases it was a judgment of a Division Bench of the High Court which was in question, and it is not contended by Mr. Sinha for the petitioner that this view of the law is not correct but he relies on the case of *Bibhuty Mohun Roy* v. *Dasimoni Dassi* (5), in which it was held by a Bench of the Calcutta High Court that where a case had been disposed of in default of appearance, the Court had power to restore the case and to hear and determine it, and he argues that the order of the 11th March 1919 cannot be taken to be a judgment. I am unable to accept this argument. The application was dismissed, not merely because no one appeared on behalf of the petitioner, but because it was pointed out by the learned Government Advocate that more than two months had elapsed since the date of the order which had been passed under section 144, Criminal Procedure Code, and that, therefore, the order was no longer in force. Whether this view was right or wrong does not affect the matter. The point is that the dismissal was not merely on account of non-appearance but for another reason also. The order, therefore, although it does not dispose of the application on the merits, is a judgment. The case relied on by Mr. Sinha was one in which the application was dismissed purely and simply for default, and it does not apply to the present case. I may remark, however, that the view which was taken in that case has been dissented from by a Full Bench of the Madras High Court in the case of *Ranga Row* v. *Emperor* (6). In that case it was held that no distinction can be made between an appeal in which an order is passed without hearing and one in which there is a hearing and that even where a revision petition has been dismissed for default, a High Court cannot review its order. There is thus some doubt even in the case of a revision application which is dismissed for default, but the question does not really arise because as I have already pointed out this application was not dismissed only for default. This application for review and for restoration of the case is, therefore, rejected.

Application rejected.

(6) 16 Ind. Cas. 518; 13 Cr. L. J. 710; 12 M. L. T. 850; 23 M. L. J. 371; (1912) M. W. N. 982.
(7) 50 Ind. Cas. 25; 46 C. 60; 20 Cr. L. J. 265.

KARTAR SINGH *v.* INDAR SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2494 OF 1917.

June 18, 1918.

Present :—Mr. Justice Scott-Smith.

KARTAR SINGH—PLAINTIFF—APPELLANT

versus

INDAR SINGH—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 17—Compromise relating to property not in suit, whether requires registration—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise—Decree based on compromise relating to property not in suit, validity of—Jurisdiction of Court.

So far as a compromise relates to property extraneous to the suit, it requires registration and if unregistered, is inadmissible in evidence. [p. 275, col 1.]

A decree based on a compromise, in so far as it relates to property extraneous to the suit, is without jurisdiction and is inoperative. [p. 275, col 2.]

Second appeal from the decree of the Additional District Judge, Hoshiarpur at Jullundur, dated the 25th June 1917.

Bakhshi *Tek Chand*, for the Appellant.

The Hon'ble Pandit *Sheo Narain*, for the Respondent.

JUDGMENT.—The facts of the case out of which the present appeal arises are sufficiently given in the judgments of the lower Courts and need not be recapitulated at length. Briefly, Kartar Singh, plaintiff-appellant, as adopted son of Jaswant Singh, claims a one-fourth share in a certain house called *pohara* from Indar Singh, defendant, a cousin of Jaswant Singh. In 1906 there was a dispute as to the *status* of Sundar Singh, *pichhlag* of Amar Singh (see pedigree table set forth in the judgment of the trial Court). Amar Singh had made a Will in favour of Sundar Singh, and Indar Singh sued for a declaration that Sundar Singh was not the real son of Amar Singh and that on the death of the latter's widows the property left by him would go to the reversioners. Jaswant Singh was impleaded as a *pro forma* defendant, he being stated to be an heir who had not joined plaintiff in suing. A list of Amar Singh's property was attached to the plaint and included a one fourth share of the *pohara* in dispute. That case was compromised on the 28th November 1906. In accordance with the compromise most of the property left by Amar Singh was divided half and half between Indar Singh and Sundar Singh, but it was stipulated in regard to this *pohara* that the plaintiff Indar Singh would take the whole of it. It was further stated in the compromise that Indar Singh, Sundar Singh and Jaswant Singh agreed to it, and Jaswant Singh signed the compromise in token of his agreement. A decree was passed in accordance with the compromise, the whole of the *pohara* and not merely the one-fourth share claimed being entered therein. The lower Courts have dismissed the plaintiff's suit, on the ground that under that compromise Jaswant Singh gave up all his rights in the *pohara* in dispute. The lower Appellate Court has held that the compromise, being a petition addressed to the Court informing it that the parties had compromised their dispute upon certain terms, did not require registration. It relied upon *Prabh Dyal* v. *Gurmukh* (1) and *Khair-ul-nisa* v *Bahadur Ali* (2).

The plaintiff has filed a second appeal to this Court and two points are raised on his behalf:—

(1) that the compromise of 1906 has been wrongly interpreted and that, it really only intended to refer to the one-fourth share of the *pohara* which at that time was in dispute; and

(2) that if the compromise related to the whole of the *pohara*, it related to property extraneous to the suit, and that so far as it related to such property, it required to be registered and not having been registered, cannot be received in evidence.

It was also contended that the decree, so far as it related to any property which was not the subject of that suit, was without jurisdiction and inoperative.

Firstly, in regard to the interpretation of the compromise. Lengthy arguments have been addressed to me upon this point, but it can, in my opinion, be settled in a few words without any difficulty. It is true that at that time it was only Amar Singh's share of the *pohara* that was in dispute, namely, one-fourth; but it does not follow from this that Indar Singh did not stipulate as a consideration for agreeing to the compromise that he would

(1) 98 P. R. 1902; 18 P. L. R. 1903.
(2) 27 P. R. 1906; 11 P. L. R. 1906.

keep the whole of the *pohara*. The words entered in the compromise are clear in themselves and I do not see why we should reject the obvious meaning of them and suppose that the parties intended something else. I agree with the lower Courts that the intention of the parties at that time was that Indar Singh should take the whole of the *pohara* and not merely a one fourth share which was then in dispute.

Upon the second point, the first case referred to is the decision of the Privy Council in *Pranal Anni* v. *Lakshmi Anni* (3). In that case a *razinama* was filed in Court and a decree was passed thereon, but the *razinama* was not registered in accordance with the Registration Act. In regard to this their Lordships remarked at page 513:—

"The *razinama* was not registered in accordance with the Act of 1877; but the objection founded upon its non-registration does not, in their Lordships' opinion, apply to its stipulations and provisions in so far as these were incorporated with, and given effect to by, the order made upon it by the Subordinate Judge in the suit of 1885. The *razinama*, in so far as it was submitted to and was acted upon judicially by the learned Judge, was in itself a step of judicial procedure not requiring registration; and any order pronounced in terms of it constituted *res judicata*, binding upon both the parties to this appeal who gave their consent to it."

Now in that case as in those relied upon by the lower Appellate Court, *viz.*, *Prabh Dyal* v. *Gurmukh* (1) and *Khair-ul nisa* v. *Bahadur Ali* (2), the *razinama* only related to property then in suit and their Lordships of the Privy Council do not appear to have laid down that if it had dealt with matters not in suit, even then its registration would not have been necessary if a decree had been passed in accordance with it. This decision of the Privy Council has been referred to in many subsequent decisions of the Indian High Courts and has been differently interpreted. The next case referred to by Bakhshi Tek Chand on behalf of the appellant is that reported as *Birbhadra Nath* v. *Kalpatru Panda* (4), wherein the following passages occur in the head-note:—

"A consent decree, in so far as it relates to properties which are the subject-matter of the suit in which the decree is made, if not otherwise open to objection, is valid, but is inoperative in so far as it purports to affect properties which are outside the suit. A petition of compromise purporting to declare the rights and interests of the parties to a suit in property worth more than one hundred rupees, and to deal with properties not included in the suit, must be registered, and such a compromise, if unregistered, is inadmissible in evidence and cannot be enforced between the parties as a binding contract.

"A petition of compromise, in so far as it relates to properties in suit, does not require registration under section 17 of the Registration Act, and the decree, in so far as it gives effect to the settlement touching such properties, operates as *res judicata*; in so far, however, as it gives effect to the settlement touching properties extraneous to the litigation, the decree is clearly without jurisdiction and is inoperative; in relation to these extraneous properties, the parties must fall back upon the petition itself, which cannot, without registration, effectively declare or create title to immoveable property exceeding one hundred rupees in value."

This was followed in *Gurdeo Singh* v. *Chandrika Singh* (5), see last paragraph of the head-note. The same view was taken in *Ravula Parti Chelamanna* v. *Ravulaparti Rama Row* (6), in which a previous ruling of the same Court reported as *Natesan Chetty* v. *Vengu Nachiar* (7) was dissented from. *Raghubans Mani Singh* v. *Mahabir Singh* (8) adopts the contrary view, but as pointed out in *Ravula Parti Chelamanna* v. *Ravulaparti Rama Row* (6), that decision was not followed in subsequent decisions of the same Court reported as

(3) 22 M. 508 (P. C.); 1 Bom. L. R. 394; 26 I. A. 101; 3 C. W. N. 485; 9 M. L. J. 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. (N. S.) 363.

(4) 1 C. L. J. 388.

(5) 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611.

(6) 12 Ind. Cas. 317; 36 M. 46; 10 M. L. T. 232; 21 M. L. J. 870; (1911) 2 M. W. N. 265.

(7) 3 Ind. Cas. 701; 33 M. 102; 20 M. L. J. 20; 6 M. L. T. 313.

(8) 26 A. 78; 2 A. L. J. 564; A. W. N. (1905) 195.

Sadar-ud-din v. *Chajju* (9) and *Kashi Kunbi* v. *Sumer Kunbi* (10). Mr. Sheo Narain has cited *Ariyaputhra Goundan* v. *Ettiya Goundan* (11), but that case is distinguishable inasmuch as a minor was concerned there and the compromise as a whole was considered to be for his benefit and a decree was, therefore, passed embodying all the terms of the compromise. In that case the conflicting decisions in *Netesan Chetty* v. *Vengu Nachiar* (7) and *Ravula Parti Chelamanna* v. *Ravulaparti Rama Row* (6) were referred to, but the Court did not say which it approved of, but under the peculiar circumstances of the case adopted the view that the whole *razinama* must be taken to be submitted to and acted judicially upon by the Court, and became part and parcel of the decree and was admissible in evidence without registration. In my opinion the correct view to take is that enunciated in *Birbhadra Nath* v. *Kalpatru Panda* (4), *Gurdeo Singh* v. *Chandrika Singh* (5) and *Ravula Parti Chelamanna* v. *Ravulaparti Rama Row* (6). I, therefore, hold that so far as the compromise related to property extraneous to the suit, in other words, to three-fourths of the *pohara*, it required registration and not having been registered, it is inadmissible in evidence.

But Mr. Sheo Narain urges that even if the compromise required registration, the decree which was passed by the Court is a good decree and is binding on the parties. Now Order XXIII, rule 3, Civil Procedure Code, lays down that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit. In connection with the present case the important words of this rule are "so far as it relates to the suit." Now the suit in the case in question related to one-fourth share in the *pohara* and not to the whole of it and, therefore, the decree should not have been passed as regards the whole of it. This was the view taken in *Birbhadra Nath* v. *Kalpatru Panda* (4), *Gurdeo Singh* v. *Chandrika Singh* (5) and *Hari Chand* v. *Maghi Mal* (12). In accordance with these authorities the decree, in so far as it relates to the property extraneous to the suit, was passed without jurisdiction and is inoperative. I, therefore, hold that the plaintiff's suit has been wrongly dismissed by the lower Courts on the sole ground that under the compromise of 1906 Jaswant Singh relinquished his share in the *pohara* in dispute. Counsel agreed that if the appeal was accepted on this ground, the case would have to go back for disposal of the other points raised.

I accordingly accept the appeal and setting aside the orders of the lower Courts remand the case to the Court of first instance for re-decision in accordance with law. Stamps in this Court and in the lower Appellate Court will be refunded and other costs will be costs in the case.

Appeal accepted; *Case remanded.*

(9) 1 Ind. Cas. 558; 31 A. 13; A. W. N. (1908) 264; 5 A. L. J. 717.

(10) 5 Ind. Cas. 234; 32 A. 206; 7 A. L. J. 206.

(11) 42 Ind. Cas. 223; (1917) M. W. N. 751; 6 L. W. 635; 33 M. L. J. 615.

(12) 40 Ind. Cas. 675; 78 P. R. 1917; 95 P. W. R. 1917; 112 P. L. R. 1917.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 419 OF 1917.

April 15, 1919.

Present:—Mr. Justice Rafique and Mr. Justice Walsh.

DWARKA SINGH—DEFENDANT—APPELLANT

versus

RAMA NAND UPADHYA AND OTHERS—PLAINTIFFS AND DEFENDANT—RESPONDENTS.

Evidence Act (I of 1872), ss. 65, 66, 90, 114—Document more than thirty years old not produced—Secondary evidence, whether admissible—Presumption as to execution and attestation—Failure of party to produce document—Notice to produce, whether necessary.

A defendant who is in possession of a document more than thirty years old, which he knows will be required in evidence, is bound to produce it. If he fails to do so, the plaintiff is entitled to give second-

DWARKA SINGH *v.* RAMA NAND UPADHYA.

ary evidence of the contents of the document without giving any notice to the defendant or to his Pleader calling upon him to produce the original, such notice being excused by section 66 *a)* of the Evidence Act. [p. 278, col. 1.]

In a suit for redemption the defendant mortgagee was in possession of the deed of mortgage which was more than thirty years old, but he failed to produce it at the trial of the suit, and the plaintiff, in order to prove the mortgage, produced a certified copy of the deed:

Held, that the certified copy was admissible in evidence under section 65 of the Evidence Act, and that section 90 of the Act did not limit or confine the application of that section to cases where the original document is actually produced in Court. [p. 277, col. 2; p 278, col. 1.]

The presumption permitted by section 90 of the Evidence Act of the due execution and attestation of a document which is shown to be 30 years old may be made by the Court where that document cannot be produced but a certified copy of it is forthcoming. [p. 277, col. 2; p. 278, col. 1.]

Second appeal against the decision of the Additional Munsif, Jaunpur, dated the 20th July 1916.

Mr. *Radha Kant Malaviya*, for the Appellant.

Dr. *S. M. Sulaiman* and Mr. *Braj Nath Vayas*, for the Respondents.

JUDGMENT.

RAFIQUE, J.—The two appeals Nos. 419 and 420 are connected and arise out of a suit brought by the plaintiffs-respondents for redemption of a mortgage. They stated in their plaint that the mortgage was executed by one *Musammat* Phulbasi on the 3rd of June 1873 in favour of Bhairon Singh, the predecessor-in interest of the defendants. The mortgage was in lieu of Rs 300 and was with possession. *Musammat* Phulbasi died leaving her surviving a son called Ram Sundar. He executed a sale-deed in respect of the mortgaged property in favour of the plaintiffs. The latter served a notice on the defendants asking for redemption on the 27th of April 1915, alleging that the mortgage had been satisfied by the appropriation of the timber on the property. The defendants declined to make over possession of the mortgaged property and on the 18th of June 1915 the suit, out of which the two appeals have arisen, was instituted by them for redemption. In addition to the recovery of the property without payment, the plaintiffs asked for Rs. 215, damages for mesne profits. The defendants resisted the claim on various pleas. They denied the mortgage of the 3rd June 1876 as also the allegation that Ram Sundar was the son of *Musammat* Phulbasi. They stated that the property in suit was their own and in any case they had been in adverse possession for more than twelve years. The original mortgage-deed was not produced in the case. The plaintiffs filed a certified copy of the deed which was admitted by the Court. The Court held that as the original mortgage-deed must have been made over to Bhairon Singh, the mortgagee, and must have come, after his death, in the possession of the defendants, they should have produced it and as they had failed to produce the original document, the plaintiffs were entitled to give secondary evidence by producing a certified copy of the original deed. The Court further held that the presumption under section 90 of the Evidence Act could be raised in respect of a certified copy filed on behalf of the plaintiffs. The revenue entries from 1864 up to the present day were also filed in the case which show that the owner of the property was the husband of *Musammat* Phulbasi and after his death her name was entered as owner and subsequently as mortgagor. After her death the name of her son Ram Sundar was substituted and he was shown as the mortgagor. The names of Bhairon Singh and the defendants were shown in the revenue papers ever since 1876 as those of mortgagees. Taking the said entries into consideration and the presumption under section 90 of the Evidence Act, the learned Munsif held the mortgage of 1876 proved. The other pleas in defence were also disallowed. The allegation of the plaintiffs with regard to the satisfaction of the mortgage was disbelieved. A decree was passed in favour of the plaintiffs-respondents for redemption of the property on the payment of Rs. 300 Under the said decree the plaintiffs were to bear their own costs as also the costs of the defendants. Both parties appealed to the lower Court, the plaintiffs with regard to costs and the defendants with regard to the decree for redemption. The lower Appellate Court dismissed the appeal of the defendants maintaining the decree for redemption and accepted the appeal of the plaintiffs partially making each party to bear his own

costs. The defendants preferred two appeals to this Court, namely Nos. 419 and 420.

The two appeals came up before me on the 20th of January 1919, when three objections were urged on behalf of the appellants against the decree of the lower Court, namely, *first*, that the mortgage of 1876 is not proved, *secondly*, that the defendants have proved their adverse possession for more than 12 years prior to the institution of the suit; and *thirdly*, that no tender having been made by the plaintiffs their claim is not maintainable. In my judgment of the 20th of January 1919 I have given reasons for the rejection of the second and third objections. The first objection, relating to the proof of the mortgage of 1876, raised a point of law about which I found conflict of authority in this Court and, therefore, I referred the case to a larger Bench. The only point now before us is whether the mortgage which the plaintiffs seek to redeem has been proved according to law. The contention for the defendants-appellants is that the plaintiffs have only filed a certified copy of the mortgage of the 3rd of June 1876 and no presumption under section 90 can be raised in respect of it. The language of the section clearly shows that the section applies only to the case of an original document, and not to a certified copy. On the other hand the argument for the plaintiffs-respondents is that the use by the Legislature of the words, " When any document is produced ", does not limit the operation of the section to cases in which the document is actually produced in Court. Secondary evidence of an ancient document is, therefore, admissible without proof of the execution of the original when a case is made out under section 65 of the Evidence Act. In support of his argument the learned Counsel for the respondents relies upon the following cases: *Khetter Chunder Mookerjee* v. *Khetter Pal Sreeterutno* (1), *Ishri Prasad Singh* v. *Lallijas Kunwar* (2) and *Ponnambalath Parapravan* v. *Karoth Sankaran Nair* (3).

(1) 5 C. 886; 6 C. L. R. 199; 2 Ind. Dec. (N. S.) 1172.

(2) 22 A. 294; A. W. N. (1900) 82; 9 Ind. Dec. (N. S.) 1227.

(3) 12 Ind. Cas. 453; 21 M. L. J. 981.

The reply for the appellants is that these cases were wrongly decided and that the provisions of section 90 were not carefully considered. Reliance is placed by the appellants on a passage in the judgment of a Bench of this Court in First Appeal No. 13 of 1913 decided on the 6th of July 1914. The passage in question is as follows :— "Section 90 of the Evidence Act only applies when the document is produced and the presumptions therein mentioned are presumptions in favour of a document which is actually produced. Even then the Court is not bound to presume, although it is entitled to do so if it thinks fit. There is no presumption in favour of a document, the copy of which is produced in evidence." On a reference to the facts of that case it appears that no question of presumption under section 90 arose, inasmuch as the loss of the original mortgage deed had not been satisfactorily proved. The observations about the application of section 90 to a certified copy were merely an expression of opinion which need not have been made as far as the decision of that case was concerned. The cases relied upon by the plaintiffs respondents were not brought to the notice of the learned Judges who decided it I agree with Mr. Justice Wilson in his observations in the case of *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno* (1). The language of section 90 does not limit or confine the application of the section to cases where the original document is actually produced in Court. This Court also took the same view in the case of *Ishri Prasad Singh* v. *Lallijas Kunwar* (2). On the construction of the section contended for by the appellants, it would open a door to fraud by enabling a mortgagee to withhold the mortgage deed and thus defeat the claim for redemption. I think that the lower Courts were right in applying section 90 to the certified copy of the mortgage of 1876 filed by the plaintiffs.

There is one more point to be considered in connection with the objection of the appellants. The learned Counsel has contended that no notice for the production of the original was served upon his clients and omission to give such a notice is fatal to the case of the plaintiffs, and that they were not entitled to give secondary evidence unless and until they had served a notice upon the defendants to produce the original.

I do not think that there is any force in this contention. According to section 66 of the Evidence Act, secondary evidence of the contents of the documents referred to in section 65, clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is (or to his Attorney or Pleader) such notice to produce it as is prescribed by law, except in the six cases mentioned in the section. One of the exceptions is: "When, from the nature of the case, the adverse party must know that he will be required to produce it." In the present case the defendants must have known that the mortgage deed in their possession would be required in evidence in the case. They failed to produce it. The plaintiffs were, therefore, entitled to give secondary evidence of the deed without giving any notice to the defendants or their Pleader, calling upon them to produce the original. I would, therefore, hold that there is no force in the appeal and that the appeal should fail.

WALSH, J.—On the question of law referred to this Court by my brother I agree that the presumption permitted by section 90 of the due execution and attestation of a document which is shown to be thirty years old, may be made by the Court where that document cannot be produced but a certified copy of it is forthcoming.

In this case the defendant, the suit being one for redemption, was an adverse party who must have known that he would be required to produce the original of the mortgage. Notice to produce the document, therefore, was excused by section 66 (*a*). The loss of the original or its wilful non-production by the defendant, it matters not which, therefore, made a certified copy admissible under section 65. That certified copy was admissible to prove the original. In other words, to prove what the original, if produced, would have proved. I feel bound to say that the language of section 90 seems to me to permit by its express terms the presumption which has been applied in this case only to an original which is produced, and I find myself unable to accept the explanation which is given of the word "produce" as not meaning production in Court, because, in my opinion, the section is only dealing with the function of a Court and no other sort of production in a section of the Evidence Act could be contemplated, and the argument for the appellant in this case is that the document is not produced. I prefer, while agreeing entirely with the result, to base my opinion upon a well-known rule of equity by which the Courts have always acted by analogy to a Statute which is not expressly applicable. We have to apply the rule of equity and good conscience where an express provision does not happen to have been made and by analogy in the case of production of a certified copy, as the document would have proved itself if produced, so I think it proves itself by the proper proof and production of secondary evidence which the law allows to be substituted for the original in certain conditions. If this is not in itself sufficient, I think it is one of those cases which was probably contemplated by the general power of presumption given by section 114 of the Evidence Act. By that section the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business. Section 90 is really only one illustration of that general presumption. The law says, and rightly says, owing to the long period of time which has expired, that in a document thirty years old which is produced it is to be presumed that it was properly executed and attested. That is nothing more than having regard to the common course of natural events, human conduct and public and private business. The probability is that it was. It may, of course, be expressly proved by the other side that it was not, but the party relying upon the document is not to be punished by its inability to prove the affirmative. It seems to me that in applying the analogy of section 90, which expressly provides for the production of the original, to the production of a properly established certified copy, the Court is merely exercising powers given to it under section 114. In any case I think there is clear authority on the subject which ought to be followed in this Court. The point was decided by a single Judge in 1880 in the case of

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Khetter Chunder Mukherjee v. *Khetter Pani Sreeterutno* (1). That decision was followed by a two Judge decision of this Court in 1900, reported in the case of *Ishri Prasad Singh* v. *Lallijas Kunwar* (2), which we ought to follow. A two Judge Madras Bench took the same view in 1907 in the case of *Ponnambalath Parapravan* v. *Karoth Sankaran Nair* (3). The only suggestions of an authority to the contrary are some *obiter dicta* by the first Court in 1914. A perusal of the record of that case shows clearly that these *dicta*, which occurred at the end of the judgment, were unnecessary for the decision. As my brother has pointed out, the case was disposed of at an earlier stage by a decision that the loss of the document was not established. The case has not been reported. The judgment shows clearly that the authorities to which we have referred were not mentioned or considered by the Court. I think it very unlikely, if the Court's attention had been drawn to these authorities, that they would have expressed the opinion which they did, at any rate without considerable argument. It is a point, as has been said, not free from difficulty and one which could not be disposed of by a few cursory observations. I think the *dictum* relied upon is not an authority at all.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1068 OF 1918.

June 21, 1918.

Present:—Mr. Justice Broadway.

POHLO RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HUKAM SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Malicious prosecution, damages for, suit for—Burden of proof—Plaintiff, duty of.

In a suit for damages for malicious prosecution the plaintiff must call evidence to prove that he was innocent of the charge that had been brought against him and that it had been brought without reasonable and probable cause. Merely to show that the criminal proceedings terminated in his favour is not enough. [p. 279, col. 2; p. 280, col. 1.]

Where the criminal case is dismissed on a technical ground, it is still more incumbent on the plaintiff to establish his innocence. [p. 280, col. 1.]

Second appeal from the decree of the District Judge, Jullundur, dated the 7th January 1918.

Pandit *Rambhaj Datta*, for the Appellants.

Messrs. *Sewaram Singh* and *Nihal Chand*, for the Respondents.

JUDGMENT.—Owing to the manner in which the learned District Judge had dealt with this case I found it necessary to remand the case for a fresh hearing and decision.

The case has now been decided afresh by the successor of the former District Judge and the suit of the plaintiff has been dismissed on the ground that, although there was no reasonable and probable cause for the prosecution of the plaintiffs—and that the prosecution had been maliciously launched—the plaintiffs had failed to prove that they were innocent.

In coming to this finding the learned District Judge relied on *Abrath* v. *North Eastern Ry.* (1), which had been followed in *Mg Tha Hla* v. *Mokhlas* (2) and *Nalliappa Goundan* v. *Kailappa Goundan* (3).

Choudhri Rambhaj Datta referred me to *Crowdy* v. *L. O'Reilly* (4) and *Venu* v. *Coorya Narayan* (5) and also read Rattan Lal on Torts, page 257. Sardar Sewaram Singh on the other side cited *Sheik Muchi Osta* v. *Horsmull Marwari* (6) and *Padashin* v. *Maung Lun* (7) and also referred to Rattan Lal on Torts, page 221.

The general consensus of authorities seems to be in favour of the view taken by the learned District Judge and the gist of the decisions is that, in a suit of this nature, the plaintiff must call evidence to prove that he was innocent of the charge that had been brought

(1) (1883) 11 Q. B. D. 440; 52 L. J. Q. B. 620; 49 L. T. 618; 32 W. R. 50; 47 J. P. 692.
(2) 31 Ind. Cas. 324; 9 Bur. L. T. 48.
(3) 24 M. 59.
(4) 18 Ind. Cas. 757; 17 C. L. J. 105; 17 C. W. N. 554.
(5) 6 B. 376; 6 Ind. Jur. 535; Chitty's S. C. C. R 106; 3 Ind. Dec. (N. S.) 706.
(6) 19 Ind. Cas. 24; 17 C. W. N. 434.
(7) 29 Ind. Cas. 883; 8 Bur. L. T. 69; 8 L. B. R. 78

against him and that it had been brought without reasonable and probable cause, merely to show that the criminal proceedings terminated in his favour being not enough.

In the present instance the criminal case was dismissed on a technical ground and, therefore, it was still more incumbent on the plaintiffs to establish their innocence. This they have not even attempted to do and I am not prepared to allow them any further opportunity. The sooner this litigation comes to an end the better it will be for the parties concerned. I accordingly dismiss this appeal but direct the parties to bear their own costs.

Appeal dismissed.

PATNA HIGH COURT.
CIRCUIT COURT, CUTTACK.
SECOND CIVIL APPEAL No. 2 OF 1918.
April 4, 1919.
Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Roe.
RAGHUBER DAS MAHANT—
APPELLANT
versus
Raja NATABER SINGH AND ANOTHER—
RESPONDENTS.

Contract Act (IX of 1872), s. 23—Agreement by spiritual adviser to bring about adoption of particular person, legality of—Public policy—Money paid under agreement, whether can be recovered.

The Courts in India will not assist a party to recover back his money paid in respect of a contract which is tainted with criminality or immorality, even though the contract has not been performed. [p. 282, col. 2; p. 283, col 1.]

An agreement by the priest or spiritual adviser of a Hindu lady to use his influence to bring about the adoption by the lady of a particular person is illegal, immoral and opposed to public policy and any money paid under the agreement cannot be recovered. [p. 282, col. 1; p. 283, col. 2.]

Second appeal against the judgment of the District Judge, Sambalpur.

FACTS appear from the judgment.

Mr. *Bujraj Chowdhury*, for the Appellant.—Both the lower Courts have found that the agreement is opposed to public policy and is also immoral. The plaintiff paid the amount as a bribe to the defendant to use his spiritual influence to adopt plaintiff's son. This is clearly immoral (see illustration *j*, section 23). The decisions relied on by the learned District Judge are distinguishable and they have been discussed in the later case of *Ledu* v. *Hira Lal Bose* (1). In the case of *Bakshi Das* v. *Nadu Das* (2), Justice Mukherjee reviewed all the cases on the subject and held that although a Court may not enforce an agreement to pay money to the parents of an intended bridegroom on the ground that the agreement is opposed to public policy, yet a suit is maintainable for the recovery of the amount actually paid if the contract is broken and the marriage does not take place; but the proposition was qualified in the later decision of *Ledu* v. *Hira Lal Bose* (1), where the same learned Judge observed "yet this exception will not be allowed if the agreement is criminal or immoral."

Moreover all the decisions cited by the learned District Judge related to marriage brokerage contracts which stand on a different footing and which are sanctioned by social custom. In this case a bribe was given to a priest to use his influence with his disciple to adopt a boy irrespective of the fitness of the child and to allow the plaintiff to get back the money would be to encourage bribery: it makes little difference if the bribe is given to a public servant or to a private individual.

Rai Bahadur *Janakinath Bose*, for the Respondents.—The agreement is not opposed to public policy. The help of the defendant was sought in getting one of the plaintiff's sons adopted; this is not opposed to public policy. The agreement is neither immoral.

The case of *Shiv Saran Lal* v. *Maharaja Kesho Prasad Singh* (3) is in point. There it was held that the transaction cannot be regarded as immoral or contrary to public policy. Moreover here the defendant was more to blame than the plaintiff. He induced the plaintiff to believe that he would bring about the adoption. Under such circumstances equity requires that the money be refunded: the decisions of all the High Courts are in favour of refunding the money, if the illegal purpose is not carried out.

(1) 29 Ind. Cas. 625; 19 C. W. N. 919; 21 C. L. J. 537; 43 C. 115.
(2) 1 C. L. J. 261.
(3) 42 Ind. Cas. 122; 3 P. L. W. 302; (1918) Pat. 86.

JUDGMENT.

MILLER, C. J.—This is an appeal from a decision of the District Judge of Sambalpur, dated the 21st November 19.7, affirming a decision of the Subordinate Judge, dated the 4th July 1917. The plaintiff who is the respondent in this suit, brings an action to recover back a sum of Rs. 5,000 paid to the defendant, in consideration of an agreement by the defendant, who was the spiritual Guru of the Rani Sahib of Kauria, to bring about the adoption by that lady of one of the plaintiff's sons. The contract which was entered into between the parties is in the nature of a receipt for Rs. 5,000 signed by the defendant. After acknowledging the receipt of the money the defendant agrees within two months to cause one or other of the plaintiff's sons, whichever he shall desire, to be adopted by the Rani of Kauria and after bringing about the adoption to cause a written intimation about it to be sent to Government as well as to the plaintiff, and then it provides if he fails in this then the defendant shall refund the entire amount of Rs. 5,000.

It is important to note at the outset that the cause of action upon which the plaintiff's claim is based is a breach of this contract itself. He refers in his plaint to the contract and to the stipulation as to re payment of the Rs. 5,000 in the event of failure to bring about the adoption. The plaintiff then goes on to say that the defendant failed to fulfil the work undertaken by him for which he had received the money and, therefore, he became liable to return the money, the stipulated time having expired and he further states that he has several times applied for the return of the money but the defendant has refused to part with it. Then he served him with notice and he relies upon that breach of the contract whereby the defendant undertook either to bring about the adoption within two months or to return the money as his cause of action.

The defence put forward by the defendant was that he never received the money at all and that he never agreed to get either of the plaintiff's sons adopted or to refund the money in case of failure. He does say, however, that the plaintiff requested him to use his influence as spiritual guide of the Rani to induce her to adopt one of his sons but that he declined to do so, and in the alternative there is a plea that the contract relied upon by the plaintiff was void as being immoral and opposed to public policy and that no suit would lie to enforce such a contract. It was found as a fact in both Courts below that the contract was entered into by the defendant.

It was contended at the trial by the plaintiff first of all that this contract was not an illegal or immoral contract or one opposed to public policy. That question was decided against him by both the learned Subordinate Judge and the District Judge of Sambalpur. Before this Court it has been but faintly argued. As to this, I do not think I can do better than refer to that part of the judgment of the Subordinate Judge which deals with this question. I think he puts it very clearly. After stating in his judgment that an agreement tending to create an interest against duty is opposed to public policy, he goes on in this way:—

"To see whether the object in this case was opposed to public policy two things are to be considered. In the first place an adoption by a Hindu female should only be made for the spiritual benefit of her husband and she should only choose such a boy as is best fitted for the purpose, unfettered by any pressure from outside. That being the case, any attempt made to fetter her choice in any way must be considered to be opposed to the spirit of Hindu Law and also opposed to public policy. In the second place, it is to be borne in mind that in the present case the defendant is her Guru whose duty it is to give her good and impartial advice. That being the case, the acceptance of money by that Guru even to plead any particular cause must place the latter in a false position. His personal interest in this case would be so to advise his *chela* as to secure to him the enjoyment of the benefit. That being the case, the payment of money to the Guru for that purpose is sure to tend to create an interest in the matter that is opposed to his duty, and, as such, a contract which has this for its object is opposed to public policy."

I entirely agree with that statement of the case put forward by the Subordinate Judge and I think in the particular facts of this case that one may go even further. In the latter part of his judgment the Subordinate Judge says that he has no doubt in his mind that the object of the agreement was illegal, immoral and opposed to public policy and that as such the agreement was void and it does seem to me that to pay a sum of money to the priest and spiritual adviser of the lady in order to bring about an adoption of a particular person is, to put it quite shortly, a matter of bribery and an attempt to corrupt the spiritual adviser to use his influence to do something which is entirely contrary to his duty.

Having decided, however, that this was a contract opposed to public policy, both the learned Judges of the Courts below came to the conclusion that although they were very loth to do so, they were really bound by certain decisions of the Courts in this country to permit the plaintiff to recover back the money and the way the case was put on behalf of the plaintiff and accepted by the Judges of the lower Courts was this: that where money is paid for an illegal purpose, which is not countenanced by law or which is contrary to public policy, then at any time before the object for which the money is paid is carried out, although the Courts will not assist either party in enforcing performance of the contract, nevertheless they will assist the person who has paid the money to recover it back. There are no doubt cases which have been referred to which support the proposition. Most of the cases in this country are cases of what in England would be called marriage brokerage contracts where money is paid to the parent or guardian of a boy or girl in order to bring about a marriage between the boy or girl and the girl or boy of the person paying the money. In the case of *Ram Chand Sen* v. *Audaito Sen* (4) the Chief Justice Sir Richard Garth, although in fact he was not satisfied that the contract there was a contract contrary to public policy, did lay down the rule that even if it were so, in a case of that kind the money could be recovered back at any time before the consideration for the payment of that money had been performed. It was not necessary in the facts of that case to go so far, because it was not held that the contract was, as I have said, contrary to public policy, but that case has been the foundation for a series of other cases in this country and I think it is too late now to question the validity and propriety of those rulings. At the same time it must be pointed out that in more than one case it has also been clearly stated that if the contract involves anything in the nature of criminality or is one of moral turpitude such as the Courts on that ground would refuse to enforce, then not only will the Court refuse to enforce the contract but it will not assist either party to recover back anything paid under the contract. It is not always easy to say what cases do come under that description, but that the rule does exist in this country I do not think can be questioned. In the case of *Bakshi Das* v. *Nadu Das* (2) decided by Mr. Justice Mukherjee the proposition is laid down that although a Court may not enforce an agreement to pay money to the parents or guardian of an intended bride or bridegroom on the ground that the agreement is opposed to public policy, yet a suit is maintainable for the recovery of any sum actually paid pursuant to the agreement, if the contract is broken and the marriage does not take place. But in a latter case, *Ledu* v. *Hira Lal Bose* (1), the same learned Judge qualifies that general proposition in these words:

"We are not unmindful that there are exceptions to the general rule that money paid or personal property transferred in accordance with the terms of an illegal contract cannot be recovered, notwithstanding the other party refuses to affirm his part of the agreement. It is plain that although where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back, yet this exception will not be allowed if the agreement is actually criminal or immoral"

In this case the principle is clearly laid down that the Courts of this country will not assist a party, even though the contract has not been performed, to recover back

(4) 10 C. 1054; 5 Ind. Dec. (N. S.) 704.

his money paid in respect of a contract which is tainted with criminality or immorality.

It seems to me, therefore, that the only question which we have to consider is whether in the particular circumstances of this case one must come to the conclusion that this is merely that class of contract which the Court refuses to enforce on the ground that it is contrary to public policy, such as gaming and wagering contracts or certain classes of marriage brokerage contracts, or whether there is not something more in this case which taints it from the beginning with something in the nature of criminality or moral turpitude. Speaking for myself, it seems to me that this is just one of that class of cases which the Court will refuse to have anything to do with at all, because it is in my view a grossly immoral act to endeavour to bribe a priest to use his spiritual influence with his *chela* in the interests of the person bribing him and if the plaintiff comes and asks us to assist him in any way in carrying out the terms of such a contract or to recover back money paid under it, I think the Court ought to refuse.

There is only one other matter which I should like to draw attention to. This is not, as the action is framed, one of those cases where the plaintiff has sought to repudiate the contract before it has been performed and claims to recover back the money paid for an illegal performance before the mischief has been done, because from the manner in which the claim is framed in the plaint the plaintiff is clearly claiming, after the time for performance has elapsed, something in the nature of damages for failure to perform the contract. The damage has been estimated at the amount which he paid and which the defendant stipulated to pay him back in the event of his failure. It is for a breach of one of the stipulations in that contract that the plaintiff is now suing and he has not up to the present time purported to repudiate the contract and recover back the money on the ground that the contract was illegal or contrary to public policy *ab initio*. So far as the plaintiff and the defendant themselves are concerned, I can see little or no distinction as to the part which each of them took in this transaction. To my mind it was one of gross immorality. I think both of them are equally to blame and there is nothing to choose between them. In this view of the case it seems to me that the decision of the Court below, which was come to with some reluctance by the learned District Judge, must be set aside and that the appeal must be allowed and judgment entered for the defendant. But in the circumstances of the case we do not think that any order ought to be made as to costs.

ROE, J.—I agree. I am satisfied that no distinction can be made between an agreement to bring about a marriage and an agreement to bring about an adoption and after reading the decision in the case of *Hermann* v. *Charlesworth* (5), I am of opinion that the Calcutta High Court has rightly held that money paid as consideration for bringing about a marriage or adoption may be recovered. But this is subject to the rule of *ex turpi causa*. I entirely agree with the learned Chief Justice that this is a case in which the Court should not interfere for fear of sullying its hands. I regard the contract as one made by a man of position to induce another to prostitute his religious calling for his benefit for a bribe of Rs. 5,000.

Appeal allowed.

(5) (1905) 2 K. B. 123; 74 L. J. K. B. 620; 93 L. T. 284; 54 W. R. 22; 21 T. L. R. 368.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 150 OF 1917.

January 9, 1919.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

KAMLA DEVI—PLAINTIFF—APPELLANT

versus

GUR DAYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *O. VII, r.* 6—*Evidence Act* (*I of* 1872), *s.* 106—*Limitation Act* (*IX of* 1908), *s.* 19, *Sch. I, Art.* 148—*Mortgage—Redemption, suit for—Plaint—Acknowledgments saving limitation, whether to be specially pleaded—Limitation—Date of mortgage—Burden of proof.*

In a suit to redeem a mortgage it was alleged that the mortgage was executed within sixty years

before suit. The trial Court dismissed the suit on the ground that the plaintiff had failed to prove the allegation and declined to consider certain acknowledgments on which the plaintiff relied, on the ground that they had not been specially pleaded in the plaint:

Held, (1) that the plaintiff having pleaded that the mortgage was within limitation, it was not necessary for him to plead that the acknowledgments saved the operation of limitation: [p. 284, col. 2.]

(2) that the mortgagee was the person in whose possession the mortgage deed would naturally be, and that the evidence as to the exact date of the mortgage was, therefore, a matter within his peculiar knowledge, so that the burden of proving that the acknowlegdments were not given within sixty years of the mortgage lay upon him. [p. 284, col. 2.]

Second appeal from a decree of the District Judge, Aligarh, modifying that of the Munsif, Havali.

Mr. *Peary Lal Banerji*, for the Appellant.

Mr. *Panna Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to redeem a mortgage. In the plaint it was alleged that the mortgage was executed in or about the year 1856. Various pleas were taken and the Court of first instance dismissed the suit. The lower Appellate Court upheld the decision of the Court of first instance upon the ground that the plaintiff was the wife of a Kanungo and that the transfer of the mortgagor's interest was really for the benefit of the Kanungo, and that it was against public policy that the Kanungo should become the transferee of the mortgagor's interest. This Court on appeal held that this was not a correct view of the law and remanded the case to the lower Appellate Csurt, the Court of first instance having decided the other issues. On remand the lower Appellate Court, whilst dismissing the suit for redemption, granted the plaintiff a decree for the amount which had been paid for the transfer of the mortgagor's interest against the vendors. The Court decided against the plaintiff so far as the claim for redemption, went upon the ground of limitation. The Court held that the plaintiff had failed to prove that the mortgage was executed within sixty years of the institution of the suit and declined to consider certain acknowledgments on which the plaintiff relied, upon the ground that if the plaintiff sought to bring herself outside limitation it was necessary for her to plead in the plaint that the acknowledgments had been given within limitation.

We think that the view taken by the Court below was incorrect. The plaintiff had pleaded the mortgage within limitation. It was, therefore, not necessary for the plaintiff to plead that the acknowledgments saved the operation of limitation. We think the Court below was bound to consider the acknowledgments which were referred to and proved to the satisfaction of the first Court. These acknowledgments are of a remarkably clear description. They consist of entries in the *wajib ul arz* commencing from the year 1826 and going on to the year 1900. Even in the year 1913 the defendant described himself as mortgagee. In the *wajib-ul-arz* the description of the land is given, the amount of the mortgage, the names of the mortgagors and the mortgagees respectively. It is said that the plaintiff was bound to have shown that these acknowledgments were given within sixty years of the date of the mortgage; and that as the plaintiff had failed to prove the exact date of the mortgage, the acknowledgments are of no avail. It must be remembered that unless the mortgage was as old as the year 1806, the acknowledgments were perfectly good. It must also be remembered that the party in whose possession the mortgage deed would naturally be, would be the defendant who was the mortgagees' representative. The evidence, therefore, as to the exact date of the mortgage was a matter within the peculiar knowledge of the defendant and not of the plaintiff. We think that the acknowledgments, assuming them to have been given in time, were sufficient acknowledgments of the subsistence of the mortgage, and we think under the circumstances of this case that we ought to hold that acknowledgmen's were given before the expiration of sixty years from the date of the mortgage. We, therefore, think that the plaintiff ought to have got a decree for redemption. There is some doubt as to whether the land now claimed is identical with the land mortgaged. Before finally deciding the appeal we think that we must refer an issue on this point. We accordingly refer the following issue to the lower Appellate Court, namely—

Is the land claimed the land mortgaged, and if not, what is the land mortgaged?

The parties will be entitled to adduce evidence relevant to this issue. On return

of the finding the usual ten days will be allowed for filing objections. The case will be put up on return of the finding. The issue may be sent down as soon as possible.

Issue remitted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 540 OF 1917.

[March 7, 1919.

Present:—Justice Sir Ernest Fletcher, KT., and Mr. Justice Cuming.

KRIPA SINDHU MUKHERJEE AND OTHERS —APPELLANTS

versus

SURENDRA NATH BANERJEE AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 161—Sale of portion of non-transferable occupancy holding, whether incumbrance—Exchange, whether sale.

The sale of a portion of a non-transferable occupancy holding is not an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. [p. 216, col. 1.]

An exchange is not for all purposes a sale. [p. 215, col. 2.]

Appeal against the decree of the Subordinate Judge, Birbhum, dated the 5th January 1917, affirming that of the Munsif, 2nd Court at Rampurhat, dated the 29th February 1916.

FACTS appear from the judgment.

Babu *Surendra Chunder Sen* (with him Babu *Bejoy Coomar Chatterjee*), for the Appellants.—The sole point to be decided in this appeal is whether the transfer of a portion of a non transferable occupancy holding is an encumbrance under section 161 of the Bengal Tenancy Act. The decisions are all conflicting on the point. The case should go up to a Full Bench. The decision in *Chundra Sakai* v. *Kalli Prosanno Chuckerbutty* (1) is in my favour. The cases against me are *Abdul Rahman Chowdhuri* v. *Ahmkdar Rahman* (2), *Tamiz uddin Khan* v. *Khoda Nawaz Khan* (3), *Rameshwar Singh* v. *Raghunandan Khawas* (4), *Asgar Ali* v. *Gouri Mohan Roy Chowdhury* (5) There is practically no distinction between an exchange and a sale, so the decision in *Chandra Sakai* v. *Kalli Prosanno Chuckerbutty* (1), though it deals with an exchange, is an authority in support of my contention that the sale of a portion of a non-transferable occupancy holding is an incumbrance within the meaning of section 161, Bengal Tenancy Act.

Dr. *Dwarka Nath Mitter* (with him Babu *Narain Chunder Kar*), for the Respondents, was not called upon to reply.

JUDGMENT.

FLETCHER, J.—The only question involved in this appeal is whether the transfer of a portion of a non-transferable occupancy holding is an encumbrance within the meaning of section 161 of the Bengal Tenancy Act. The decisions of this Court seem to be quite clear that it is not. The ruling in the case of *Abdul Rahman Chowdhuri* v. *Ahmadar Rahman* (2) is exactly in point. A similar view has been taken in the High Court of Patna in the case of *Rameshwar Singh* v. *Raghunandan Khawas* (4). On section 86 of the Bengal Tenancy Act, there is also a decision of this Court. [*Tamizuddin Khan* v. *Khoda Nawaz Khan* (3)], which shows that the sale of a portion of a non-transferable occupancy holding is not an encumbrance within the meaning of section 86, sub-sections (6) and (7), of the Bengal Tenancy Act. The only difficulty that is raised is by the decision in *Chandra Sakai* v. *Kalli Prosanno Chuckerbutty* (1). That is a case of exchange, where it was held that an exchange was not an encumbrance within the meaning of section 161 of the Bengal Tenancy Act. Whether we agree with that decision or not, it is quite clear that an exchange is not for all purposes a sale, and the case has been distinguished already in the case of *Abdul Rahman Chowdhuri* v. *Ahmadar Rahman* (2), already referred to, on the ground that an exchange is not a sale. There may be a difficulty in principle in the case of an exchange and it may be that on some subsequent date it may be

(1) 23 C. 254; 12 Ind Dec. (N. S.) 170.
(2) 31 Ind Cas. 554; 43 C. 558; 19 C. W. N. 1217; 22 C. L. J. 356.
(3) 5 Ind. Cas. 116; 14 C. W. N. 229; 11 C. L. J. 16.
(4) 38 Ind. Cas. 337; 1 P. L. J. 403; 2 P. L. W. 364.
(5) 2 Ind. Cas. 58; 18 C. L. J. 257 at p. 259; 18 C. W. N. 601.

necessary to review the judgment in *Chandra Sakai* v. *Kalli Prosanno Chuckerbutty* (1). But on the question of sale, it seems to me that the authorities are clear and conclusive, namely, that the sale of a portion of a non-transferable occupancy holding is not an encumbrance within the meaning of section 161 of the Bengal Tenancy Act. In that view, the present appeal fails and must be dismissed with costs.

CUMING, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL NO. 94 OF 1917.

March 26, 1919.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Oldfield, Mr. Justice Sadasiva Aiyar, Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Aiyar.

PUTHIAPURAYIL KANNYAN BADUVAN AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

CHENNYANTEAKATH PUTHIAPURAYIL ALIKUTTI AND OTHERS—PLAINTIFF, DEFENDANT NO. 1 AND LEGAL REPRESENTATIVE OF DEFENDANT NO. 1—RESPONDENTS.

Malabar Law—Landlord and tenant—Lease of several items of property—Ejectment, partial, right to—Compensation, payment of, for other items—Assignee of reversion in part of demised premises, right of, to evict tenant from such part—Malabar Compensation for Tenants' Improvements Act (Mad. I of 1900), ss. 5, 6, 7, 9—Transfer of Property Act (IV of 1882), s. 109.

Held, by the Full Bench, (*Seshagiri Aiyar, J.*, dissenting).—Where several items of property are comprised in a lease, the lessor is not entitled to eject the tenant from a part only of the holding, but the assignee of the reversion in part of the demised premises is entitled to eject for due cause from such part on payment of the value of the improvements to that part, and this applies to tenancies in Malabar. [p. 291, col. 2; p. 292, col. 1.]

Per *Seshagiri Aiyar, J.*—Under the Malabar Compensation for Tenants' Improvements Act there can be no partial eviction until payment of compensation in respect of the holding as a whole. [p. 293, col. 2.]

Neither under section 109 of the Transfer of Property Act nor under the general law of the land is it competent to an assignee of part of the demised premises to eject the tenant from that portion compulsorily during the period of the tenancy. Even if section 109 of the Transfer of Property Act is capable of a different construction, its operation should not be extended to agricultural tenancies in this country. [p. 292, col. 1.]

The Legislature, in providing for compensation on eviction in the Malabar Compensation for Tenants' Improvements Act, understood that the parties were in *status quo ante* and that there had been no break-up of the lease interest. [p. 292, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tellicherry, in Appeal Suit No. 476 of 1916, preferred against the decree of the Court of the District Munsif, Cannanore, in Original Suit No. 186 of 1914.

This second appeal coming on for hearing on the 16th July 1918, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit, and upon hearing the arguments of Mr. *E. Ramaswami Iyer*, for the 1st Appellant, and of Mr. *T. Eroman Unni*, for the 1st Respondent, and the 2nd Appellant and the 3rd Respondent not appearing in person or by Pleader, and the case having stood over for consideration till the 19th July 1918, the Court (Phillips and Kumaraswami Sastri, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

In this case a lease was granted to the 2nd defendant for a period of 8 years. This lease comprised 11 items of property, and the period of 8 years had expired at the time of suit. The plaintiff is a Melcharthdar from the Jenmi, and his Melcharth refers to only one item of the 2nd defendant's lands.

Two minor points have been raised in this second appeal, firstly, that the Melcharth which was obtained by one Ussan Parikutti and assigned to the 2nd defendant is valid, and secondly, that notice to quit had been waived by subsequent receipt of rent. These two points were found against the 2nd defendant by the District Munsif, and were not argued before the Subordinate Judge, and we agree with the District Munsif that they must be found against the appellant for the reasons given by him. The fact that the appellant now

urges, *i. e.*, that the properties were Devaswom properties and not ordinary Tarwad properties, is a question of fact which cannot be decided without evidence, and it is very doubtful if it can affect the merits of the case.

The main point for consideration is whether the plaintiff is entitled to evict the 2nd defendant from one item of his leasehold lands without paying compensation to him for improvements in the other items. The Subordinate Judge has found that he can do so, and the reasons he gives are that the rent of each of the items is stated separately in the lease-deed, Exhibit X, and that the term of each is to expire after 8 years, and there is no agreement forbidding the lessor to recover each item separately. As a matter of fact the rent of the plaint item is not stated separately in the lease, but its rent is lumped up with that of the only other Nilam contained in the lease, the other 9 items all being parambas.

It has no doubt been held that, when there is a severance of the interest of the landlord the owner of the severed interest can sue to recover the portion of the property which has fallen to him. *Vide Korapalu* v. *Narayana* (1) and *Syed Ahmad Sahib* v. *Magnesite Syndicate Ltd.* (2). But these decisions are not decisions from Malabar, and hardly seem to bear on the question of the tenants' rights under the Improvements Act. In this case plaintiff is not the original landlord but a Melcharthdar, a lessee under the landlord, but there seems to be no reason why if a landlord cannot eject from one item only, the assignee from the landlord should be allowed to do so. Under the Malabar Compensation for Tenants' Improvements Act, a tenant is entitled to resist eviction until he has been paid compensation for his improvements, but it has been held in an unreported case, Second Appeal No. 2180 of 1914, that when the lease is divisible and when no hardship is caused to the tenant by ejecting him from one item of land without paying for his improvements in the other item, he can be evicted from a portion only of the leased property without compensation for improvements on other items. This judgment does not decide definitely what the tenant's rights are under section 5 of the Malabar Improvements Act. It appears to consider that his rights are dependent on facts, such as whether the lease can be divided up into parts, and on the hardship that the tenant might suffer through the division of the property and ejectment from one portion of it. The object of section 5 of the Act appears to be to give the tenant some security that he will receive the value of the improvements made upon the land, and the question that has to be decided is, whether the whole of the land held on lease is the security for such payment, or whether only the items of land on which those improvements stand form the security. Section 5 is in very general terms and merely says that the tenant shall on ejectment be entitled to compensation for improvements, and is entitled to remain in possession until ejectment in execution of a decree or order of Court. The language of the section would seem to imply that a tenant can resist eviction from any portion of his holding until he gets compensation, and there is no section of the Act which specially authorizes eviction from a part of the holding without paying compensation. In section 3, clause (3), "Improvement" is defined as any work or product of a work which adds to the value of "the holding," is suitable to it and consistent with the purpose for which the holding was let, mortgaged or occupied; and again section 9 relates to improvements which enhance the value and annual produce of "the holding." The use of the word 'holding' seems to imply that the whole of the land demised under the lease has to be considered when there is a question of compensation for improvements; and we see in section 6, clause (2), that if a tenant is found to be in arrears with his rent, the Court is directed to set off such sum against the amount found due for improvement. If, therefore, a landlord is entitled to evict a tenant from a portion of his holding on which no improvements have been made, he might obtain a decree for ejectment and for arrears of rent, and the tenant would not be able to set off

(1) 20 Ind. Cas. 930; 38 M. 445; 23 M. L. J. 315; (1913) M. W. N. 655.

(2) 32 Ind. Cas. 512; 39 M. 1049.

against arrears of rent the amount due for improvements, and he would thus lose the benefit of section 6 (2). We think this is a very important question which in many cases is likely to arise in Malabar, and consider it advisable to refer it to the decision of a Fulll Bench of this Court, more especially in view of the decision in Second Appeal No. 2180 of 1914, which does not seem to have held that there is any definite principle underlying the provisions of the Act as regards the security which the tenant has for the payment of his improvements. We, therefore, refer for the orders of the Full Bench the following question:—

When several items of property are comprised in a lease, is the landlord entitled to evict the tenant from one of those items only, without paying him compensation for the improvements on other items?

This second appeal came on for hearing, in pursuance of the above Order of Reference, on the 3rd February 1919 before the Court (the Chief Justice, Oldfield and Seshagiri Aiyar, JJ.)

Mr. *N. P. Narasimha Iyengar*, for the Appellant, read out the definitions of "improvement," "holding", etc., in the Malabar Compensation for Tenants' Improvements Act of 1900.

[Mr. *Eroman Unni*, for the Respondents, was at this stage called upon as the onus lay on him.]

[WALLIS, C. J.—The tenant is at liberty under the Act to remain on the land till he is paid the compensation. The premises are his security.]

Mr. *Eroman Unni*, for the Respondents.—That is the question at issue. Under the general law I am permitted to evict. Further I am the Melcharthdar of only one item and so I can't sue in ejectment for the whole.

[WALLIS, C. J.—But even your Jenmi is not allowed to evict from a part of the holding. How can you?]

Compensation for one item necessarily involves compensation in part at least for the other items, because the items are dependent upon one another.

[SESHAGIRI AIYAR, J.—Suppose the item not redeemed is unproductive What is the good of retaining that item alone?]

See Second Appeal No. 2180 of 1914 (unreported). The general law gives me the right.

[WALLIS, C. J.—The holding cannot be split up without the tenant's consent. That is the general law.]

Where the interest of the landlord is severed by him even without the tenant's consent, the transferee of a part so severed can recover that alone from the tenant. See *Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya* (3), *Korapalu* v. *Narayana* (1) and *Syed Ahmad Sahib* v. *Magnesite Syndicate Ltd.* (2).

[WALLIS, C. J.—All these cases assume that the tenancy is determined, in which case a co-owner, joint tenant or tenant-in-common can recover his share alone. They do not apply here].

[The other side cited *Harihar Banerji* v. *Ramsashi Roy* (4), which lays down that notice to quit part of a holding is bad and even if good, the suit must fail].

The Privy Council do not go further than that notice to quit a part only is bad. Further the share alone can be recovered, see *Dwarka Nath Rai* v. *Kali Chunder Rai* (5), followed in *Hurendra Narain Singh* v. *Moran* (6). See also *Ebrahim Pir Mohamed* v. *Curseljj Sorabji Devitre* (7) and *Subramaniam Chettiar* v. *Periasami Thevar* (8).

[The Chief Justice cited Cole on Ejectment and 3 Barnewall and Adolphus.]

Here there is no question of notice. Does the suit lie is the only question. The case in *Harihar Banerji* v. *Ramsashi Roy* (4) does not apply. See also Second Appeal No. 2173 of 1914. The Compensation Act defines a tenant also as of a part of a holding and so contemplates redemption piecemeal. Further the tenancy is already determined. The tenant simply holds over. See *Nynam Veetil Mayan Kutti* v. *Valappilakath Kunhammad* (9), *Theman* v. *Kunhi Pathumma* (10).

(3) 29 M. 29.
(4) 48 Ind. Cas. 277: 35 M. L. J. 707; 23 C. W. N. 77; 16 A. L. J. 969; 29 C. L. J. 117; 9 L. W. 148; 25 M. L. T. 159; 45 I. A. 222 (P. C.).
(5) 13 C 75; 6 Ind. Dec. (N. S.) 548.
(6) 15 C. 40 at p. 46; 12 Ind. Jur. 220; 7 Ind. Dec. (N. S.) 612.
(7) 11 B. 644; 6 Ind. Dec. (N. S.) 423.
(8) 24 Ind Cas. 726; 26 M. L. J. 435.
(9) 44 Ind. Cas 110; 41 M. 641; 7 L. W. 143; 34 M. L. J. 167; 23 M. L. T. 156; (1918) M. W. N. 205.
(10) 43 Ind. Cas. 757; 41 M. 118; 6 L. W. 570; (1917) M. W. N. 784; 34 M. L. J. 128.

[WALLIS, C. J.—What is held under a single lease cannot be split up. The Act empowers the tenant to make improvements till actual ejectment. See section 6, clause (3).]

Mr. *N. R. Narasimha Aiyar*.—*Abdulla Rowthan* v. *Vasudeva Ravi Varma* (11) is a case where consent was found as a fact. See also Moore's Malabar Law, page 245. Assent is necessary. The Act does not locate improvements as a specific item but uses the term with reference to the whole holding: sections 5 and 6. Further the tenant has no right of suit in respect of improvements. See also *Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya* (3) where the difference between Indian and English Law is stated.

[The appeal came on for further argument on 24th February 1919 and having been ordered on the said date to be posted before a Fuller Bench, the case accordingly came on for hearing before the Chief Justice and Oldfield, Sadasiva Aiyar, Coutts Trotter and Seshagiri Aiyar, JJ.]

Mr. *N. S. Narasimha Aiyar*, for Appellant No. 1.—Sections 5 and 6 of the Malabar Compensation for Tenants' Improvements Act speak of the 'land' and not part of a 'land' as the subject of the holding.

[WALLIS, C. J.—Section 6 refers to the land which forms the subject of eviction. Is it not?]

No. It is the whole land. See also section 9.

[WALLIS, C. J.—The reference to decree and execution shows that they provide only in case of a decree for ejectment].

Section 9 provides for calculating net increment on the whole land. See also section 6 (2), (3) and section 7, the latter of which speaks of "substantial injury to the holding." See also section 9

[WALLIS, C. J.—What was the law before the Act? Was there a customary right to the value of improvements?]

Yes, there was a customary right. The Act simply incorporates the existing custom.

[WALLIS, C. J.—Then what the Act does is to give the tenant a procedure to enable him to realise the value of improvements.]

Yes.

[COUTTS TROTTER, J.—The object of section 5 is to enable the tenant to continue in possession until he gets compensation for his improvements. So that the landlord does not get a right to possession until he pays for the improvements].

Puthiyapandikasalayil Abdulla Koya v. *Kallumpurath Kanaran* (12).

[SADASIVA AIYAR, J.—Why not treat each item in the present case as given on a separate lease?]

Even the rent is not separately fixed.

See sections 3 and 4, where improvements are defined and enumerated without regard to the lands on which they are made.

[WALLIS, C J.—Suppose the tenant falls into arrear with his rent. He can be evicted from the part of the holding by the assignee of the part.]

See *Vasudevan Nambudripad* v. *Valia Chathu Achan* (13) and the position of a Kanom tenant is the same that of a Verumpathom tenant.

Moore's Malabar Law, page 237.

[COUTTS TROTTER, J.—Suppose the landlords sells half the reversion, can the assignee compel the tenant to split up the rent into two?]

See *Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya* (3). He cannot.

Without a right of suit, I have to rely on being redeemed wholly to get the value of improvements without prejudice.

Mr. *T. Eroman Unni*, for Respondent No. 1.—The Act does not provide for the present difficulty. So the general law apart from the Act ought to guide the Court.

[SESHAGIRI AIYAR, J.—Are we entitled to resort to section 109, Transfer of Property Act, in respect of agricultural tenancies? The object of such tenancies is really to give the advantage to the tenant of having the whole land, as crops may not be grown on all the lands included at the same time and the Malabar Act specifically considers such a case.]

Even before the Act, in *Iswar Chunder Dutt* v. *Ram Krishna Dass* (14) the principle of section 109 was applied. See also *Sri Raja Simhadri Appa Rao* v. *Prattipati*

(11) 29 Ind. Cas. 286; 29 M. L. J. 316.

(12) 43 Ind. Cas. 6; 33 M. L. J. 463; 6 L. W. 696; (1917) M. W. N. 822.

(13) 24 M. 47 (F. B.); 10 M. L. J. 321.

(14) 5 C. 90; 6 C. L. R. 421; 3 Shome L. R. 132; 2 Ind. Dec. (N. S.) 1182.

Ramayya (3). The rent could be apportioned in the case of partial assignment.

[COUTTS TROTTER, J.—Even though the landlord's covenants and liabilities have yet to be discharged?]

The burden would be distributed by the assignments.

Cole on Ejectment, pages 44, 697;

Cutting against Derby. William Blackstone;

Foa, page 670 (Landlord and Tenant), 4th Edition; *Vasudeva Shenoi* v. *Damodaran* (15), *Achuta* v. *Kali* (16).

The right to improvements cannot be attached by creditors. *Anantha Bhatta* v. *Mavinamale Anantha Bhatta* (17). It is not a charge on, or interest in, property. Compensation for one item may also be compensation in lieu of the increased production of the unredeemed items, as for instance if that item be a tank.

[WALLIS, C. J.—It comes to this, that there may be an assignment but the tenant is not to be evicted from the part.]

If there were a practical impossibility in severing, perhaps it may be that partial eviction cannot be had.

[WALLIS, C. J.—You say that by asking the assignee of the part to pay for the whole of the improvements, the tenant will continue to enjoy the part of the improvement even though he has got also the value thereof.]

Yes. Otherwise I will be paying compensation for land from which he is not ejected, even though he is entitled to compensation only on ejectment. See also section 5.

[COUTTS TROTTER, J.—Such a suit would not be tolerated and so such a difficulty cannot arise.]

And the Act steers clear of such a situation. It provides only for lands regarding which suits are brought and decrees are obtained.

And when the Act is found not to apply readily to a question, resort to the general law is the best way out of the difficulty. Further in many cases, the general law has been applied to agricultural leases.

Mr. *N. P. Narasimha Aiyar*, in reply.—See *Harihar Banerji* v. *Ramasashi Roy* (4). Whether the tenant be one from year to year for a term of years, the principle of that case applies.

(15) 23 M. 86; 8 Ind. Dec. (N. S.) 454.
(16) 7 M. 545; 2 Ind. Dec. (N. S.) 962.
(17) 48 Ind. Cas. 705; 36 M. L. J. 92; (1918) M. W. N. 887; 9 L. W. 78.

OPINION.

WALLIS, C. J.—The Malabar Compensation for Tenants' Improvements Act, 1899, entitles a tenant who is sued in ejectment to compensation for improvements to the land from which it is sought to eject him, and authorizes him, notwithstanding the determination of the tenancy, to remain in possession until ejectment in execution of a decree or of an order of Court varying that decree as provided in section 6 (3). Section 6 (1) provides that the decree is to direct that on payment by the plaintiff into Court of the amount found due for improvements the defendant is "to put the plaintiff into possession of the land with the improvements thereon." As under section 5 (2) the tenant after decree is to continue in possession as a tenant, section 6 (3) provides for a revaluation of the improvements when the plaintiff seeks to execute the decree with reference to the state of things then existing, and for an order of Court varying the decree accordingly. The only improvements for which compensation is payable under these sections are improvements to the land from which it is sought to eject the tenant, and they neither impose nor recognize any obligation on the plaintiff to pay for improvements to land from which the plaintiff does not seek and is not entitled to eject the tenant. We have, therefore, to consider the question referred to us apart from the provisions of the Act. A lessor cannot give a tenant notice to quit a part of the holding only and then sue to eject him from such part only, as pointed out quite recently by the Privy Council in *Harihar Banerji* v. *Ramasashi Roy* (4). Consequently if the suit is brought by the original lessor, the answer to the question referred to us must be in the negative because such a suit does not lie at all. Other considerations, however, arise, where, as in the present case, the original lessor has parted in whole or in part with the reversion in part of the demised premises. Under the general law such an assignment effects a severance, and entitles the assignee on the expiry of the term to eject the tenant from the land covered by the assignment. There never was any question about this, but it was

held in England that, while the assignee of the reversion in part was entitled to the benefit of the covenants in the lease as regards such part, the result of the severance effected by the assignment was to destroy altogether the conditions in the lease as for re-entry for non-payment of rent. Coke on Littelton, 215*a*. The law was altered as regards the case last mentioned by 22 and 23 Vict. C. 35, section 3, and generally, as regards leases made after the passing of the Act, by section 12 of the Conveyancing Act, 1881. See *Piggott* v. *Middlesex County Council* (18). Section 109 of the Transfer of Property Act gets over the difficulty by providing that "the transferee shall possess all the rights of the transferor in the part transferred" words which are large enough to cover both covenants and conditions. There is no question of a condition here, as the suit was to recover possession on the expiry of the term. Under the general law the assignee of the reversion in part of the demised premises is entitled to bring such a suit, and there does not appear to be any ground for suggesting that the general law in this respect is inapplicable in Malabar. The learned Judges in their Order of Reference have referred to the provision in section 6 (2) that "the money due by the plaintiff to the defendant for rent or otherwise in respect of the tenancy" is to be set off against the amount found due for improvements. The only rent due to a plaintiff suing as assignee of the reversion in part of the demised premises would be the apportioned rent in respect of the part assigned to him. There would be, therefore, no difficulty in applying the provision in question to such a case. Moreover, it is a provision in favour of the landlord, and cannot be regarded as enlarging the tenant's rights. The view I have taken is in accordance, as to the construction of the Act, with the decision of Sadasiva Aiyar and Moore, JJ., in Second Appeal No. 2180 of 1914 and as to the question of severance, with the decision of Sundara Aiyar and Sadasiva Aiyar, JJ. in Appeal against Order No. 85 of 1911, an earlier stage of the same case. It was not suggested that there was any hardship to the tenant in that case or in this. If, however, it be apprehended that Jenmis may be so unwise as to attempt to use the power of severance in a manner oppressive to their tenants, the proper course, it seems to me, is to move for an amendment of the Act.

I would answer that the lessor is not entitled to eject from a part only of the holding, but that the assignee of the reversion in part of the demised premises is entitled to eject for due cause from such part on payment of the value of the improvements to that part, and that this answer applies to tenancies in Malabar.

OLDFIELD, J.—I agree with the answer just proposed to the reference and accept the reasoning, by which it is supported, unreservedly, so far as it relates to the effect of severance on a tenancy. I agree also that its effect is undiminished, when, as in the case before us, the tenant is holding over and there has been no acceptance of rent, involving that the lease has been renewed.

I have, however, felt some hesitation regarding the application of Act I of 1900 as between the tenant and the transferee of a part of the leased property, because it has been argued that the Act is worded with reference to improvements to the holding and compensation is payable only for improvements on the holding, that is, the whole property covered by the original lease, not for those standing on or affecting the transferred portion. And no doubt in section 3 (3) an improvement is defined with reference to the value of the holding and the purpose, for which it is let; and in sections 4, 7 and 9 (1), improvements, which increase the value of the holding, are referred to directly. But there are also provisions, in which the reference is not to the holding, but to the tenancy, such reference being direct in section 6 (2) and (3) and indirect in section 6 (1), where the reference to "the land" may be read as to the land referred to in the definition of "tenant" in section 3 (1). The question is then whether the use of the term "holding" was intended by the Legislature to be distinctive and to mean the property originally leased, not the portion of it, from which in consequence of a subsequent transfer the

(18) (1909) 1 Ch. 134; 77 L. J. Ch. 813; 99 L. T. 662; 72 J. P. 461; 6 L. G. R. 1177.

tenant would be separately ejected. The result of so regarding it will be the exclusion of claims to compensation after severance from the purview of the Act, and we have been shown no reason for thinking that this was contemplated. The Act contains no definition of the term "holding," and in the circumstances I am of opinion that a liberal interpretation of it is legitimate and I, therefore, concur in the conclusion reached by the learned Chief Justice.

SADASIVA AIYAR, J.—I agree with the judgment of my Lord and have nothing to add.

COUTTS TROTTER, J.—I agree with my Lord. The Legislature might have created a substantive right in the tenant to compensation for his improvements enforced by a lien on his holding in its entirety. What in fact it has done is to make the right to compensation merely an adjunct to a suit in ejectment or for redemption. So far as I can see, the right itself does not even arise till such a suit is brought. That being so, the right must, it appears to me, be limited to the land which is the subject-matter of the suit, *i. e.*, the land from which it is actually sought to eject the tenant.

SESHAGIRI AIYAR, J.—The scope of the reference was considerably limited during the second argument before a Fuller Bench. The objection which I had raised to the suggestion that there can be no eviction from part of the premises during the continuance of the tenancy was not attempted to be answered by Mr. Eroman Unni, on the second occasion. I feel no hesitation in saying that neither under section 109 of the Transfer of Property Act nor under the general law of the land is it competent to an assignee of a part of the demised premises to eject the tenant from that portion compulsorily during the period of the tenancy. Even if section 109 is capable of a different construction, I would hold that its operation should not be extended to agricultural tenancies in this country, because the rule of equity, justice and good conscience would be defeated rather than advanced by the extension of the doctrine of partial eviction to agricultural leases. As to the rule of English Law, I had formed an opinion at the first hearing that partial eviction before the expiry of the term of the tenancy is equally unavailing in England and I see no reason to change that view. But I do not think it necessary to discuss the point now. Therefore, my answer to the question would be in the negative, if it is understood to refer to eviction before the expiry of the period of the lease.

But what we have to consider is a case of a terminated tenancy which by virtue of the Malabar Compensation for Improvements Act has not wholly ceased to be operative. There can be no doubt that the Act does not attempt to legislate whether there can be partial eviction or not. The Legislature has only provided for events happening on the filing of a suit for ejectment. At the same time, to my mind, it seems clear that it did not contemplate the possibility of a partial eviction. It, by the terms of sections 5, 6, 7 and 9, seems to have assumed that the lease under which the tenant came in would continue intact. In clause (1), the expression used is "notwithstanding the determination of the tenancy." This must have reference to the one which was created on the first entry and not to the split up parts by the process of sale or assignment. Strictly speaking, unless the tenant attorns or otherwise acknowledges the fractional landlord, there would be no tenancy to determine. Again in section 6, clause (1), the word "tenant" is used; in clauses (2) and (3) the word "tenancy". These words are not appropriate to the relationship which comes into existence by reason of the division of the demised premises, either by conveyance or assignment. In sections 7 and 9, as if by way of variety, the language employed is "holding". Where can we have "holding" between the assignee of one of the demised premises and the quondam tenant of all the premises, unless a new tenancy is created in respect of it? If such a one is by act of parties brought into existence, the present question is easily answered. Otherwise I find it difficult to hold that on the expiry of the term of the lease, there is any "holding" belonging to the assignee of a portion or "a tenant" in respect of it. It seems to me that the Legislature in providing for compensation on eviction understood that the parties were in *status quo ante* and that there has been no break-up of the lease interest.

It is no answer to this difficulty to say that under the ordinary law, a tenant that was, can be evicted from each and every portion of the leased property. If that can be done, except in cases of holding over, it would be by regarding him as a trespasser who had no right to remain on the soil after the efflux of time limited by his lease. I am prepared to concede that the Act we are construing, does not in terms prohibit partial eviction. But that is only the negative side of the enactment. Has it not by implication asked the Courts to pass a decree in ejectment preparatory to the award of compensation on the basis of an existing tenancy? That is my reading of the Act, and I, therefore, regret I am unable to agree with the conclusion to which the learned Chief Justice and my learned brothers have come.

I have been reading a great deal about the genesis of the Act. The report of the Malabar Land Tenures Committee shows that the present law is a compromise between the creation of occupancy rights in the soil in favour of all tenants in the same way that the Estates Land Act has done and the endeavour to purchase the landlord out altogether. I do not propose to quote any extracts from the report; but I cannot help remarking that it is a sad commentary on their labours that the law which they recommended should have been so inaptly worded as to enable the landlord to evict the tenant piecemeal. The danger which threatens the tenant is not an imaginary one. I suggested some cases in the course of the hearing. A tenant erecting a house in a portion of the Paramba or digging a tank in one of the demised premises to irrigate the lands demised are instances in which partial eviction would place the tenant very badly at the mercy of the landlord. When we remember the practice of granting Melcharths which prevails in Malabar, it would occur at once that a Karnavan can by threatening to evict the tenant from a portion of the holding exact unconscionable terms prior to renewal. In the case of ordinary owners of property such a procedure would not be frequently adopted. But the Malabar Jenmi of to day is in a transition stage. Education and notions of independence have destroyed his benevolent despotism. He is a watched man and he, therefore, does not hesitate to make the most of his opportunities. Melcharths and the demand of a heavy renewal fee for which he is seldom held accountable to the flock under him are his resorts to enrich his wife and children. There may be still a few old fashioned Jenmis who wish well by the Tarwad and its property; but their numbers are diminishing. The tie of natural kinship rebels against the enforcible claims of the corporate body; and the result is that, in the majority of cases, the Karnavan is trying to exact as much as possible from the tenants. Our decision would place a new weapon in his hands and the lot of the tenant would become more difficult than ever.

I hope I may be excused this incursion into the domain of social tie between the Tarwad and its members, because I am anxious to catch the eye of the Legislature as to the necessity of so amending the law as to make the lot of the Malabar tenant more tolerable than it would be under our decision. I feel compelled to differ from the majority of the Court and to hold that until the payment of compensation in respect of the holding as a whole, there can be no partial eviction.

M. C. P.

Reference answered.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 14 OF 1918.

January 9, 1919.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Hayward.

MORARJI GOKULDAS & CO.—PLAINTIFFS —APPELLANTS

versus

THE ASIAN COMMERCIAL ASSURANCE CO., LTD.—DEFENDANTS—RESPONDENTS.

Bombay Rent (War Restrictions) Act (II of 1918), *s.* 2 (c —"*Landlord*," *who is.*

A lessee of premises who is entitled to recover rent for the premises falls within the terms of the definition of "landlord" in section 2 (*c*) of the Bombay Rent Act, 1918. [p. 294, col. 2.]

Appeal against a decision of Beaman, J., dismissing the suit.

Messrs. *Weldon* and *Desai*, for the Appellants.

Mr. *Strangman* (Advocate-General) and Mr. *Kanga*, for the Respondents.

JUDGMENT.

SCOTT, C. J.—As a result of negotiations which commenced in December 1917, the plaintiffs took a lease from Sir Mahomed Yusuf of his premises in Church Gate Street consisting of a four-storied house, on the 6th of February 1918.

By the lease the plaintiffs became entitled to the premises for twenty years, at a rent of Rs. 6,500 per annum for the first ten years and Rs. 7,000 for the second ten years with an option of renewal for another seven years at the same rent, and by the lease they acquired the benefit of all subsisting tenancies.

Their object in taking the house was to utilise the fourth floor as an office for their firm. At the date of the lease it was held by the defendants on a monthly tenancy and the plaintiffs arranged with Sir Mahomed Yusuf to give notice to quit on the 31st March to the defendants as the plaintiffs' tenure was to commence on the 1st of April.

Accordingly such notice to quit was given to the defendants on the 18th of February.

They did not, however, quit at the commencement of the plaintiffs' tenure. Therefore, they were not in lawful occupation of the fourth floor. They were trespassers. On the 10th of April the Bombay Rent Act (II of 1918) came into force and on the same day the plaintiffs filed this suit for possession of the fourth floor. The defendants contend that under the Rent Act they cannot be ejected. They rely upon section 9, which so far as material is as follows:—

"No order for the recovery of possession of any premises shall be made so long as the tenant pays or is ready and willing to pay rent to the full extent allowable by this Act and performs the conditions of the tenancy: Provided that nothing in this section shall apply...where the premises are reasonably and *bona fide* required by the landlord either for the erection of buildings or for his own occupation..."

The plaintiffs reply that the premises are reasonably required by them for their own occupation.

The learned Judge, after a consideration of the evidence adduced by the plaintiffs, held that it would be unwarrantable to throw the slightest suspicion upon the honesty of their motives in taking the lease of the 6th February, by which I understand him to mean that although they had not made out a very strong case of inconvenience in their former premises, they did *bona fide* require the fourth floor for their own occupation. It seems to me that on this point there can hardly be two opinions. The plaintiffs are paying to their lessor for a long term a rent much higher than that he was already receiving and this, coupled with their evidence as to the inadequacy of their present office accommodation, convinces me that they reasonably and *bona fide* require the fourth floor for their own occupation. It is indisputable that the plaintiffs fall within the terms of the definition of 'landlord' in the Rent Act, section 2 (*c*), for they are the persons entitled to recover rent for the premises. The learned Judge, however, held that their lessor did not require to occupy the premises, and, therefore, could not by assigning a reversion to the fourth floor confer the right to claim to occupy that portion of the house.

Whether that argument would be tenable if the landlord had assigned his reversion after the Act came into force is a question which does not arise in this case, for the landlord had parted with his rights for twenty years and the defendants' tenancy had determined before the Act came into force and I find it impossible to hold that the Act has any retrospective force in limiting the operation of prior transfers. The plaintiffs were the 'landlords' when the Act came into force and I cannot find in section 9 or in any other part of the Act anything to prevent them from exercising the rights reserved to landlords by section 9 (2).

The defendants, besides relying on the provisions of the Rent Act, contended in their written statement that they are entitled to specific performance of a lease of the fourth floor from Sir Mahomed Yusuf for five years. Their evidence, however, negatives any such claim. It shows that they had a lease prepared and stamped to take the fourth floor from Sir Mahomed

SUKKULAL SOWCAR v. TIRUMALA ROW.

Yusuf in November 1917 for five years at Rs. 200 per month, but owing to some conversations with Sir Mahomed Yusuf's agent they abandoned the idea of a lease and agreed to pay Rs. 175 per month on the understanding that they would not be evicted. Assuming the story of the promise or understanding that there would be no eviction is true, it cannot prejudice the plaintiffs who admittedly had no notice of any such understanding. The defendants may have some right of action against Sir Mahomed Yusuf but they have no defence to the plaintiff's claim for possession under his registered lease.

A further point was made that the plaintiffs were not entitled to sue as the firm of Morarji Gokuldas & Co. includes Sir Dinsha Wachha who is not a party plaintiff. That gentleman has deposed that though a partner he has no interest in the financial side of the firm or in the lease in question. He is indeed a salaried partner only not interested in the assets and, therefore, not a necessary party to a suit such as this.

We set aside the decree of the lower Court and pass a decree for the plaintiffs for possession as prayed—Rs. 165 per mensem from 1st April 1918 till delivery of possession as compensation for use and occupation —with costs throughout on the defendants.

Appeal decreed.

MADRAS HIGH COURT.
CIVIL SUIT No. 278 OF 1917.
February 27, 1918.
Present:—Mr. Justice Coutts Trotter.
SUKKULAL SOWCAR—PLAINTIFF
versus
A. V. TIRUMALA ROW SAHIB, A WARD UNDER THE COURT OF WARDS REPRESENTED BY THE MANAGER AS HIS GUARDIAN *ad litem* —DEFENDANT.

Contract Act (IX of 1872), s. 74—'Penalty,' meaning of—Agreement to re-pay larger amount than that borrowed, covering principal and interest for specified period—Payment of interest in advance—Unconscionable bargain—Court, power of, to award equitable relief.

An agreement by a borrower, in return for a smaller sum to re-pay a larger one on a given day representing the original principal and interest, is not contrary to law. [p. 298, col. 1.]

In such a case the Court cannot award relief under section 74 of the Contract Act as the transaction is not penal in its nature. [p. 297, col. 2.]

Willingford v. *Mutual Society*, ('880) 5 App. Cas 685; 50 L. J. Q. B. 49; 43 L T. 258; 29 W. R. 81, followed.

Velchand Chhagan Lal v. *A. Flagg*, 13 Ind Cas. 853; 36 B. 164; 14 Bom. L. R. 18, dissented from.

The word 'penal' in section 74 of the Contract Act has a bearing only when there is a main contract and a subsidiary contract providing for some more drastic consequences in the event of the breach of the original and main contract. It is totally inapplicable to a term of the original contract or consequence of the original contract not owing to breach but owing to fulfilment. [p. 297, col. 1.]

Defendant executed a pro-note to plaintiff for Rs. 10,000 promising to re-pay the amount with interest at 24 per cent. per annum. On the same day he gave a letter to plaintiff in which he agreed to discharge the said loan by monthly payments of Rs. 500, for which he executed 20 *hundis*, one to be cashed each month. The amount paid by plaintiff in cash was only Rs. 6,000. In a suit to enforce the pro-note:

Held, that the transaction, though oppressive, was not penal within the meaning of section 74 of the Contract Act. [p. 297, col. 2.]

FACTS appear from the judgment.

Mr. *M. A. Tirunarayanachari* (with him Mr. *P. Kandaswami*), for the Plaintiff:—The transaction evidenced by the pro-note and the letter is not penal within the meaning of section 74 of the Contract Act. It is not like the familiar class of cases where a larger interest is stipulated in default of payment. The re payment is to be in specified instalments over a certain period and covers the principal and interest. There is no provision of any Indian Statute which makes such a bargain illegal.

Section 74 of the Contract Act applies only where there is a breach of the original contract. It cannot be applied to consequences arising from the fulfilment of the contract.

Mr. *V. Ramesam* (Government Pleader), for the Defendant:—The actual amount paid was only Rs. 6,000. The amount repayable at the end of 20 months was Rs. 10,000. Interest on Rs. 10,000 was deducted in advance. The defendant, who is only liable to pay interest on the Rs 6,000 actually advanced, has to pay interest on a much larger fictitious amount. That works up at about 40 per cent. per annum. That is an unconscionable and oppressive

bargain and is within the mischief of section 74 of the Contract Act. See *Velchand Chhaganlal* v. *A. Flagg* (1).

The stringency of the bargain is manifest from the fact that even after Rs. 9,500 was discharged and only a sum of Rs. 500 was due, defendant had to pay interest on Rs. 10,000, *i.e.*, he had to pay Rs. 200 interest on Rs. 500. *Quoad* Rs. 9,500 as it was discharged there was failure of consideration.

JUDGMENT.—This is a suit on a promissory note and an equitable mortgage of properties securing it. The plaintiff is a Sowcar and the defendant is the Jagirdar of Arni represented by the manager of his estate as his guardian. It is an estate under the Court of Wards and his interests are represented by Mr. V. Ramesam, the Goverment Pleader. The contract is this. It is a promissory note, dated the 18th day of July 1915, in the ordinary form for Rs. 10,000,—"on demand I promise to pay Sukkulal Sowcar or order at Madras, the sum of rupees ten thousand only with interest at 24 per cent. per annum for value received in cash." That is the promissory note and that is accompanied by two other contemporaneous documents one of which is not of very great importance, because it only shows what was done, which I am going to describe presently. The other is a letter signed by the defendant in which he says this:—"I have this day borrowed and received from you the sum of Rs. 10,000 upon the equitable mortgage of the stable No. 2/10 Madaran Paracherry, Egmore, Madras, for the re-payment of the amount of the promissory note payable on demand with interest at 24 per cent. per annum. I have this day executed for the re-payment of the amount of the said promissory note, 20 Hundis of Rs. 500 each authorising you to cash each Hundi every month on the due date and credit the sum so realised towards the said pro-note. If the amount of the said Hundis is not paid by me you are at liberty to proceed against me, for the recovery of the amount of the said Hundis and credit the same on footing of the said promissory note", and then a document is executed which shows what was done. There was paid Rs. 4,500 in cash and a balance of Rs. 1,500 outstanding on an old promissory note of 1914 was wiped out. The remaining Rs. 4,000 is described in this way, "paid interest for 20 months in respect of the promissory note for Rs. 10,000 dated this day on condition of re-payment of the amount of the said pro-note by monthly instalments of Rs. 500 for which 20 Hundis of Rs. 500 each and executed this day in your favour," this is the transaction on the documents. One has to see what the real transaction was. Treating the extinction of the old promissory note as cash, he did not get Rs. 10,000 at all but only Rs. 6,000 and he agreed to pay all the interest on Rs. 10,000, to treat that as paid in advance, and to re-pay Rs. 10,000 by 20 Hundis of Rs. 500 each. So that on the face of it at best he got a loan of Rs. 6,000 with an obligation to re-pay Rs. 10,000 in 20 months which worked out at something like 40 per cent., and not 24 per cent. as described in the contract. But there are two other features about this matter which make the interest, though it would require an expert mathematician to work it out, very much more oppressive than that. In the first place, but for the payment of the interest as a whole in advance the defendant would have had the advantage of having in his hands all the interest at any given time which remained unpaid. If he paid it as stipulated, he would have the use of it for the whole or the gradually diminishing period during the 20 months instead of the user passing forthwith to the plaintiff. In the second place, while he is paying—consider that the interest was paid at the end instead of at the beginning—month by month Rs. 200, in fact what he is doing is to pay a consolidated interest on the total which is in fact constantly diminishing. So that every month he is in fact paying a higher rate of interest because, whereas he pays on Rs. 10,000 for the first month, the next month he pays off Rs. 500 and still pays interest on Rs. 10,000, although the capital has been reduced by the payment of Rs. 500 and so on. That will have the effect of spreading a little more interest over smaller sums and the rate of interest will increase until

(1) 18 Ind. Cas. 853; 36 B. 164; 14 Bom. L. R. 18.

you get the astounding result in the last month that he pays Rs. 200 for the month's use of Rs. 500 which works out at very nearly 500 per cent. In this state of things the question I have to consider is, whether the plaintiff is entitled to enforce this contract as it stands, or whether there is any provision of law which enables me to give relief to the defendant. It is an unconscionable bargain, but I have not got a Money Lenders Act to give relief against a bargain merely because it is oppressive and catching and no plea has been raised here of undue influence or pressure or anything of that kind. So that the sole question I have to ask myself is, is there any provision of law administered in this country that enables me to attack or give relief against this transaction. I need hardly say that if I possibly could I would have done so.

The first way in which Mr. Ramesam puts his case is that put down in his pleadings. He says this case comes under section 74 of the Contract Act, being penal. I asked him what was penal. He said what is penal is to treat a loan of Rs. 6,000 as a loan of Rs. 10,000 and make the interest payable in advance—I think that both the English and the Indian Courts have finally established the principle that the word penal or penalty has a bearing, as Mr. Justice Ayling puts it, only when there is a main contract and a subsidiary contract providing for some more drastic consequences in the event of the breach of the original and main contract. That seems to me what is meant by penalty, and I do not think anything can be brought under the operation of section 74 which is a term and stipulation of the main contract between the parties. A common instance of such a penal stipulation is the familiar one that on failure of payment of one instalment the whole shall become due. That is the penalty for the breach of what the contracting party has undertaken to do. Against such penalties the Courts can, if they choose, give relief. But it seems to me that the word penalty is totally inapplicable to a term of the original contract or consequence of the original contract not owing to breach but owing to fulfilment; and what Mr. Ramesam complains against is not in consequence of the breach but in consequence of the fulfilment of the contract; if I fulfil this contract according to its tenor, he says, these are the consequences and these I say are penal. They may be oppressive, but in my opinion they are not penal within the meaning of the Contract Act and the decided cases.

In relation to this a decision of Sir Basil Scott and Mr. Justice Bachelor, *Velchand Ohhaganlal* v. *A. Flagg* (1), was referred to. It does certainly appear from the decree there that where a larger sum was recited to have been lent—Rs. 6,000—but in fact by the deduction of interest a smaller sum was lent, the Court undoubtedly seems to have treated the loan in its judgment as being a loan for the lesser amount. There is no report of the arguments and the judgment gives no reasons whatever for the result arrived at and does not discuss the matter in the least. All I can say is that the result of the case which is apparently embodied in the headnote is one that is absolutely unintelligible to me. No reasons, as I say, are given and it is not necessary for me to say that I think the case is wrongly decided. I can only say that as reported, it is absolutely unintelligible, and I see that my brother Ayling in *Suryadevara Seetarumayya Suryadevara Kotayya* (2) made similar observations with regard to this very same case at page 114. I, therefore think that it is impossible to give relief under this contract to the defendant under section 74.

Mr. Ramesam puts forward a most ingenious argument and one which if I thought verged on soundness I should certainly give effect to. It is this. All through—neglect the fact that I paid interest at the start—I was paying interest on money which I had not got, because the moment I paid off Rs. 500 for the first Hundi there was only Rs. 9,500 to pay interest on, but I paid interest on Rs. 10,000 and so on until the capital has gone to Rs. 500 and the interest is still on Rs. 10,000, that is, *quoad* Rs. 9,500 as it was discharged there was total failure of consideration. I think he wants me to go so far as to say that the whole stipulation to pay interest was vitiated by that feature. It seems

(2) 35 Ind. Cas. 111,

to me that you cannot break up this contract into bits and treat each monthly payment as a separate contract. It seems to me that the contract is indivisible. I do not think it can reasonably be described as a loan of Rs. 10,000—I think in truth it is a loan of Rs. 6,000 with an agreement to pay Rs. 500 a month which goes in reduction of principal and interest until the sum of Rs. 10,000 has been paid off. Whether you regard one particular portion of it as re-payment of interest and another as re-payment of principal does not matter. I think there is no law in this country which either forbids such a transaction or allows a Court to give relief against it. It simply is a re-payment of Rs. 10,000 spread over a certain period in return for a loan of Rs. 6,000 and I am totally unable to see that there is anything illegal or improper about such a matter according to the law of this country, and I think that the well-known observations of Lord Hatherley in *Wallingford* v. *Mutual Society* (3) apply, where in a decision before the Money Lenders Act in England and after the repeal of the Usury Acts the House of Lords held that an agreement in return for a smaller sum to re-pay a larger one on a given day representing the original principal and interest was not contrary to law. I must hold the same with regard to this agreement and I must give judgment for the plaintiff for the amount claimed with costs and interest at the contract rate till the date of plaint and 6 per cent. thereafter. Usual mortgage decree. Time six months. Plaintiff must give credit to the defendant for the payment already made.

M. C. P.

Suit decreed.

(3) (1880) 5 App. Cas. 685 at p 702; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 514 OF 1918.

June 10, 1918.

Present:—Mr. Justice Martineau.

KHUDA YAR AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

AHMAD AND ANOTHER—DEFENDANTS —RESPONDENTS.

Custom—Succession—Full brothers, whether exclude half-brothers—Kaliar *Jats of Mauza Kaliaranwala, Tahsil and District Mianwali.*

Among Kaliar Jats of Mauza Kaliaranwala, Tahsil and District Mianwali, in succession among brothers, half brothers are excluded by full brothers. [p. 299, col. 2; p. 300, col., 1.]

Second appeal from the decree of the District Judge, Shahpur at Sargodha, dated the 8th January 1918.

Mr. *Nanak Chand* for the Appellants.

Mr. *C. L. Gulati*, for the Respondents.

JUDGMENT.—The parties are Kaliar Jats of Kaliaranwala village in the Mianwali Tahsil and District. Their relationship is shown in the pedigree table given in the judgments of the lower Courts. Ahmad Yar's widow Sabhrai has died, and the dispute relates to the succession to his share in Khatas Nos. 1013 and 1014, which descended from his father Gheba. The question for determination is whether Ahmad Yar's half brothers are entitled to succeed equally with his full brothers (who are the plaintiffs) or are excluded by them. The first Court gave the plaintiffs a decree, but the lower Appellate Court has accepted the defendants' appeal and dismissed the suit, finding that the defendants have proved that in their family the rule of succession among brothers is that whole and half-brothers succeed equally.

I do not find any proof that this is the rule of succession in the family of the parties. On the contrary the only instance of succession among brothers in this family is in favour of the plaintiffs. It occurred in 1914, when on the death of Sabhrai her share in two other *khatas* which had descended from Gheba, namely, Khatas Nos. 1009 and 1011, was mutated in the names of the plaintiffs alone.

The learned District Judge has given his decision in favour of the defendants on the strength of the fact that when Gheba died about seven years ago Khatas Nos. 1009 and

1011 were mutated in the names of his sons according to the *pagwand* rule. From this fact he draws the presumption that half-brothers succeed equally with full brothers.

It is no doubt stated in paragraph 26 of Rattigan's Digest of Customary Law that when the property of the common ancestor was distributed according to the rule of *pagwand*, the Court may presume that the whole blood and half blood succeed together, but it is also stated that where the brothers of the whole blood subsequently form separate groups and so regulate the succession amongst themselves as to alter the original rule of distribution, the presumption will cease to operate. Now we find that in the mutation of Khatas Nos. 1009 and 1011 on Gheba's death 2/6ths were entered in the names of defendants, 3/6ths in the names of plaintiffs and Sabhrai and 1/6th in the name of plaintiffs' mother Mehran. This suggests that the defendants were regarded as forming a group separate from their half-brothers, and when the fact is further taken into consideration that the defendants have, by the mutation effected after Sabhrai's death, been so far excluded by the plaintiffs from a share in Khatas Nos. 1009 and 1011, I think that the fact of Gheba's property having been distributed among his sons according to the *pagwand* rule does not justify the presumption that in the family of the parties in succession among brothers the half blood succeeds with the whole blood. A reference to Pandit Hari Kishan Kaul's Customary Law of the Mianwali District, 1903, would also show that the proposition laid down in Rattigan's Digest as to the presumption to be drawn from the prevalence of the *pagwand* rule of succession among sons does not apply in the Mianwali District. The *pagwand* rule appears to prevail universally throughout the district, but there is nevertheless no general rule that half-brothers succeed along with full brothers.

The important question in this case is on which side the *onus* lies. The learned District Judge is of opinion that the Munsif was right in placing the *onus* on the defendants, and I agree with him. In the *riwaj i am* of 1878 it is stated that among Pathans the whole blood excludes the half blood, and that Jats follow the Pathan custom. In the Customary Law of the Mianwali District of 1908 it is stated that among Jats, full brothers and half-brothers succeed equally, but that several instances have been quoted amongst them in which full brothers have succeeded to the exclusion of half-brothers, and on page 7 of the introduction it is said that "the Jats though maintaining the reverse appear to have followed the rule of full brothers excluding the half-brothers."

I gather from this that the custom, as it was stated to exist in 1878, had not been changed in 1908. The Jats in 1908 were apparently in favour of the custom being changed, but no change had actually taken place, and the old rule by which full brothers excluded half-brothers was still observed in practice. Questions of inheritance have to be decided in accordance with the custom as it exists and not in accordance with views that may be entertained as to what it ought to be.

It is, therefore, for the defendants to prove that they are entitled to succeed with the plaintiffs to Ahmad Yar's estate. They have been able to produce evidence of only two instances of half-brothers succeeding along with full brothers among Jats. These two instances, which are mentioned by the witnesses Hayat and Khadullah, are insufficient to discharge the *onus*. The plaintiffs' witnesses give instances among Pathans of full brothers excluding half-brothers and say that Jats follow the same custom. This is in accordance with the entry in the *riwaj i am* of 1878. Further there are three instances of exclusion of half-brothers among Jats mentioned in the current *riwaj i am*, which counter-balance the instances mentioned by the defendants' witnesses.

The lower Appellate Court mentions a Munsif's judgment of 1909 which was in favour of the rights of half brothers but against this there are two judgments, referred to by the lower Appellate Court, one given by Mr. Kennaway and the other by his predecessor Khan Bahadur Abdul Ghafur Khan, in which the *riwaj-i-am* of 1878 was followed.

My conclusion is that the defendants, on whom the *onus* lies, have failed to prove the existence either of a family custom or of a tribal custom by which in succession among brothers those of the half

blood succeed equally with those of the full blood.

I accordingly accept the appeal, set aside the decree of the lower Appellate Court, and restore that of the first Court. The respondents will pay the appellants' costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1849 OF 1917.

November 27, 1918.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

MUTHU AYER ST. ARUNACHALAM CHETTIAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

ST. N. NARAYANAN CHETTIAR AND OTHERS—DEFENDANTS NOS. 1 TO 4—RESPONDENTS.

*Paper Currency Act (II of 1910), ss. 26, prov. —Negotiable Instruments Act (XXVI of 1881), ss. 120, 122—*Hundi *payable to bearer—Creditor and debtor mentioned at top of* hundi—Hundi *drawn on banker—Intended deposit of money to cover draft—Validity of* hundi—*Endorsement by payee, effect of, on right to dispute validity of* hundi—*Estoppel—Evidence Act (I of 1872), s* 115.

First defendant drew a *hundi* on a Rangoon firm in which at the top he was described as the debtor and the 3rd defendant as the creditor. The material portion of the *hundi* was as follows: "the money with Rangoon current rate of interest should be paid on demand to the person who brings this by the Rangoon firm" The 1st defendant had no money with the firm when he drew the *hundi*, but intended to make a deposit before presentation:

Held, that the *hundi* was covered by the proviso to section 26 of the Paper Currency Act and that the plaintiff was entitled to recover on the basis of it. [p. 301, col. 2.]

Where a *hundi* is drawn on a banker, an intended deposit before presentation would save the *hundi* under the proviso to section 26 of the Paper Currency Act. [p. 301, col. 1.]

Chidambaram Chettiar v. *Ayyasami Thevan*, 36 Ind. Cas 741; 40 M. 585; 31 M. L. J 401: (1916) 2 M. W. N. 210; 4 L. W. 261; 20 M. L. T. 350, explained and distinguished.

Per *Seshagiri Aiyar, J.*—The policy of the proviso to section 26 of the Paper Currency Act is to enable *bona fide* customers to operate on actual or intended deposits There is nothing against public policy in so doing and a *hundi* can be drawn on a bank against an intended deposit. [p. 301, cols. 1 & 2.]

The endorser of a negotiable instrument is estopped as against the endorsee from disputing the validity of the instrument. [p. 302, col. 1.]

Second appeal against the decree of the District Court, Ramnad at Madura, in Appeal Suit No. 404 of 1916, preferred against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 16 of 1915.

Mr. *C. S. Venkatachariar*, for the Appellants.

Messrs. *A. Krishnaswami Aiyar* and *Patanjali Sastri*, for the Respondents.

JUDGMENT.

SESHAGIRI AIYAR, J.—This is a suit by an endorsee of a Hundi. On the 9th of April 1914 the 1st defendant drew the Hundi, Exhibit A, on a Rangoon firm. At the top of the Hundi the 3rd defendant is described as the creditor and the 1st defendant as the debtor. The exact rendering of the Hundi omitting unnecessary portions is "the money with Rangoon current rate of interest should be paid on demand to the person who brings this, by the Rangoon firm." This was signed by the 1st defendant. Subsequently the 3rd defendant put his signature by way of endorsement. Plaintiffs lent to the 1st defendant on the strength of the endorsement. Hence the suit. The defence was that the debt was discharged, and that as the Hundi offended against the provisions of the Paper Currency Act the suit is not maintainable. The Courts below held that the Hundi was not discharged. They came to the conclusion, relying upon *Chidambaram Chettiar* v. *Ayyasami Thevan* (1), that the suit should be dismissed.

Mr. Venkatachariar in the second appeal tried to distinguish *Chidambaram Chettiar* v. *Ayyasami Thevan* (1) from the present case on the ground that the Hundi must be regarded as not being made payable to the payee or bearer. I am unable to agree with him. The fact that the name of the payee is entered at the top of the Hundi does not matter. In effect the Hundi is drawn in favour of the 3rd defendant, and is made payable to bearer. I think that even without the endorsement of the 3rd defendant the Hundi could have been presented for payment. Consequently it is obnoxious to section 26 of the Paper Currency Act.

(1) 36 Ind. Cas. 741; 40 M. 585; 31 M. L. J. 401; (1916) 2 M. W. N. 210; 4 L. W. 261; 20 M. L. T. 350.

This case, however, is distinguishable from *Chidambaram Chettiar* v. *Ayyasami Thevan* (1) on another ground. In the first place, I think that the document in question is covered by the proviso to the section. Under it, a draft can be made payable "to bearer on demand in respect of deposits of money in the hands of bankers and held at the credit and disposal of persons drawing such drafts." Mr. Patanjali Sastri contended that in the present instance the Hundi should not be regarded as being drawn against a deposit of money, because on the date of the Hundi there was no money in the Rangoon firm due to the 1st defendant. If we turn to the admissions of the 1st defendant contained in his deposition, it is clear that this contention must be overruled. He says: "When the Hundi was drawn on it I had no money in that firm, but I had written to Saigon where I had money to send it on to the said Rangoon firm, and so I drew the Hundi on it." "My account with that firm as regards that money is not yet closed. No money is due to me from that firm. The money I wanted to be sent to the Rangoon firm from Saigon was not sent. After the suit Hundi my money has gone to that firm and I have drawn it." Notwithstanding the evident intention of the 1st defendant to tell as many lies as would save him from liability, the net import of this evidence is that he drew the Hundi on money which he directed to be sent to the Rangoon firm and that after drawing the Hundi and before presentation for payment at Rangoon, he drew that money out. It is clear from this statement that the case comes within the proviso, because the draft was drawn in respect of an intended deposit of money which was expected to be held by the bankers at the credit and disposal of the 1st defendant. The money that apparently reached the Rangoon firm would but for the dishonest conduct of the 1st defendant have been available to the plaintiffs. To hold otherwise would be to decide that when a customer draws a cheque or Hundi on a bank to which he has directed a payment to be made which would cover the draft, is guilty of an offence. The object of the proviso is to enable *bona fide* customers to operate on actual or intended deposits. There is nothing against public policy in so doing and I am of opinion that the Hundi was validly drawn on the bank. The subsequent misconduct of the 1st defendant in drawing out the money would not invalidate it.

There is another possible ground. It was not disputed that the plaintiff was a holder in due course. He had paid consideration for the Hundi before it had become payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. *Prima facie* therefore, the 3rd defendant is estopped from saying that the Hundi which he endorsed is not a valid document. Under the English Bills of Exchange Act the position of the plaintiffs would have been unassailable. Section 55, clause (2) (*c*), runs thus: "The endorser of a bill by endorsing it is precluded from denying to his immediate or subsequent endorsee that the bill was at the time of his endorsement a valid and subsisting bill and that he had then a good title thereto." This rule is an illustration of the principle of estoppel contained in section 115 of the Indian Evidence Act. The Indian enactment, though passed a year previous to the passing of the English Bills of Exchange Act, was apparently modelled on its provisions. In the chapter headed Special Rules of Evidence, sections 120 and 122 refer respectively to estoppel against makers and endorsers. Section 120 says that "the maker or drawer of a bill of exchange shall not be permitted in a suit thereon by a holder in due course to deny the validity of the instrument as originally made or drawn." This would undoubtedly make the 1st defendant liable. As regards the endorser section 122 says: "No endorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument." There are two noticeable differences between the two sections. One is that, under the latter section, the liability incurred is not only to the holder in due course but to any holder. In the second place, the estoppel is only against *denying the signature or capacity of* a prior party and not against the *validity* of the instrument as originally made or drawn.

There is no reason why there should be this distinction between the position of a drawer of a bill of exchange or the maker of a promissory note and the endorser. The English Law does not recognize such a distinction, and I am inclined to think that it is a case of inadvertent omission rather than of deliberate departure from the English rule. If we turn to section 35 of the Act, we find that "every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied." Section 38 says: "Each prior party is, in the absence of a contract to the contrary, liable thereon as a principal debtor in respect of each subsequent party." The illustration to the section shows that the drawer will be the principal debtor and the endorser will be the surety. Ordinarily an estoppel which would apply against the principal party would also be available against the surety, unless there are circumstances such as those mentioned in section 40, etc. Byles in his book on Bills of Exchange (16th edition) says at page 180: "The endorser makes a similar contract, and promises in the same way to compensate the holder or any subsequent endorser; he is estopped from denying to a holder in due course the genunineness and regularity in all respects of the drawer's signature, and all previous endorsements; is estopped from denying to his immediate and any subsequent endorsee, that the bill was at the time of his endorsement *a valid and subsisting bill* and that he had a good title thereto." I fail to see why this salutary principle of estoppel should not be applied in India. However, having regard to the language of section 122, I shall not base my decision on the rule of estoppel enunciated in section 55, clause (2) (*c*), of the English Act. The Legislature should make this point clear. As I have held that the Hundi is covered by the proviso to section 26 of the Paper Currency Act, this appeal should be allowed and the decrees of the Courts below reversed; plaintiff is entitled to a decree as prayed for and to costs in all the Courts.

PHILLIPS, J.—I agree that the suit document comes within the proviso to section 26 of the Paper Currency Act. The finding that the 1st defendant had no money with his bankers at the time he signed the Hundi is not by itself sufficient to show that he was not operating on money deposited by him with his bankers. In fact he admits that he was so operating and had given instructions for a remittance to be made to his bankers to meet the suit Hundi. The Subordinate Judge's conclusion from the mere fact that no money was actually in the banker's hands when the Hundi was signed is not warranted, for it would involve the proposition that a cheque drawn payable to bearer at a time when as a matter of fact the drawer had no balance at the bank is an offence against the Paper Currency Act, although the drawer believed he had sufficient funds in the bank or intended to put the bank in funds before the cheque could be presented. The words of the proviso to section 26 "in respect of deposits of money in the hands of the bankers" do not seem to me to warrant such a broad proposition. I, therefore, agree in the order proposed, and think it unnecessary to discuss the further question of estoppel.

M. C. P.

Appeal allowed.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1341 TO 1352 OF 1917.

May 16, 1919.

Present:—Mr. Justice Das.

LAL MOHAMMAD KHAN AND OTHERS—APPELLANTS

versus

Mahanth KRISHNA DAYAL GIR—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 50—Evidence—Presumption as to fixity of rent—Specific plot must be shown to be fixed rate—Burden of proof.

In order to enable a Court to come to the conclusion that a tenant is a fixed-rate tenant it must be established that he has held at a rent or rate of rent which has not been changed from the time of the permanent settlement. [p. 303, col. 2.]

The rule laid down in sub-section (1) of section 50 of the Bengal Tenancy Act is a rule of law, whereas the rule laid down in sub-section (2) of the section is a rule of evidence which merely raises a presumption that the conditions laid down in sub-section (1) have been satisfied. [p. 303, col. 2.]

LAL MOHAMAD KHAN v. KRISHNA DAYAL GIR.

In a case where the evidence, if accepted, gives rise to a presumption under section 50 (2) of the Bengal Tenancy Act that the entire area is a fixed-rate holding, but it is conceded that a portion of the holding is not held at a fixed rate, the presumption arising under section 50 (2) is affected and the holding cannot be held to be a fixed-rate holding. [p. 304. col. 1.]

Appeals from a decision of the District Judge, Shahabad.

Khawja *A. Majid*, Dr. *Mahmud* and Mr. *Md. Hassan Jan*, for the Appellants.

Messrs. *Manuk*, *S. N. Palit* and *Profulla Ch. Bose*, for the Respondents.

JUDGMENT.—These appeals are on behalf of tenants and arise out of proceedings under section 106 of the Bengal Tenancy Act. It appears that at the attestation the tenants claimed Sharah Moaiyan status with reference to every portion of the holdings held by them but that their claim was rejected on the ground that portions of the land consisted of *bhowli* converted since the permanent settlement. They raised the question again under section 103 (*a*) of the Tenancy Act. Their claim was again disallowed as the documents on which they relied were not accepted, and as they could not identify the lands as to which they claimed Sharah Moaiyan status. They then commenced this action under section 106 of the Bengal Tenancy Act. In their plaint they enumerated the Khasra plots as to which they claimed the Sharah Moaiyan status and they asked the Court to declare that the entry in the Record of Rights recording them as *kaemi* tenants is erroneous and that they should have been recorded as fixed rate tenants with reference to these plots of land and they asked for further consequential reliefs. The lower Appellate Court has come to these conclusions, first, that the tenants have established the fact that they have paid one rental for one area or where the area has varied then one rate for the cash rent holding for 20 years and so raised in their favour presumption under section 50, sub-section 2, of the Bengal Tenancy Act: secondly, that admittedly a portion of the holding is *bhowli* land converted into a cash paying rent some time previous to these twenty years, and thirdly, the tenants have not been able by their evidence to identify the Khasra plots as to which they claimed Sharah Moaiyan status. These findings are binding on me in second appeal, but in the very able arguments which have been advanced before me learned Counsel appearing on behalf of the appellants has insisted that, upon the finding that the tenants have succeeded in establishing the fact that they have held at a fixed rent for 20 years, it was for the landlord to show that the holdings claimed by the tenants as fixed rate holdings were not in fact fixed rate holdings. He puts his argument in this way. The evidence shows, evidence which has been accepted by the lower Appellate Court, that the entire areas held by the tenants are fixed rate areas but he gives up his claim with reference to portions of that area. Therefore, the remaining portion, must be held to be fixed rate portions, unless the landlord succeeds in proving that they are not fixed rate portions.

The argument is an ingenious one, but in my opinion it does not deserve success. In order to enable a Court to come to the conclusion that the tenant is a fixed rate tenant it must be established that he has held at a rent or rate of rent which has not been changed from the time of the permanent settlement. No doubt section 50, sub section 2, lays down a convenient rule in view of the fact that it is almost impossible for the tenant to prove that he has held at a rent or rate of rent which has not been changed from the time of the permanent settlement. The Legislature has laid down a convenient rule in sub-section 2 of section 50 that the Court shall presume that he has held at a rent or rate of rent from the time of the permanent settlement if he proves that he has held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceedings. It must be remembered that the rule laid down in sub-section 1 is a rule of law, whereas the rule laid down in sub-section 2 is a rule of evidence which merely raises a presumption that the conditions laid down in sub section 1 have been satisfied. In my opinion as soon as it is conceded that the rule laid down in clause 2 is a rule of evidence, it must follow that anything which affects any portion of that evidence must affect the remaining portion of that evidence. In this case the evidence, if it can be accepted, goes to show that the

entire area is held at a fixed rate; but it is conceded that a portion of it is not held at a fixed rate. In my view it is impossible to come to the conclusion that the remaining portion of the land is held at a fixed rate. The plaintiff comes to Court with a specific case that he holds specific plots of land at a fixed rate. The lower Appellate Court has come to the conclusion that he has not been able to satisfy that Court that he has held those specific plots of land which he has enumerated in his plaint at a fixed rate. In my view, therefore, this appeal must fail and is dismissed with costs.

The judgment will govern all the analogous appeals.

Appeals dismissed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

March 17, 1919.

Present:—Viscount Haldane, Viscount Cave, Lord Phillimore and Sir John Edge.

UPADRASHTA VENKATA SASTRULU —APPELLANT

versus

DIVI SEETHARAMUDU AND OTHERS —RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 7 (2) (d), 8, 153, 189—Inam, grant of—Grant, whether of land revenue or of land—Estate.

There is no presumption of law that an *inam* grant of a village is *prima facie* a grant of the land revenue only as distinguished from the land itself. Each case must be considered by itself and the determining factors are the terms of the particular grant and the whole circumstances connected therewith [p. 306, col. 1.]

Suryanarayana v. *Patanna*, 48 Ind Cas. 689; 41 M. 1012; 25 M. L. T. 30; (1918) M. W. N. 85; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U P L. R. 11; 36 M. L. J. 585; 45 I. A. 209 (P. C.), followed.

Consolidated appeals from sundry decrees of the Madras High Court (Sadasiva Aiyar and Seshagiri Aiyar, JJ.), dated the 1st March 1914, reported as 24 Ind. Cas. 224, affirming decrees of the District Judge, Kistna, dated the 2nd August 1911.

FACTS of the case are sufficiently stated in their Lordships' judgment and the report as 38 Madras 891; 24 Ind. Cas 224. The lower Courts held that the village in suit was an "estate" within Madras Act I of 1908, and that hence the appellant, the Inamdar, must eject the defendants, if at all, in the Revenue and not in the Civil Courts.

Mr. *Kenworthy Brown*, for the Appellant.—The whole question is, was this an estate? and this depends on two further questions:

(*a*) Was the grant made to a person not owning the Kudivaram?

(*b*) Was the grant of the land revenue alone?

The District Judge and the High Court held there was a presumption that the grant was only of the revenue. No such presumption exists.

Suryanarayana v. *Patanna* (1).

The burden of proof lay really on defendants, who sought to oust the jurisdiction of the Civil Courts. They had to prove (1) that the grant was only of the Melvaram, (2) that the grantee did not already own the Kudivaram.

[LORD PHILLIMORE.—The question is, ought we to assume that at the date of the grant there were occupancy rights?]

There is no evidence that there were any tenants with such rights at the date of the grant.

The grant here was of the grantor's whole interest: there is no evidence to show that he did not own both Melvaram and Kudivaram.

As to 60 acres it is admitted they were waste at the time of the grant. In these 60 acres at all events the grantee got the Kudivaram, so the grant was not one of revenue alone. The waste is not part of the estate—*vide* section 8.

(The Board intimated that in their view "acquired" in section 8 meant acquired after grant).

The result would be odd: if a man gets the Kudivaram by grant he would be worse off than if he acquired it the day after.

A landholder can acquire the Kudivaram by surrender or abandonment.

Ponnuswamy Padayachi v. *Karupudayan* (2).

Miller, J., was I submit, right in his view that the Kudivaram right cannot

(1) 48 Ind. Cas. 689; 45 I. A 209; 41 M. 1012; 25 M. L. T. 30; (1918) M W. N 859; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. 11; 36 M. L. J. 585 (P. C.).

(2) 24 Ind. Cas 217; 38 M. 843; 26 M. L. J. 285; 15 M. L. T. 299; 1 L. W. 218.

be outstanding: it must be in some one: if it is not in the person in occupation, it is in the owner.

Here the fact that there has never been any assertion of such a right shows that no such outstanding right existed in 1748.

The use of the word "Mauje" in 1783 does not indicate there was necessarily a Mauja in 1748, and anyhow does not indicate the nature of the land: you cannot infer from the word "Mauje" that separate Kudivaram rights existed either in 1783 or 1748.

The learned Judges of the High Court were misled by what they erroneously conceived to be a legal presumption, and did not consider the real point, which is whether or not the documents, etc., show, as we contend, that the whole right and not merely the land revenue was given.

JUDGMENT.

VISCOUNT CAVE.—These are consolidated appeals against a judgment delivered by the High Court of Judicature at Madras on the 18th March 1914 and decrees made in pursuance thereof in eleven suits. The High Court by its judgment affirmed a judgment of the District Judge of Kistna, whereby he set aside the decision of the Munsif of Gudivada and directed the return of the plaints in all the suits for presentation in the Revenue Court.

The suits out of which these appeals arose were suits for ejectment in respect of different parts of the Inam village of Billapadu in the Gudivada sub-district of the Kistna district. The appellant, who was the plaintiff in all the suits, is the Inamdar of the village, holding under a grant made to his ancestor in or about the year 1748 and since confirmed and recognised by the British Government. The defendants were persons who at various dates in the year 1907 had been let into possession by the plaintiff under tenancy agreements, expiring in 1908. Each of these agreements contained a declaration by the tenant to the effect that except the right of cultivating the land for a year under the agreement he had no other right whatever thereto, and accordingly that he agreed to the landlord (the plaintiff) taking possession of the land at the end of the year of tenancy without any relinquishment by the tenant. The tenancies having expired and these suits having been brought for possession, the defendants pleaded that they were *ryots* having permanent *jeroyati* rights, and that as the Inam village was an "estate" governed by the Madras Estates Land Act, 1908, the Civil Courts had no jurisdiction to try the suits. The Munsif overruled this plea and granted decrees in favour of the plaintiff; but the District Judge, holding that the property was an "estate" under the Act of 1908, set aside the Munsif's decision and directed the plaints to be returned. This decision was affirmed by the High Court, and thereupon this appeal was brought.

The decision on the appeal must turn on the question whether the property is or is not an "estate" within the meaning of the Madras Estates Land Act, 1908; and for the purpose of determining this question reference must be made to the definition of the term "estate" contained in section 3 of the Act. That definition, so far as it is applicable here, is as follows:—

"In this Act, unless there is something repugnant in the subject or context...(2) 'Estate' means...(*d*) any village of which the land revenue alone has been granted in Inam to a person not owning the Kudivaram thereof, provided that the grant has been made, confirmed or recognised by the British Government, or any separated part of such village."

The term "Kudivaram" is not defined in the Act; but in *Suryanarayana* v. *Patanna* (1) it was explained as being a Tamil word, literally signifying a cultivator's share in the produce of land as distinguished from the landlord's share, which is sometimes designated "Melavaram." The "Kudivaram" or "Kudivaram interest," as it is called in section 8 of the Act, is in fact a species of tenant right or right of permanent occupancy. The question, therefore, to be considered in this case is whether the Inam grant was a grant of the land revenue alone to a person not having a permanent right of occupancy, or whether it vested in the grantee the whole proprietary interest in the village. In the former case this appeal will fail, but in the latter it should succeed.

In dealing with this question the District Judge and the High Court acted upon a supposed presumption of law that an

Inam grant of a village, particularly if made to a Brahmin, is *prima facie* a grant of the "Melvaram" right only and does not include the "Kudivaram." This view was supported, when the High Court gave its decision, by some previous decisions of the High Courts of Madras and Bombay; but in the case above cited of *Suryanarayana* v. *Patanna* (1) it was held by their Lordships that no such presumption exists. Each case must, therefore, be considered on its own facts; and in order to ascertain the effect of the grant in the present case, resort must be had to the terms of the grant itself and to the whole circumstances so far as they can now be ascertained.

The original grant of 1743 is not now forthcoming, although it is referred to in Exhibit Z (an extract from the Cazulet Register of 1802), and there is no doubt of its having existed. The earliest deed which is produced is a "gift deed of Agraharam," executed in September, 1783, by the Zemindars in favour of the plaintiff's ancestor, which appears to be a confirmation of the original grant. The operative part of this deed is as follows: —

"We have conveyed to you, as *sarva agraharam*, the village of Billapadu, attached to Gudivada Parganah, together with gardens, holy shrines, wells, big and small tanks, etc. So you shall cultivate the same and enjoy the produce thereof every year as a dedication to the God Sri—hereditarily from son to grandson and so on.

"Sanskrit Sloka :—'To administer (or confirm) the gift of another is twice as meritorious as one's own gift-making.'"

Other confirmatory documents were executed at or about the same date; and in one of these, being a "Hakikbat" (or representation) made to William Oram, Esquire, the Collector, by officials of the district, dated the 23rd July 1788, it was stated that the village of Billapadu Agrabaram had continued to be in the enjoyment of the plaintiff's ancestor, who is referred to as "a resident of the aforesaid place." There are also some *dumbalas* (or orders) dated in the year 1793 requesting that the plaintiff's ancestor shall be allowed to reap and enjoy the crops pertaining to Billapadu.

In the Cazulet Register of 1802, above referred to, and in similar registers dated 1860 and 1865, the property is entered in the name of the plaintiff's ancestor; and on the 27th June 1865, a recognition of title was duly granted to the plaintiff's ancestor.

There is not in any of the documents above referred to any trace of a claim by any person other than the Inamdar to a permanent right of occupancy; and the fact that by the terms of the grant the grantee is desired to cultivate the lands, and that he is referred to as residing in the village, tend to show that no such right existed in any other person. In the judgments under appeal stress is laid on the fact that the confirmatory grant of 1783 refers to the existence on the property at that date of gardens, wells, tanks, etc., and also on the fact that in the Register of 1802 Billapadu is called a *mouje* (or *mauza*), these expressions indicating (it is suggested) that the village was the home of proprietary inhabitants who had planted gardens and dug wells; but it does not appear to their Lordships that it would be safe to build on the use of expressions of this character in 1783 and 1802 an inference as to the existence in 1743 of tenants having permanent rights of occupancy. And when the subsequent history of the estate comes to be examined, it is found to be wholly inconsistent with the existence of any permanent occupancy rights. Tenancies have been continually granted by the Inamdars for short periods and at variable rents. When tenancy lands were compulsorily acquired by Government and compensation was paid to the Agraharamdar, no claim to compensation was put forward by the tenants. In the year 1904 all the tenants formally relinquished their lands to the plaintiff and put them in his possession, and from that date until tenancies were granted in the year 1907 the property remained vacant. When the defendants were admitted as tenants, they severally declared (as stated above) that they had no right of occupancy except such as was given to them by the tenancy agreements. It has been found in these suits on issues specially directed that the land in question was waste land at the time of the grant of the Inam, and that at the time of the letting to the defendants they had no occupancy right.

Having regard to all the facts it appears to their Lordships to be impossible to resist the conclusion that the Inam grant carried, not the land revenue alone, but the whole proprietary interest in the property; and it appears probable that, but for the supposed presumption above referred to, the High Court would have come to the same conclusion. If so, it follows that the property is not an "estate" within the meaning of the Madras Estates Land Act, 1908, and that section 189 of that Act does not apply. In view of this conclusion it is unnecessary to consider the effect, having regard to section 8 of the Act, of the relinquishment of tenancy rights made in the year 1904. Section 153, as amended by section 8 of Act IV of 1909, appears to have no application to this case.

For the above reasons their Lordships are of opinion that this appeal should be allowed and the decrees under appeal should be set aside and the decrees of the Munsif restored, and that the defendants should pay the plaintiff's costs in all the Courts and his costs of this appeal; and they will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitor for the Appellant: Mr. *Douglas Grant*.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1204 OF 1917.

May 5, 1919.

Present:—Mr. Justice Das.

KALI PROSAD TEWARI—PLAINTIFF—APPELLANT

versus

MAHABIR TEWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Ejectment suit—Denial of landlord's title—Relationship of landlord and tenant not established—Suit, subsequent, for ejectment, whether competent—Res judicata.

Where in a suit for ejectment it is found that the land in dispute belongs to the plaintiff and that a previous suit for ejectment was successfully resisted by the defendants on the ground that they were not tenants of the plaintiff, the defendants are not entitled to remain upon the land and the plaintiff is entitled to *khas* possession. [p. 308, col. 2.]

Appeal from a decision of the Subordinate Judge, Mozaffurpore.

Mr. *Harnarain Prosad*, for the Appellant.

Mr *B. N. Mitter*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellant for ejectment of the respondents from the property which is the subject-matter of dispute between them. In 1910 the present appellant brought a rent suit against the defendants, which suit the defendants resisted on the ground that there was no relationship of landlord and tenant between them. The Court gave effect to the defendants' plea and dismissed the plaintiff's suit for rent. Thereupon the appellant has brought his present suit for ejectment of the defendants, his ground being that the tenants having taken the plea that there was no relationship of landlord and tenant between them and him and that plea having been given effect to by a Court of competent jurisdiction, he is now entitled to ask the Court to eject the defendants.

The lower Appellate Court has come to the conclusion, firstly, that the disputed land lies within the Zemindari of the plaintiff, secondly, that there was a previous rent suit between the plaintiff and the defendants in which the defendants successfully pleaded that they were not the tenants of the plaintiff. But the lower Appellate Court dismissed the plaintiff's suit mainly, as I understand the judgment, on two grounds, firstly, because it was not shown that the plaintiff inducted the defendants on the land and secondly, because it was not shown that the consent decree by which the plaintiff established his title to the land was not passed in the presence of the defendants.

In my view the circumstances relied upon by the lower Appellate Court do not help the respondents, because it does not matter whether the respondents were parties to the consent decree or not so long as the plaintiff has established his title to the land. The appellant, having established his title to the land, was entitled to rent from the respondents if they desired to stay on the land. They cannot obviously stay on the land and yet refuse to pay rent to the appellant. Secondly, it is no doubt true that the appellant did not induct the respondents on the land, but I do not see how that affects the question whether the appellant as landlord is now entitled to eject the respondents who have succes-

fully established in a Court of law that they are not the tenants of the appellant.

The learned Vakil for the appellant relied upon two cases reported as *Nilmadhab Bose* v. *Ananta Ram Bagdi* (1) and *Fayz Dhali* v. *Aftabuddin Sirdar* (2). These cases establish that the rule that a denial of the relationship of landlord and tenant does not entail a forfeiture does not apply where that denial is given effect to by a decree of Court. It having been found in this case that the land belonged to the plaintiff and it having been found in the previous suit that the defendants are not their tenants, the defendants have no right to remain upon the land and the plaintiff is entitled to *khas* possession. The learned Vakil for the respondents relies upon a case decided by Mr. Justice Mookerjee and reported as *Mallika Dasi* v. *Makham Lal Chowdhury* (3). On the facts that case is clearly distinguishable from the present case, because in the case before his Lordship Mr. Justice Mookerjee there was no denial of the entire title of the plaintiffs or their predecessor-in-interest. The objection which was successfully maintained was that the plaintiffs alone were not entitled to realise the whole rent, and their claim was dismissed, not because they had no title to any portion of the rent, but because their right to collect any share of it separately from their alleged co-sharers was not established. In this case the denial was of the entire title of the plaintiff and therefore the decision of Mr. Justice Mookerjee reported as *Mallika Dasi* v. *Makham Lal Chowdhury* (3) does not apply to the facts of this case. But Mr. Justice Mookerjee does say this: "But in our opinion the decision in these two cases," referring to the decision in *Nilmadhab Bose* v. *Ananta Ram Bagdi* (1) and *Fayz Dhali* v. *Aftabuddin Sirdar* (2), "is not consistent with the principle deducible from the cases of *Debiruddi* v. *Abdur Rahim* (4) and *Dhora Kairi* v. *Ram Jewan Kairi Mahton* (5), in which it was pointed out that there cannot be any eviction from an agricultural holding governed by the Bengal Tenancy Act, on the ground of forfeiture incurred by denial of the landlord's title, inasmuch as such ground is not specified in sections 25, 44 and 49 of that Act, which enumerated the grounds of ejectment of occupancy *raiyats*, non-occupancy *raiyats* and under-*raiyats* respectively. To hold that a tenant of any of these three classes may be evicted because by reason of the doctrine of estoppel, he is barred from pleading his tenancy, seems to us to be an application of the doctrine of forfeiture by disclaimer without the formal use of the expression," and their Lordships relied upon the case of *Kally Dass Ahiri* v. *Monmohinee Dassee* (6), a decision of Mr. Justice Jenkins, reported in Indian Law Reports 24 Calcutta 440.

So far as the decision of Mr. Justice Jenkins is concerned, that learned Judge had an opportunity of giving expression to his opinion in the much later case of *Ekabar Sheikh* v. *Hara Bewah* (7). The true principle, as I understand the decision, is laid down in that case where the learned Judges point out that the question is not one of forfeiture but whether having regard to the previous decision between the parties the tenant can plead his tenancy in the later suit. If by reason of the operation of the principle of *res judicata*, the tenants are unable to plead their tenancy, the question of forfeiture of a tenant under the provisions of the Bengal Tenancy Act does not arise. That is how the late Chief Justice of the Calcutta High Court views the matter and I respectfully follow that decision and the decision in another case reported as *Ramgati Mohurer* v. *Pran Hari Seal* (8). I hold that the respondents were not entitled to, nor did they in fact, plead any tenancy and the previous decision is *res judicata* between the parties and that therefore the appellant is entitled to a decree for ejectment against the defendants, the question of tenancy not being allowed to be raised.

I set aside the judgment and the decree of the lower Appellate Court and restore the judgment and the decree of the Court of first instance. The appellant is entitled to his costs throughout.

Appeal accepted.

(1) 2 C. W. N. 755.
(2) 6 C. W. N. 575.
(3) 2 C. L. J. 389; 9 C. W. N. 928.
(4) 17 C. 196; 8 Ind. Dec. (N. S.) 669.
(5) 20 C. 101; 10 Ind. Dec. (N. S.) 68.
(6) 24 C. 440; 1 C. W. N. 321; 12 Ind. Dec. (N. S.) 961.
(7) 8 Ind. Cas. 660; 15 C. W. N. 335; 13 C. L. J. 1.
(8) 3 C. L. J. 201.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 114 OF 1916.

September 10, 1918.

Present :—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Shah.

NARSINGGIRJI MANUFACTURING CO.—PLAINTIFFS—APPELLANTS

versus

THE GREAT INDIAN PENINSULAR RAILWAY—DEFENDANTS—RESPONDENTS.

Railways Act (IX of 1890), s. 72—Contract Act (IX of 18?2), s. 151—"Goods delivered to be carried", loss of—Liability of Railway Company, extent of—Destruction of goods by fire—Suit for damages—Railway Company, liability of.

According to section 72 of the Railways Act, the liability of a Railway Company in respect of goods delivered to be carried is that of a bailee under section 151 of the Contract Act, and that liability can only be limited by agreement with the consignor provided that such agreement has been approved by the Governor-General in Council. [p. 309, col 2.]

The expression "goods delivered to be carried" in section 72 of the Railways Act must be read literally and according to its natural meaning [p. 309, col. 2.]

A person sent certain goods through his agent to the Sholapur Railway Station for carriage. A consignment note was prepared and the goods were taken into the goods yard, and after they had been registered, weighed and marked they were taken into the goods forwarding shed by an official of the railway, who also took charge of the consignment note therefor:

Held, that the goods were "delivered to be carried" as soon as they were taken into the goods forwarding shed and that the delivery was the delivery of the consignor, and his intention was to be considered. [p. 310, col. 2; p. 314, col. 1.]

Where goods "delivered to be carried" were destroyed by fire and it was proved that the Railway Company had not taken all measures necessary for the protection of the goods against fire:

Held, that the Railway Company was negligent and was liable in a suit for damages for the destruction of such goods. [p. 313, col. 2.]

Appeal from the decision of the first class Subordinate Judge, Sholapur, in Civil Suit No. 709 of 1914.

Mr. *Wadia* (with him Mr. *N. V. Gokhale*), for the Appellants.

Mr. *Binning* (with him Messrs. *Little & Co.*), for the Respondents.

JUDGMENT.

SCOTT, C. J.—This appeal arises in Civil Suit No. 709 of 1914 in the Court of the first class Subordinate Judge at Sholapur. It is one of a number of suits resulting from the destruction of goods in the goods forwarding shed at Sholapur by a fire which took place on the 14th May 1913 at about 3 o'clock in the afternoon.

The defendants are a company governed by the provisions of the Indian Railways Act of 1890.

Section 72 of that Act provides that their liability in respect of goods delivered to be carried shall be that of a bailee under section 151 of the Indian Contract Act, and their liability as bailee in respect of such goods can only be limited by agreement with the consignor provided that such agreement has been approved by the Governor-General in Council. The expression "goods delivered to be carried" is taken from the English Carriers Act, and section 72 is intended to indicate that the Railway Companies in this country shall not be liable to the extent of common carriers in England, but only as bailees under the Contract Act. The words "delivered to be carried" must, it seems to me, be read literally and according to their natural meaning in the same way as they have always been read in connection with cases arising under the English Carriers Act

The first question which arises is, whether upon the facts proved the goods of the plaintiffs had been "delivered to be carried" at the time of the fire by which they were destroyed? For if this question is answered in the negative, the plaintiffs' suit must fail.

There is no dispute as to the procedure resulting in the goods being lodged in the goods forwarding shed. It is described in the judgment of the trial Court as follows:—

"The Hundekari (agent) in charge of goods appears at the station gate, prepares the upper part of the consignment note and presents it to the gate clerk who on seeing that the consignment is complete gives the serial number of the day to the consignment note and takes the Hundekari's or consignor's signature in the 10th column of the Register Exhibit 49. The goods are taken on the premises of the forwarding goods-shed and are dumped down in the proper section in the goods shed. The Hundekari is generally aware of the position and there are boards stuck to show the section. If he is not aware the clerks there give him the information. The register clerk fills the first and second columns of the lower half of the consignment note in English before it is given back to the

Hundekari. The consignment note is next taken by the Hundekari to the clerk called receipt clerk, who marks the entries of the first two columns of the office copy of railway receipt called record receipt along with other copies by use of carbon paper, makes entries as to sender and consignee, place of destination of the goods from the consignment note, and then gives the intended mark number of the goods in the third column and puts in the book number and by number, *i. e.*, the entire receipt number on the consignment note at its right hand upper corner. The serial number of the consignment note is at times found on the record receipt. The consignment note so marked is next presented to one of the foremen to whom the consignment relates according as it has to go to up or down direction or to the grain scale, and the foreman next calls upon the Hundekari to get the goods at his expense to the scale where a waggon for the goods is available. He next weighs the goods, orders the marker under him to put mark number on the packages and fills the column in the lower part of the consignment note relating to actual weight, the waggon number and of the condition of the goods, if any, and then orders the Company's Hamals to load the goods. The weighing, marking and loading are done at once and at the same time and the consignment note is next sent by him singly, if desired, or in a lump number to the goods clerk, who enters the columns of weight, charges, the rates of the several railways, if any, the total charges, to pay or be paid, and makes a note of the risk note to be taken, if any, in the lower part of the consignment note. It is next sent by him to the receipt clerk, who prepares the record receipt from the particulars in the aforesaid consignment note and is ready to give it to the Hundekari. The Hundekari takes the mark number from the receipt clerk on presenting the consignment note to him as noted above, and then going to the marker clerk unloads the goods at the place shown by him, gets him, the marker clerk, to note the marks on the packages and then he goes and gives over the consignment note to the foreman and does nothing more. The foreman gets and weighs the goods on the scale and loads them on behalf of the Company and the Hundekari gets the railway receipt the next day or any later date from the receipt clerk."

The learned Judge appears to have doubted whether the evidence that after the Hundekari gave over the consignment note to the foreman he did nothing more in relation to the goods was correct. Whether correct or not, it appears to me that the Railway Company cannot escape from the conclusion that the goods were 'delivered to be carried,' as soon as they were taken into the goods forwarding shed. The delivery is the delivery of the consignor and the intention of the consignor has to be considered. For what other purpose can it be supposed that the consignor delivers goods to a Railway Company to be lodged in the forwarding shed, if not to be carried by railway? The mere fact that the particular branch of the railway administration which is concerned with the loading of goods upon trucks has not yet handled the goods, cannot affect the question whether the goods have been delivered by the consignor to be carried, compare *Burrell* v. *North* (1), a case under the English Carriers Act. In *Chapman* v. *Great Western Railway Co.* (2) it was said: "The contract of the carrier being not only to carry, but also to deliver, it follows that, to a certain extent, the custody of the goods as carrier must extend beyond, as well as precede, the period of their transit from the place of consignment to that of destination. First, there is in most instances an interval between the receipt of the goods and their departure—sometimes one of considerable duration." The Company's rules and notifications suggest the same conclusion. For example, Exhibit 80, page 235, a Supplement to the Traffic Instruction Book, revised Order No. 101, entitled "Procedure to be adopted in regard to the despatch of goods", states: "A sender desiring to despatch goods by railway will bring his goods into the Railway Yard and stack them on the platforms in a manner prescribed and in a position to be pointed out by the Railway Company. II. Should the quantity of the goods tendered be in excess of the accommodation

(1) (1847) 2 Car. & K. 681.
(2) (1880) 5 Q. B. D. 278 at p. 281; 49 L. J. Q. B. 420; 42 L. T. 252; 28 W. R. 561; 44 J. P. 363.

available, the Railway Company will close its gates to *the receiot of goo ls for desoatch.* The Railway Company will be the sole judge of when it is necessary to close its gates to *the receipt of goods traffic*, but it will endeavour to give notice at 18 hours the previous evening of its intention to do so. When the Railway Company opens its gates for the reception of a limited quantity of goods only on any day, the quantity to be received will be stated in the notice referred to."

Exhibit 92 is an example of the notices which the Company was in the habit of issuing advising consignors that the goods shed was open for the receipt of goods for despatch. "The receipt of goods for despatch", which is the expression used in clause II of Order 101, describes from the Railway Company's point of view the operation which the consignor would regard as *'delivery of goods to be carried.'* The Railway Company, in order that they may not be responsible for the goods in the goods shed, have endeavoured to limit their liability by taking the signature of the consignor upon one of their register forms so as to indicate that he acquiesces in the terms stated above the signature. It is, however, admitted, and correctly admitted, by the learned Counsel for the Railway Company that if the goods have been 'delivered to be carried', such an agreement as is indicated by the consignor's signature upon the register form would not, inasmuch as it has not been approved by the Government of India, be of any avail. We are, therefore, unable to agree with the decision of the learned Judge that the Company are not liable inasmuch as the goods had not been delivered to be carried.

The first question being answered in the affirmative and against the Railway Company, the question remains whether the defendants have discharged the onus which is upon them, of showing that they took proper care of the goods committed to their charge as bailees.

It is important to notice that on the 30th April 1912 a fire took place at the goods shed of the same station in which a number of bales of cotton were destroyed and the conclusion come to by the investigating *panch* was that the fire was due to engine sparks. That also appears to have been the opinion of the Station Master—see Exhibit 151.

The fire in the present case, as has been stated, took place on the 14th May 19'3, and a report was called for by the District Magistrate from the Railway Company in that month for submission to Government. After various reminders the District Magistrate obtained information from the Railway Company that the fire in the goods shed had originated from a spark from the shunting engine working in the goods yard and that a number of bundles of gunny bags which were stacked in the west end of the forwarding goods shed were noticed to be on fire at about 3 noon on the 14th of May. Every attempt was made to extinguish the fire, but this could not be done owing to a heavy wind and the rapidity with which the flames burnt down the whole of the shed with the goods in it. See Exhibit 160.

On the 12th June 1913, the Deputy Traffic Manager had addressed an answer (which did not reach its destination) to the District Magistrate in reply to his inquiry of the 29th of May, stating that a number of bundles of gunny which were stacked in the west end of the forwarding goods shed were noticed to be on fire. It had not been ascertained how the fire originated. Every attempt was made to extinguish the fire, but this could not be done owing to a heavy wind prevailing at the time and the flames spread rapidly, burning down the whole of the shed with the goods in it and close to it.

As regards the cause of the fire there appears to be no other conclusion open to the Court upon the evidence but to hold that it was due to the sparks of a shunting engine which was working alongside the goods shed in the afternoon of the 14th of May. The emission of sparks, however, is not in all cases evidence of negligence and it has been proved that the Railway Company had adopted the best known mechanical devices available to them for the prevention of spark emission, and the danger of spark emission was, therefore, reduced to a minimum. If, therefore, the Company are to be held liable for negligence, it must be on some other ground than the emission of a spark from the shunting engine.

The evidence now recorded makes it clear that the fire commenced at the northern end of the goods shed with the ignition of bundles of gunny bags stacked against the iron sheeting with which the northern end of the shed was partly inclosed, that the flames rapidly ignited the roof of the shed, and that in consequence the shed and the goods in it were destroyed. It is contended that the storing of the gunny bags at the northern end of the shed was evidence of negligence, inasmuch as they constituted inflammable material, and the experience of the previous year should have shown the danger arising from sparks of shunting engines. Although the gunny bags were separated from the contents of the goods shed by metal sheeting, we are of opinion that their storage in that position was evidence of negligence since the ignition of the gunny bags would at once endanger the inflammable roof of the shed.

The most vulnerable points in the defendants' case are the inflammable nature of the roof of the shed and the absence of proper resources for the rapid extinguishment of the fire.

With regard to the materials of the shed the Station Master (Exhibit 73) says: "The roof of the goods shed was a tiled roof with ordinary common tiles. There was matting below the tiles. It was bamboo matting. The matting was on battens. As far as I know it was an old roof probably as old as the station."

Kirby, the Loco Foreman, Exhibit 103, says:—"The fire travelled very rapidly owing to the inflammable nature of the goods inside the shed, the dryness of the substance of which the roof was made and a very stiff breeze blowing from the direction where the fire originated."

Govind Appaji, Exhibit 123, in the service of the Railway Company as head goods clerk, states: "My attention was drawn to the fire by noise. I came out and went towards the forwarding goods shed. I went to the scene of the fire. Half of the heap of the old bagging was already on fire when I went there. It was rotten and was at the outside of the Bombay end of the forwarding goods shed. When I saw the fire first, I found that the flames were reaching up to the top of the roof near the eaves on one side. The roof was tiled roof with ribs under bamboo *tatties*."

On behalf of the Railway Company it is said that the Railway Company's buildings are subject to inspection by Government Inspectors who have to remark if anything is wrong, and that if the roof had been dangerous it would have been noticed. This is an argument of a very negative type. The Acting District Traffic Superintendent, Exhibit 101, states that "a Government Inspector passes over this section of the line two times a year in Company with the head officials of various Departments of the Railway. They go about together and examine the buildings, the lines, bridges and everything else connected with the Railway. They do inspect the goods sheds at certain stations. I cannot say if they inspected this goods shed. This examination comes within their purview. As a result of this inspection the Government Inspector makes the report on any points which he considers important for the attention at the hands of the Railway Company. During the course of one of the inspections every building comes within the notice of the Inspector. No adverse comments were ever made by him regarding the Sholapur goods shed to my knowledge."

Perhaps goods sheds of this description are not likely to escape adverse comment at the hands of the Inspectors, since the occurrence with which we are now concerned. The position appears to be this: that had the goods shed roof been non-inflammable, the fact that the flames were driven high by a strong wind from the pile of gunny bags would not have caused ignition of the roof and thence of the shed and everything therein contained, and we cannot hold that persons storing goods of their customers in an inflammable shed, the immediate surroundings of which are liable to accidental fire, are taking reasonable and proper care of the goods. The obligation of the bailee is to take reasonable care that any building in which the bailor's goods are deposited is in a proper state so that the things therein deposited may be reasonably safe in it: see *Searle* v. *Laverick* (3).

(3) (1874) 9 Q. B. 122 at p. 127; 43 L. J. Q. B. 43; 30 L. T. 89; 22 W. R. 367.

But that is not all that can be said against the Railway Company. It is contended that there were no sufficient resources available to enable the railway employees to cope with the fire. In the first place, there were no buckets with water in the goods shed ready to be thrown on the flames. We are not prepared to say that the absence of buckets in the circumstances made any material difference in the result of the fire.

It is also said that the supply of water available was insufficient, and that the hydrant from which water would ordinarily be obtained was not in proper order, and was very difficult to open, and that this led to serious delay. The day after the fire the Station Master sent this report to the Deputy Traffic Manager:—"The fire was first discovered at 15 hours Bombay end of forwarding goods shed among bundles of bagging; owing to strong high winds roofing of forwarding goods shed caught fire and within 10 minutes the whole roofing was ablaze. There was insufficient water in our hydrant and water column, hence I applied to the Vishnu Mills and obtained their assistance to extinguish the fire; from 15-20 of 14th May 1913 to 5 hours on the 15th two pumps were working of the mills. The Municipality also sent us two pumps, one in charge of the City Police, the other in charge of Water Works Engineer. The City Police pump was stopped at 19 hours while pump in charge of Water Works Engineer was utilized off and on till 5 A. M." The rapidity of the fire is indicated by the telegram by the Station Master on the 14th, Exhibit 76, "Very serious fire forwarding shed and goods stock in it completely burnt at 15 hours to day serious loss cause unknown report follows." That was handed in for despatch at 16 40, that is to say, an hour and 40 minutes after the fire had first been observed, and at that time the whole of the shed and the goods stacked in it was reported to be completely burnt.

It is important, therefore, to consider whether there was any delay in getting water working on the flames owing to negligence on the part of the Railway Company, for we know from the report of the 15th that the Vishnu Mill pumps were not brought into requisition before 15-20 on the 14th.

[His Lordship discussed the evidence of various witnesses and proceeded as follows:—]

It appears to us that the conclusion to be drawn from the evidence to which attention has been called is that the railway hydrant was not in working order at the time the fire broke out, that it was some considerable time before it could be opened, that when it was opened no water came through it that could be used for the extinguishment of the fire, and that the first water which was brought to play upon the burning shed was water from the Vishnu Mills through the Vishnu Mills' pumps. We can only conclude that the Railway Company did not do their duty in taking all measures for the protection of goods in the goods shed when the risk of fire was imminent or had actually occurred: see *Brabant & Co.* v. *King* (4) and *Rivers Steam Navigation Company* v. *Choutmull* (5). The condition of the hydrant and the absence of the water must be attributed to want of care on their part.

We refer the trial of issues Nos. 1, 10, 11 and 12 raised in the Sholapur Court to that Court for trial and direct the Court to take the additional evidence, if any, required and to return such evidence to this Court together with the findings and the reasons for the same.

Findings should be returned within three months.

SHAH, J.—I desire to add a few words as supplementing the judgment of my Lord the Chief Justice, with which I entirely agree.

First, as to the question of the delivery of goods to be carried by railway, the rule framed under section 47, sub section (1), clause (*f*), that there can be no delivery until a receipt is given for the goods delivered to be carried, has been held to be invalid as being inconsistent with the provisions of section 72 of the Indian Railways Act in *Ramachandra Natha* v. *G. I. P. Railway Company* (6). For the reasons stated in my judgment in that case I am still of

(4) (1895) A. C. 632 at p. 640; 64 L. J. P. C. 161; 11 R. 517; 72 L. T. 785; 44 W. R. 157.

(5) 26 I. A. 1 at p. 5; 3 C. W. N. 145; 26 C. 398 (P. C.); 13 Ind. Dec. (N. S.) 857.

(6) 29 Ind. Cas. 545; 39 B. 485; 17 Bom. L. R 496.

the opinion that the rule is invalid as being inconsistent with section 72, so far as it postpones the liability of the Company beyond the time of actual delivery until the receipt is given by the Railway Company.

On the evidence in the present case it is clear that the goods were delivered to be carried by railway. They were brought in the goods shed to be carried by railway, and were not removeable therefrom without the permission of the Railway Authorities. The consignment notes in respect of the goods were given by the Hundekari and received by the goods clerk. The evidence shows that the consignment notes are registered after the goods are brought there and that the consignment notes were registered in respect of the goods in question. Thus the delivery in fact for carriage by railway was, in my opinion, complete for the purposes of section 72.

The consignment note contains conditions, which are approved by the Governor-General in Council under section 54 of the Indian Railways Act. The first condition is in effect the same as the rule just referred to. It postpones the responsibility of the Company under section 72 until the goods are booked and a receipt given for the same by their clerk. Section 54 requires that the conditions should be consistent with the provisions of the Act; and I think that this condition is inconsistent with the provisions of section 72 to the same extent as the said rule made under section 47, and for the same reasons.

The Railway Company, in addition to the said rule and the condition printed on the consignment note, take an undertaking from every consignor, indemnifying the railway from *ad interim* liability till the railway receipt is granted for goods tendered, in column X of the register of the consignment notes (see Exhibit 49). This form is admittedly not approved by the Governor-General in Council under section 72 (2) (*b*); and it could not well be, if, according to the rule and the condition just referred to, there could be no delivery and therefore no liability under section 72, sub section (1), before a receipt is given. I doubt whether the Company has any power to insist upon such an agreement from every consignor, if the rule and the condition printed on the consignment note be invalid. The rule and the condition, if valid, are sufficient to protect the Company in this case apart from the agreement. If the rule and the condition cannot validly postpone according to law the liability arising under section 72 in virtue of the actual delivery of the goods to be carried by railway until a receipt is given, such an undertaking cannot help them. We are not concerned in this case with the consideration of the possible use, which the Company may be able to make of such an agreement in their favour, if an attempt were made to make them liable in virtue of their power to charge wharfage under rule 1 made under section 47, sub section 1, clause (*f*), apart from section 72 of the Act.

Secondly, on the point of negligence, I agree with the learned Chief Justice both as to the facts which the evidence establishes, and as to the inference to be drawn from those facts.

The question of the burden of proof is not important under the circumstances of this case. The lower Court has considered the evidence on the footing that the onus lies on the defendant Company, and has found in favour of the Company except that it did not provide an adequate roof for the building of the goods shed in question. Mr. Binning for the defendant Company has not suggested before us that the lower Court's view as to the onus being on the Company is wrong. This view is supported by certain decisions of the Indian High Courts. But it must be considered in the light of the observations of their Lordships of the Privy Council in the recent case of *Dwarkanath* v. *Rivers Steam Navigation Co.* (7). In the present case both the defendant Company and the plaintiff have adduced evidence on the question of negligence, and on that evidence it has to be determined whether the defendant Company is shown to have taken as much care of the goods bailed to them as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality

(7) 46 Ind. Cas 319; 70 Bom. L. R. 735 at p. 739; 27 C. L. J. 615; 23 M. L. T. 376; 8 L. W. 4; (1918) M. W. N. 435 (P. C.).

and value as the goods bailed. The defendant Company would not be liable if they took the requisite amount of care. If the evidence establishes that they failed to take the requisite amount of care as required by section 151 of the Indian Contract Act, the plaintiff must succeed, as in that case the burden of proving the negligence of the defendant Company would be discharged. For this reason it is unnecessary to discuss the question of the burden of proof any further. Assuming that the burden of proving the want of due diligence or the negligence of the Railway Company lies upon the plaintiff, in my opinion, the burden is amply discharged; and the evidence taken as a whole establishes that the defendant Company failed to take the requisite amount of care.

As to the cause of the fire, it seems to me that in all probability the fire was due to a spark from a shunting engine. But the defendant Company have strongly contested this view before us, and maintained that the cause of the fire is not known. On that footing the position of the Railway Company is not any better, as it would leave open the reasonable possibility that the fire may have been due to the negligence of any servant of the Company. Even if the cause of the fire is traced to a spark from an engine, I do not think that the mere fact that the Company cannot reasonably be expected to control the emission of a spark, when proper precautions have been taken to reduce the possibility of such emission to its minimum, can absolve the Company under the circumstances of this case. As a matter of ordinary prudence the risk of fire in consequence of a spark from an engine should have been taken into account in relation to the locality and its surroundings, and the Railway Company should have taken such care in shunting, in watching the goods directly exposed to such a risk, in storing inflammable goods like gunny bags near the goods shed and in providing a suitably protective shed for the goods deliverad to them for carriage by railway as a man of ordinary prudence would, under similar circumstances, take in dealing with his own goods. In my opinion they did not take such care, and are responsible for the quick spread of the fire, even though no doubt it was considerably aided by the strong breeze blowing at that time.

I have considered the argument urged by Mr. Binning that the fire was so sudden and quick that nothing could have saved the goods, and that therefore even if the Company may have been negligent in maintaining a proper water supply and the fire appliances, it would not matter. I am unable to accept this argument. The fire was sudden and quick, but its operation might have been and probably would have been arrested or appreciably prolonged if some watch were kept to guard against the reasonable possibility of fire resulting from a spark from the engine while the shunting was going on, if the inflammable materials had not been stored in such large quantity and in such close proximity to the goods shed and if the goods shed had not a roof of inflammable materials. These factors contributed materially, in my opinion, to the easy and extensive spread of the fire. Even apart from that I am by no means satisfied that ordinary and effective arrangments for water supply would not have saved a substantial part of the goods burnt in the shed.

Further I am slow to allow the benefit of such an argument to a bailee, who has been negligent in keeping such appliances and water supply available at the proper time as he would be expected to keep as a bailee, unless of course it is absolutely clear that nothing could have prevented the spread of fire. I am not satisfied that the normal water supply and appliances could not have prevented the spread of the fire and saved the goods in question.

As to the deficient water supply, I think that Mr. Binning's criticism against the evidence of Sanyal, the Municipal Engineer loses much of its force when we remember the fact that the Company never taxed the Municipality soon after the fire or at any time that the insufficient supply of water was due to any defect in the Municipal main or to any defective supply by the Municipality. At least there is nothing to show that the Railway Company ever wrote to the Municipality to that effect or suggested it in any other way; on the contrary, the assistance rendered by the Municipality is acknowledged in the report

made by the Station Master on the next day after the fire.

Issues sent down.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 19 OF 1919.
CIVIL REVISION NOS. 211 AND 212 OF 1918.

May 9, 1919

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

RAMENDRA NATH—PETITIONER—APPELLANT

versus

Musammat HIKAIT KUER—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 85, 86—Execution of decree—Sale—Decree-holder auction-purchaser, duty of—Failure to pay balance of purchase-money into Court, effect of.

The provisions of rules 85 and 86 of Order XXI of the Civil Procedure Code are mandatory. These rules impose an obligation upon a decree-holder purchaser to bring into Court whatever balance may be due on foot of the purchase-money, after deducting the amount of the decree. If the decree-holder fails to comply with the rules, the property is liable to be re-sold. [p. 317, col. 2.]

Appeal from an order of the Subordinate Judge, Saran.

Messrs. *Sushil Madho Mullick*, *Baikuntha Nath Mittra* and *Panchanan Banerjee*, for the Appellant.

JUDGMENT.—Three applications have been presented to us on behalf of the judgment-debtor, *viz.*, Miscellaneous Appeal No. 19 of 1919 coupled with Civil Revision No. 211 of 1918 and Civil Revision No. 212 of 1918.

The questions which await our determination are covered by Miscellaneous Appeal No. 19 of 1919 and Civil Revision No. 212 of 1918. The respondent in this appeal is a decree-holder who obtained a decree on foot of a mortgage-bond, dated the 20th January 1899, for a sum of Rs. 3,100. Many attempts have been made to execute this decree from time to time but unhappily they have all been rendered abortive for one reason or another.

The present application for leave to issue execution is dated the 17th January 1911, now eight years ago. The sale that is now impeached by these proceedings took place so far back as the 14th April 1913, and various applications were made to set aside that sale. The matter proceeded to the Calcutta High Court and eventually came before this Court and our learned brothers Chapman and Roe, JJ., held that no appeal lay to the High Court and that an appeal should be presented before the District Judge to whom only an appeal lay. The learned Judge in one proceeding dismissed the appeal that came before him on the 25th of March 1918. The learned Subordinate Judge in another proceeding refused to set aside the sale by his order dated the 28th June 1913.

Now Miscellaneous Appeal No. 19 comprises two matters, one a proceeding under section 47 of the Civil Procedure Code for the purpose of setting aside the sale on the ground of non-observance by the decree-holder auction-purchaser of the provisions of Order XXI, rules 85 and 86, and also dealing with an application under Order XLVII, rule 1, for a review of a prior order of the learned Subordinate Judge. The property was valued at Rs. 30,000 by the Subordinate Judge but was sold to the decree-holder as the only bidder for a sum of Rs. 8,000. Apart from this double-barrelled application under section 47 of the Civil Procedure Code and under Order XLVII, rule 1, of the Civil Procedure Code, there was also an independent proceeding under Order XXI, rule 90, seeking to set aside the sale on the ground of irregularity and fraud. Fraud was not specifically alleged but irregularity in the conduct of the sale was relied on to justify setting aside the sale. The irregularity complained of was referable to the non-service of the notice of the sale proclamation. The learned Judge in dealing with this matter held that the notice of sale proclamation had not been served and though the non-service of the sale proclamation was an irregularity that nevertheless the judgment-debtor had not suffered any substantial damage or injury by reason of such irregularity. The reasoning of the learned District Judge in this aspect of the case is far from clear, and his conclusion of fact appears to be based on surmise rather than on proof.

The learned District Judge appears to

have failed to consider the question of impeaching the sale on the ground alleged by the judgment-debtor in Miscellaneous Appeal No. 19 of 1919 relative to the non-observance of rules 85 and 86 of Order XXI. The District Judge thought that, inasmuch as an appeal was taken from his decision in the proceeding under Order XXI, rule 92, that it would be open to the High Court in that appeal to consider as an additional ground for impeaching the sale the non-observance by the auction-purchaser of the provisions of rules 85 and 86 of Order XXI. That portion of the application in Miscellaneous Appeal No. 19 of 1919 which dealt with the review application of the Subordinate Judge's order under Order XLVII, rule 1, it is not material to consider, and Mr. Mullick I think concedes this.

However, the learned Vakil's two main points are that the learned Judge in Civil Revision No. 212 of 1918 acted without or failed to exercise a jurisdiction vested in him in not setting aside the sale on the ground of irregularity, and he alleges that on the face of the proceedings the property was sold at a gross undervalue to the decree-holder; that there was no proper bidding; and that obviously, having regard to the value of the property and the price offered by the decree-holder, there was substantial injury to the judgment-debtor. The learned Judge assigns certain reasons for holding that the judgment-debtor cannot be considered as a person who has sustained substantial injury inasmuch as he and the decree-holder have deliberately set themselves to make war one against the other and to use every means in their power to defeat the execution which the decree-holder seeks to enforce. The reasons are more in the nature of surmises than conclusions of fact founded upon legal proof and appear to us unsatisfactory; and in our opinion the order of the District Judge refusing to set aside the sale on the application presented to him under Order XXI, rule 90, Civil Procedure Code, should be set aside. However, apart from the application instituted under Order XXI, rule 90, we think that the sale must also be set aside on a ground that was not considered by the learned District Judge, namely, the ground that the decree-holder auction-purchaser failed to comply with the provisions of Order XXI, rule 85, read in conjunction with rule 86. Rule 85 provides that the purchaser shall bring into Court the amount of his purchase money within fifteen days of the date of sale. Now admittedly in this case the purchase price bid for the property sold was the sum of Rs. 8,000 and it is apparent that there would be a residue in favour of the judgment-debtor to the extent of Rs. 2,000, if the true value of the mortgage decree be Rs. 6,000 and odd as alleged. It is right to mention that in the execution petition the decree-holder specified that the amount due on the foot of the mortgage decree was the sum of Rs. 15,726. This estimation of the amount due on the mortgage-decree was obviously incorrect. If the true rate of interest be calculated upon the decree, the actual amount due to the decree-holder would be Rs. 6,728. Thus if the purchase price of the property be Rs. 8,000, then there would be a balance of Rs. 1,272 in favour of the judgment-debtor. Therefore clearly the obligation which the Civil Procedure Code imposes upon a decree-holder purchaser is to bring into Court whatever balance may be due on foot of the purchase money, after deducting the amount of the decree. This the decree-holder did not do. Rule 86 of Order XXI provides a penalty on failure to observe the provisions specified in rule 85. In our opinion the provisions of rules 85 and 86 of Order XXI read in conjunction are mandatory. The obligation was clearly upon the decree-holder purchaser at the auction sale to bring into Court the balance due on the foot of the purchase price of the property for which he bid and purchased, and having failed to do that the property was liable to be re-sold, and upon the application of the judgment-debtor under Order XLVII, rule 1, the Court ought to have considered the judgment-debtor's application and set aside the sale and directed a re-sale of the property. Accordingly the relief sought in Miscellaneous Appeal No. 19 of 1919 is granted with costs and the sale impeached in the proceeding under section 47 of the Civil Procedure Code is set aside on the grounds stated above. The application in Civil Revision No. 212 of 1918 is disallowed without costs. The ap-

plication in Civil Revision No. 212 of 1918 is also granted but without costs. The hearing fee in Miscellaneous Appeal No. 19 of 1919 is measured at three gold *mohurs*.

Appeal & Revision No. 212 *allowed*;
Revision No. 211 *disallowed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 255 OF 1916.

January 22, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Krishnan.

GOPISETTI NARAYANASWAMI NAIDU GARU, RECEIVER OF NIDADAVOLE AND MEDUR ESTATES, AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHODAVARAPU KAMANNA AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3 (16)—'Tank-bed,' meaning of—Ejectment from tank-bed, suit for—Jurisdiction of Civil Courts.

Land which is a tank-bed, *i. e.*, which has been continuously used for the storage of water is not *ryoti* land and a suit to eject a tenant from such land is cognizable by the Civil Court. [p. 318, col. 2.]

Where, however, its user for that purpose has been abandoned and the land has lost its character as tank-bed at the date of the suit, the suit is not cognizable by the Civil Court. [p. 318, col 2.]

Section 3 (16) of the Madras Estates Land Act suggests its application to land which had not lost its character as tank-bed when the Act came into force. [p. 318, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Bezwada, dated the 8th September 1915, in Appeal Suit No. 185 of 1914 (transferred from the file of the Court of the Subordinate Judge, Ellore), preferred against the decree of the Court of the District Munsif, Tanuku, dated the 23rd December 1913, in Original Suit No. 666 of 1911.

This appeal came on for hearing on the 23rd and 24th January 1918.

Mr. *P. Nagabushanam*, for the Appellants.

Mr. *P. Narayanamurthy*, for the Respondents.

JUDGMENT.—We deal at present only with the objection to the jurisdiction and with one ground on which appellants have attempted to support that of the Civil Court, that the suit land is tank-bed within the meaning of that expression as used in section 3 (16) of the Estates Land Act. No doubt, if the land is tank-bed, it follows from that provision that it is not *ryoti* and the lower Appellate Court's finding at the conclusion of the 7th paragraph of its judgment that it is *ryoti* and the acquisition of *ryoti* right in it, in spite of the proprietor, possible, is unsustainable.

The lower Appellate Court's use of language is not clear. But we understand it to hold that the land lost the character of tank-bed at some date not specified, and was cultivable waste at the date of suit, because of its cultivation for fourteen years. It is not, in our opinion, clear that this fact alone is a satisfactory ground of decision.

The Act contains no definition of "tank bed." But the lower Appellate Court has proceeded on the assumption that the land originally had that character, although it was justified in doing so by no admission of defendants and in fact their written statement rather denies it. If, however, that assumption was justified, there is then the difficulty that the wording of section 3 (16) suggests its application to land, which had not lost its character as tank-bed, when the Act came into force; and, if so, a determination of the date on which that character was lost, is necessary, before the lower Appellate Court's argument can be accepted. Again it is argued that letting and cultivation of the land are not necessarily inconsistent with its retention of that character. For land may be let, but may not be cultivated in years in which water does not cover it or may be cultivated, notwithstanding that it does so temporarily; and the evidence as to the fourteen years' letting referred to by the lower Appellate Court does not show whether it was of either character or that it involved an abandonment of the use of the land as tank-bed. In this connection reference may be made to the evidence of plaintiff's 1st and 2nd witnesses regarding the existence of a *bund* between the land and the tank and the possibility which the lower Appellate Court has not considered, that it indicates such abandonment. It is not our intention in referring to these points to attempt an exhaustive enumeration of those

tc which the parties and the lower Appellate Court may appropriately attend. We specify them only because they have been mentioned in argument and no authority regarding the interpretation of the term "tank-bed" in section 3 (16) having been cited, such specification may be of assistance in the further enquiry which we mean to direct.

The interpretation of the term" tank-bed" raises new and important questions and we cannot regard the lower Appellate Court's determination of it, reached without any finding by the trial Judge and apparently without appreciation by the parties of the matters really in issue, is satisfactory. We, therefore, call for findings on the issues:—

(1) Whether the suit land was ever continuously used for the storage of water?

(2) If so, whether such use has been permanently abandoned and at what date?

Fresh evidence may be taken. Findings will be due in two months. Seven days for objections.

In compliance with the order contained in the above judgment the Subordinate Judge of Ellore submitted the following

FINDINGS.—The plaintiff's case is that S. No. 18 in extent acres 3—50 cents was the site of a tank...(*cheruvu prathas amu*) and that the tank-bed...(*cheruvu garbham*) was being leased by him for cultivation temporarily from the year 1899, and that in Fasli 1318 he sold the Kudivaram right of the land for Rs. 840 to one Nagayya but that, as the defendants would not deliver up possession of the land, the sale could not be carried into effect. The plaintiff accordingly sues to eject the defendants from the land. The defendants deny that the land was at any time tank bed land. I have been asked to submit findings, firstly, as to whether the suit land was ever continuously used for the storage of water; and secondly, if so, whether such use has been permanently abandoned and at what date. The schedule attached to the plaint, Index No. 5, would indicate that the suit S. No. 18 is the re-Survey No. The schedule shows that S. No. 57, an Inam land, and S. No. 58, a *zeraiti* land, are the northern boundaries of the suit land; though another schedule, Index No. 512, shows that S. No. 59 Cheruvu also forms the northern boundary. In both the schedules the path leading to the Cheruvu S. No. 59 is shown as an eastern boundary for the suit land. At the time of trial it was alleged that S. No. 18 was the old S. No. and the Kurnam, P. W. No. 1, has come forward to swear that the old Survey Nos. 17 and 18 correspond to re-Survey No. 59 which measures acres 10—75 cents, and that out of this land the suit land, measuring acres 3—50 cents, was leased to the defendants by the plaintiff. The plaintiff's attempt has been to make out that the entire re Survey No. 59, acres 10—75 cents, is tank-bed land, and that the plaint land which forms a portion thereof also partakes of that character. But beyond such vague assertion there is nothing to support such a contention. The copy of the Adangal account, Exhibit A, shows that the suit land, though forming part of Survey No. 59, is *zeraiti* cultivated land in the possession of Chodavarapu Ramanna and irrigated by the Government canal water. The Kurnam admitted that even with regard to the remaining acres 7—25 cents in Survey No. 59 only 5 acres form the waterspread of the tank. The sketch prepared by him, Exhibit B, would also show that the tank-bed forms but a portion of the Survey No. 59, and that there is a considerable portion of the land in the south not covered by the tank. In this connection it is necessary to remember that re Survey No. 59 is said to include 2 old Survey Nos. 17 and 18 and that the suit land corresponds to old Survey No. 18. There is nothing to show that it was tank-bed. No doubt the plaintiff has put forward some persons to swear that the suit land formed a portion of the tank to its north, and that even at present in spite of a *bund* intervening, a considerable quantity of water would stagnate on the suit land during the rainy seasons. But I have little hesitation in rejecting it as absolutely unworthy of credit. The witnesses have given free vent to their imagination and indulged in all sorts of assertions. This would be evident from their story as to a Dhwajastambham having at one time stood on the land. Admittedly there is a pretty big *bund* intervening between the suit land and the tank. Nevertheless the Kurnam, P. W. No. 1, did not scruple to assert that there would be some extent of the suit land under water, though first

crop was being raised on the land with the help of canal water every year. The P. W. No. 3 merely confined himself to stating that before defendants began cultivating the land 14 or 15 years ago it formed the waterspread of a tank. But the plaintiff's 4th witness was more straightforward and he admitted that before the defendants came into possession of the land it was waste land. The land was also let to the defendants in 1899 as Asalaminha waste, and in subsequent Faslies as a *zerait* land. The plaintiff would assert that, as the land is known as Pallacheruvu, it should have formed part of a tank at one time. But the name might merely indicate a wet land near a tank. The P. W. No. 5 would ask the Court to believe that water would stagnate to a depth of 3 feet on the suit land, when there is heavy rain. Similarly the P. W. No. 6 would allege that water would always stagnate on the land, though admittedly the land was being cultivated by the defendants during the last 22 or 23 years without interruption and damage. The plaintiff has utterly failed to prove by any reliable evidence that the suit land formed the site of a tank at any time and that it is tank-bed land. At any rate there is not the least doubt that it had ceased to be used for the storage of water long ago, and that it had been abandoned from being used for any such purpose before the memory of man. The fact that in Fasli 1318 the plaintiff had sold publicly the Kudivaram right in the land conclusively proves its permanent abandonment from being used as tank-bed. It was argued for the plaintiff that such abandonment should be considered as having taken place only after the said sale and not before. This overlooks the fact that but for such abandonment, it could not have been fit for cultivation when leased to the defendants in 1899 and that since then the land is being used only for cultivation purposes and not as a tank, is admitted.

In this connection it may also be noted that even the existing tank in Survey No. 59 serves no useful purpose except for washermen to wash the clothes. It is not an irrigation tank nor is it one of general utility to the villagers. In these circumstances no one is interested even in preserving the present tank.

For the aforesaid reasons I answer the 1st issue in the negative, and the 2nd issue in the affirmative.

This appeal came on for final hearing after the return of the finding of the lower Appellate Court upon the issues referred to by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and dismiss the appeal against order with costs.

M. C. P.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1096 OF 1917.

May 15, 1919.

Present:—Mr. Justice Das.

MUKHI SINGH AND OTHERS—PLAINTIFFS —APPELLANTS

versus

KISHUN SINGH AND ANOTHER—DEFENDANTS —RESPONDENTS.

Evidence Act (I of 1872), s. 92—Oral evidence to contradict recital in deed, whether admissible.

There is nothing in section 92 of the Evidence Act to exclude evidence of an oral agreement which contradicts, varies, adds to, or substracts from, not the terms of the contract, but some recitals in the contract itself. [p. 321, col. 1.]

Appeal from a decision of the District Judge, Patna.

Mr. *Panchanan Banerji*, for the Appellants.

Messrs. *Fakhruddin* and *Seveshwardayal*, for the Respondents.

JUDGMENT.—Only two questions have been argued before me, *first*, that the lower Appellate Court erred in coming to the conclusion that evidence of the existence of a separate oral agreement could be given in this case, and *secondly*, that the lower Appellate Court erred in coming to the conclusion that the case was a case of breach of trust and, therefore, there was no limitation. It appears to me that so far as the first question is concerned, the lower Appellate Court came to a right conclusion. The plaintiff's case was that at the time of the mortgage he left the consideration money with the mortgagee in order that certain prior mortgage debts may be paid

off. His complaint is that those prior mortgage debts were not paid off and, therefore, he was obliged to bring this suit for recovery of the money which remained in the hands of the mortgagee. The learned Vakil for the appellants points out that the mortgage-deed contains a clear recital that the mortgagor received the full consideration money and paid off the debt due to the prior mortgagees, and he argues that there being a clear recital to that effect, the contemporaneous oral agreement to the effect that the money remained with the mortgagee for the purpose of being applied to the payment of prior mortgage debts is not admissible under section 92 of the Indian Evidence Act. The learned Government Pleader in his able argument points out that the word deliberately used by the Legislature in section 92 is "terms" and not "recitals", and section 92 excludes all evidence of oral agreements in so far as it contradicts, varies, adds to or substracts from the terms of any contract, grant or other disposition of property. It will be noticed, therefore, that there is nothing in section 92 of the Evidence Act which excludes evidence of an oral agreement which contradicts, varies, adds to, or substracts from, not the terms of the contract, but some recitals in the contract itself. I am of opinion that the argument of the learned Government Pleader is manifestly sound and must prevail. If any authority is needed for the proposition it will be found in the case of *Shah Lal Chand* v. *Indarjit* (1). I, therefore, come to the conclusion that the lower Appellate Court came to a right conclusion on this point and that, therefore, the Court of first instance must come to a definite conclusion on the question raised by the plaintiff in his pleading.

The next point urged is that there is no necessity to remand the case to the Court of first instance inasmuch as the plaintiff's suit is clearly barred by limitation. The learned Vakil points out that the lower Appellate Court is clearly wrong in coming to the conclusion that the case is a case of breach of trust and that, therefore, there is no question of limitation. I agree with him that no case has been made out under section 10 of the Limitation Act, but I do not agree with the learned Vakil that the suit is necessarily barred by limitation. I do not desire to express a definite opinion on this point, inasmuch as I do not think that I should fetter the judgment of the Court of first instance on this point. I hold, however, that the opinion of the lower Appellate Court that the case comes within section 10 of the Limitation Act and that, therefore, there is no limitation at all is, in my opinion, not correct. In my opinion either Article 62 or Article 115 would possibly apply to the facts of the case; and if Article 62 applies, then it would be for the Court of first instance to consider the starting point of limitation. The Article itself says that the period begins to run from the time when the money is received". Clearly it must mean when the money is received for the plaintiff's use, that is to say, the period would begin to run from the time "when the mortgagee refused to pay to the prior mortgagees but held the money constructively for the use of the plaintiff. If authority is needed for this proposition, it will be found in the case of *Johuri Mahton* v. *Thakoor Nath Lukee* (2). I, however, do not express any opinion on the question whether Article 62 applies or whether Article 115 applies, or whether the suit is, in fact, barred by limitation. All that I say is that there is no case made out of breach of trust in this matter. The appeal is dismissed with costs.

Appeal dismissed.

(1) 22 A. 370 (P.C.); 4 C. W. N. 485; 2 Bom. L. R. 553; 27 I. A. 93; 7 Sar. P. C. J. 702; 9 Ind. Dec. (N. S.) 1281.

(2) 5 C. 830; 6 C. L. R. 355; 2 Ind. Dec. (N. S.) 1136.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 36 OF 1919.

May 6, 1919.

Present:—Mr. Justice Walsh and Mr. Justice Stuart.

L. PEAREY LAL—APPLICANT—APPELLANT

versus

MUIR MILLS COMPANY, LTD., CAWNPORE—OPPOSITE PARTY—RESPONDENT.

Hindu Law—Joint family—Company shares held by father on behalf of family—Manager of family, right of, on death of father, to be registered share-holder.

S, the head of a Hindu joint family, purchased some shares in the Muir Mills Co, on behalf of the family. Upon his death his son became the manager of the family and applied to be registered in the books of the Company as the holder of these shares:

Held, that the son and the remaining members of the family were entitled to the beneficial interest in the shares by right of survivorship upon the death of the father, and that under Articles 30 and 9 of the Articles of Association of the Company the son was entitled to be registered as the holder in lieu of his father of the shares in question. [p. 322, col. 2; p. 323, col. 2.]

First appeal from the order of the District Judge, Cawnpore, dated the 15th November 1918.

Mr. *Panna Lal*, for the Appellant.

Mr. *Arrendell*, for the Respondent.

JUDGMENT.

WALSH, J.—In this case a slight difficulty seems to have arisen as to who is entitled to be placed on the register of shareholders in a limited liability company in the event of the death of the head of a joint Hindu family. The facts are quite simple. One Sheomukh Rai, who was a holder of 80 shares in the Muir Mills Company, Limited, Cawnpore, recently died leaving surviving him Pearey Lal, his son, who is *sui juris*, and a grandson who is a minor. So far as we know, these are the only parties concerned in this application. The Company, perhaps naturally not wishing to decide one way or the other whether the son was entitled to be registered, left him to make the necessary application to the Court having jurisdiction under the Companies Act to determine whether Pearey Lal was entitled to be so registered. Pearey Lal made an affidavit which, with the exception I will mention in a moment, is the only material we have before us with regard to the facts. However, such as it is, this material is uncontradicted inasmuch as the Company do not oppose the application, The affidavit sets forth a claim by Pearey Lal to be the heir of his deceased father, but in a letter subsequently written by him to the Court on the 23rd of October 1918 he corrected this defect explaining that it was a mistake of legal terminology and adding these facts which we are prepared to accept as though they were part of the original affidavit. "Sheomukh Rai and myself were the members of a joint Hindu family. I became entitled to the joint family property as the sole survivor on the death of Lala Sheomukh Rai because there was no other member of the family then in existence." It must, therefore, be taken and we find as a fact that the present applicant Pearey Lal is the manager of the existing joint Hindu family and he and the other member of the family are entitled to the beneficial interest in these shares by right of survivorship upon the death of the father.

It is perhaps unnecessary to say that where any difficult and complicated question of fact arising out of a dispute between two adverse claimants to be placed upon the register upon the event of the death of the prior holder occurs, the Directors may, if they think fit, decide the matter on the material before them, but they are not bound to do so. They may think the material insufficient or the decision of the question too difficult and leave the rival applicants to fight out their right through the machinery of an application to the Court to rectify the register under section 38 of the Companies Act. That is precisely how the present applicant has brought the matter before the Court. Article 30 provides that "any committee of a lunatic member and any person becoming entitled to shares in consequence of the death, bankruptcy, or insolvency of any member, upon producing such evidence, etc., may, with the consent of the Directors, be registered himself as a holder." It is to be borne in mind that Articles of Association are no part of the general law. They are rather terms of the contract or regulations by which persons joining a limited company agree to be bound and regulated in the conduct of the affairs of the Company, and the provisions made by the Articles of Association are usually and must necessarily be made with due regard on the one hand to the rights of the share-holders

and their successors-in interest but on the other hand to the convenient management of the affairs of the Company. And amongst other things it would be extremely embarrassing to the books and the management of the Company if in the case of a joint Hindu family all the members of which are by law entitled to the shares which have been purchased out of the joint funds, they had the right as against the Company to insist, each one of them, upon having their names entered amongst the holders of the shares. A similar difficulty is likely to occur where there are several executors of a Will or several trustees entitled under a trust deed, and the Company have, therefore, provided what is almost a common form by Article 9 that though they may, they cannot be compelled to, register more than one name as the holder of a particular block of shares. Similarly they are not compelled to recognise trusts, the trustee or holder, for the time being, of any block of shares in which other persons may be beneficially interested is the person recognised by the Articles of Association as the person entitled to the shares for the time being and entitled to be registered as the holder thereof. Turning to Article 30, speaking at any rate for myself, I find myself quite unable to agree with the view of the District Judge that the Articles do not contemplate and are not appropriate for the recognition of the rights of a joint Hindu family. Article 30, as I have already pointed out, provides for any person becoming entitled to shares in consequence of death to be registered if the Directors are satisfied with the evidence of his title. I think those provisions are quite wide enough to cover the members of a joint Hindu family. The survivors are all entitled to the shares in consequence of death by survivorship. If that be the correct view, it is only necessary to superimpose upon the provision made by Article 30 the provision made by Article 9, or in other words the Directors are not bound to recognise more than one person of such joint Hindu family as the person entitled to be placed upon the register. Who is such person, is, as I have said, in every case a mere question of fact and in this case a particularly simple one. Ordinarily speaking, he would be the manager or in other words in a great majority of cases the senior male surviving adult member of the family. Applying these principles to the present case, we think that there was no reason for rejecting the application. We are satisfied that Pearey Lal is the manager of this joint Hindu family and that as such under the general provisions of Articles 30 and 9 he is entitled to be registered as the shareholder in lieu of his father and all the share registers are to be rectified accordingly.

I will just add one word as the matter is mentioned in argument. Whether he is or he is not a member of a joint Hindu family is no concern really of the Directors, although as I have said they may decide whether he is *prima facie* entitled to be registered on such evidence as they think sufficient in each case. But so far as this case is concerned, we have acted upon the sworn statement of the applicant corrected by his letter, to the effect that he is the manager of this joint Hindu family. So far as he is concerned, in any question which may arise with regard to the beneficial interest in these shares, he is estopped for ever by having obtained this order upon his own representation from alleging that he has a separate and self-acquired interest.

STUART, J.—I concur. The case put forward by Pearey Lal is that the shares were purchased by his father Sheomukh Rai on behalf of the joint Hindu family, of which Sheomukh Rai was the head, and of which Pearey Lal and his son are members. In other words, all the shares were the property of the joint Hindu family. They were entered in the name of the *karta*. This is perfectly unobjectionable. When the *karta* died, it became necessary to substitute the name of his successor. Article 30 of the Articles of Association appears to me to cover the case. Pearey Lal has become entitled to the entry of his name in consequence of the death of Sheomukh Rai. It is pointed out by the learned Counsel for the Company that the words of the Article are "any person becoming entitled to shares" and that I am interpreting the Article as though the words were "any person becoming entitled to registration," but I think I am stating the intention of the framers and I do not think that I am stretching the words unduly in find-

ing that Pearey Lal is entitled to the shares.

BY THE COURT.—We allow the application, set aside the order of the Court below and direct that the name of Pearey Lal be entered in the share registers of the Muir Mills Company, Limited, in place of Lala Sheomukh Rai deceased and that all the share registers of the Company be rectified accordingly. Each party should bear its own costs.

Application allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 892 OF 1917.

January 20, 1919.

Present:—Mr. Justice Beachcroft.

SHYAM LAL DEY—DEFENDANT—APPELLANT

versus

MANMATHA NATH SARKAR—PLAINTIFF—RESPONDENT.

Public nuisance—Injunction to restrain public nuisance, suit for—Special damage, proof of—Inability to commit nuisance, whether special damage.

Plaintiff brought a suit for a declaration that a certain passage closed by the defendant was a public passage and for an injunction restraining the defendant from obstructing the passage, alleging that by reason of the obstruction caused by the defendant he could not enter or pass over the passage and that he had also suffered special damage by being unable to erect scaffolding on the passage for the repair of his house:

Held, (1) that the suit was not maintainable in the absence of proof of special damage beyond that suffered by the rest of the public who used the way and that the fact that the plaintiff could not enter on or pass over the land was not sufficient proof of such damage; [p. 325, col. 2.]

(2) that if the passage was a public highway, the plaintiff was not entitled to erect a scaffolding on it and that he could not sue in respect of a nuisance when the special damage he asserted was his own inability to commit a nuisance. [p. 325, col. 2.]

Appeal against the decree of the Additional District Judge, 2nd Court, 24-Pergannas, dated the 19th March 1917, affirming that of the Munsif, 2nd Court, Sealdah, dated the 5th August 1915.

Babus *Provash Chundra Mitter* and *Surendra Madhab Mullick*, for the Appellant.

Babu *Jyotish Chundra Hazra*, for the Respondent.

JUDGMENT.—The litigation concerns a narrow strip of land about 3 inches wide, which runs between the backs of the houses of the plaintiff and defendant. There are windows of plaintiff's house overlooking this strip but it does not appear whether any door of his house, which has two road frontages besides, opens on to it.

The facts either admitted or found are that up to the year 1909 this strip was a drain. In that year the connected latrine system was introduced by the Corporation and from that time the drain began to silt up. In 1913 the defendent paved the strip with bricks. Subsequently he closed it at both ends.

The plaintiff brought this suit to have the obstruction removed alleging that the drain was a public drain, which had subsequently become a public passage, and asked for a declaration to that effect. In paragraph 7 of his plaint he set out the damage which he had suffered. He begins by asserting that he cannot enter on or pass over the land, and then sets out the special damage that he has been deprived of the only means of repairing the eastern wall of his premises as he is now unable to have scaffolding put on the strip of land for the purpose of repair and as a consequence his house is deteriorating in value.

In the alternative, in case the strip of land should be found to be the property of the defendant, he asked for a declaration that he had acquired as an easement the right of entering on the land and repairing his house by means of scaffolding erected on the land.

He also asked for a perpetual injunction restraining the defendant from obstructing the passage.

The Munsif gave a decree that the passage in dispute be declared to have been a public drain converted into a lane on which the plaintiff had a right to go for making necessary repair to his house by scaffolding, that the defendant had no right to obstruct him and that the plaintiff be further declared to have an easement of necessity. He directed the defendant to open a door in the newly erected wall and to keep it open and gave a permanent injunction restraining him from closing the passage and door.

This decree was not varied on appeal by the District Judge, but the learned Pleader for the respondent concedes that he cannot ask

for it to be upheld in its entirety, and that the declaration that plaintiff has an easement of necessity must be expunged as also that portion which declares that the plaintiff has a right to erect scaffolding on the land.

The Munsif found that the land did not belong to the defendant, and this finding was upheld by the learned Judge who apparently came to the conclusion that it was Khas Mahal land.

As regards the question of easement, the Munsif considered that plaintiff had not established user for a sufficient period to give him the right claimed. Before the Appellate Court plaintiff did not rely on this right in view of the contention that the defendant had no title to the land.

As regards the public right of way, the learned Judge's findings are embodied in the following passages: "there can be no doubt that for very many years, at least since 1873, anybody who wished to pass by this land was able to do so, though as a rule it was only used by Methers. But one witness proves that he went that way in order to repair his houses further north and another witness proves that when a boy he passed by this alley on his way to play in the field beyond...I have no difficulty in holding that any member of the public who wished to do so could pass by this alley between the years 1873 and 1913." As regards special damage the learned Judge said, "that the plaintiff sustained special damage is obvious from the fact that his houses are bounded on the east by the obstructed land. It is idle for the defendant to say he is willing to allow the plaintiff to erect scaffolds when necessary, especially when it is found that the defendant is himself a trespasser."

A number of grounds have been urged in this appeal, *viz.*, that the learned Judge used statements which were not admissible in evidence against defendant in coming to the conclusion that he had no title, that the restricted use to which the learned Judge found the passage had been put was not sufficient to justify the finding of dedication as a highway, that if there was any dedication to the public at all it was dedication for the purpose of a drain and that as the drain existed up to 1909, there was no evidence of dedication as a highway, for when the purpose of the dedication ceased the land would revert to the owner, that the special damages which the plaintiff claimed to have suffered did not justify his suit in respect of a public right, and that the Secretary of State and the Corporation ought to have been made parties to the suit.

It is not necessary to discuss all these grounds. Obviously the question of dedication, which depends on title and intention, does not arise at all if the defendant or his predecessors never had any title to the land.

The appeal may, however, be disposed of on the ground that the suit was not maintainable in the absence of proof of special damage. I have already set out what was the damage which plaintiff alleged that he had suffered and the learned Judge's remarks on the question of special damage. That the plaintiff could not enter on or pass over the land is not sufficient. He must show some damage beyond that suffered by the rest of the public who use the way: *Winterbottom* v. *Derby Earl* (1). The case of *Harihar Das* v. *Chandra Kumar Guha* (2) is not an authority for the proposition that mere inability to use the passage amounts to special damage. There the plaintiff was held to have suffered special damage because he had been put to expense in pursuing another route. The necessity of proving special damage was clearly realised in the plaint. It was alleged and found by the learned Judge to be the inability to erect scaffolding for the repair of his house. Now if the passage is a public highway, it is clear that the plaintiff had no right to erect scaffolding on it. Obviously the plaintiff cannot sue in respect of a nuisance when the special damage which he asserts is the inability of himself to commit a nuisance. The suit was clearly not maintainable.

The appeal is accordingly allowed and the suit is dismissed. The defendant will get his costs in all the Courts.

Appeal allowed.

(1) (1867) 2 Ex. 316; 36 L. J. Ex. 194; 16 L. T. 771; 16 W. R. 15.

(2) 49 Ind. Cas. 79; 23 C. W. N. 91.

GOVINDAN NAIR *v.* KUNJA NAYAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 1036 OF 1918.

February 14, 1919.

Present :—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

KALAVOOR CHEMBAZHI GOVINDAN NAIR—PLAINTIFF—APPELLANT

versus

KUNJA NAYAR AND OTHERS—DEFENDANTS NOS. 1 TO 34—RESPONDENTS

Malabar Law—Male member leaving tarwad *house to live in wife's* tarwad, *right of, to separate maintenance or* menchilavu—*Sufficient cause for leaving* tarwad—*Burden of proof.*

A male member of a Malabar *tarwad* leaving the *tarwad* house solely for the purpose of living with his wife is entitled to separate maintenance and *menchilavu*. [p. 328, cols 1 & 2; p 327, col. 2.]

Maravadi v. *Pamakkar*, 14 Ind Cas 383; 36 M. 203; 11 M. L T. 112; (1912) M. W. N. 109; 22 M. L. J. 309, *Kunhi Amma* v. *Ammu Amma*, 16 Ind. Cas. 178; 36 M 591; (1912) M. W. N. 1233; 24 M L. J. 559 and *Muthu Amma* v. *Vellathumkara Gopalan*, 16 Ind. Cas 895; 36 M. 593; 23 M. L. J. 496; 13 M. L T. 120, applied.

Per *Seshagiri Aiyar, J.*—The Customary Law of Malabar, as enunciated in the decisions of the High Court, is that ordinarily every member of a *tarwad* house should be maintained by the *karanavan*. The onus of proving that his departure from the *tarwad* is for proper cause is on the member leaving the *tarwad* house and it is not for the *karnavan* to show that it was improper. [p 328, col]

Kunhi Amma v *Ammu Amma*, 16 Ind Cas. 178; 36 M 591; (1912) M W.N. 1233; 24 M. L. J. 559, followed.

Kozhipurath Kunnikrishna Menon Karnavan v. *Kozhipurath Kunhikavamma*, 49 Ind. Cas. 471; 35 M. L. J. 565; (1918) M. W. N. 761; 24 M. L. T. 448, dissented from.

Menchilavu is part of maintenance and does not stand on a higher footing. [p. 328, col. 2.]

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 154 of 1917, preferred against the decree of the Court of the District Munsif, Parappanangadi, in Original Suit No 195 of 1915 (Original Suit No. 637 of 1913) (Original Suit No. 73 of 1915 on the file of the Court of the Additional District Munsif, Tirur).

FACTS appear from the judgment.

Mr. *C. Madhavan Nair* (with him Mr. *K. Kuttikrishna Menon*), for the Appellant.—The plaintiff is entitled to separate *menchilavu*, because the right to maintenance is a proprietary right so that even if a member of the Tarwad earns and lives by his earnings, he can claim it. See *Maravadi* v. *Pamakkar* (1). Residing out of the Tarwad house alone is no reason for disallowing maintenance separately. "Good ground" is the basis of the decision in *Maravadi* v. *Pamakkar* (1). If residing outside is not improper, maintenance should, if claimed separately, be allowed. See also *Ammini Ammal* v. *Padmanabha Menon* (2), followed in *Kozhipurath Kunnikrishna Menon Karnavan* v. *Kozhipurath Kunhikavamma* (3).

[OLDFIELD, J.—The view of Sundara Aiyar, J., in *Maravadi* v. *Pamakkar* (1) seems to be inconsistent with the view of Sadasiva Aiyar, J., in *Kozhipurath Kunhikrishna Menon Karnavan* v *Kozhipurath Kunhikavamma* (3).]

Sadasiva Aiyar, J., sitting with Sundara Aiyar, J., has followed *Maravadi* v *Pamakkar* (1) in *Muthu Amma* v. *Vellathumkara Gopalan* (4).

Unless living out is shown to be improper I am entitled. The onus is on the other side and it has not been discharged.

[SESHAGIRI AIYAR, J.—Is it not the ordinary rule that every member should live in the Tarwad house ?]

No. There is no such hard and fast rule. It was a custom of by gone days

[SESHAGIRI AIYAR, J.—You may have given it up but the law has not been altered. And even under the Hindu Law, no member can claim a share of the family income on the ground that he wants to live apart.]

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.—The Marumakkathayam Law recognises only the case of a female living with her husband. And even with females mere absence of comfort or inconvenience of living in the Tarwad house would not suffice to enable them to claim separate maintenance. See *Kunhi Amma* v. *Ammu Amma* (5).

[SESHAGIRI AIYAR, J.—The ordinary rule being that a husband visits the wife at her house, if a woman can claim separate maintenance when living with her husband, is not the male member's case stronger?]

Not in the absence of good ground. That is the law of Malabar Tarwads. Perhaps the

(1) 14 Ind. Cas 383; 36 M. 203; 11 M. L. T. 112; 1912) M. W. N. 109; 22 M. L. J. 309.

(2) 48 Ind Cas. 104; 41 M. 1075; 35 M. L. J. 509; 24 M. L. T. 498.

(3) 49 Ind. Cas. 471; 35 M. L. J. 565; (1918) M. W. N. 761; 24 M L. T. 448

(4) 16 Ind. Cas. 895; 36 M. 593; 23 M. L. J. 496; 13 M. L. J. 120.

(5) 16 Ind. Cas. 178; 36 M. 591; (1912) M. W. N. 1233; 24 M. L. J. 559.

woman is exempted by the needs of the times: see *Kozhipurath Kunnikrishna Menon Karnavan* v. *Kozhipurath Kunhikavamma* (3) and *Krishnan* v. *Govinda Menon* (6). The law in Travancore also is the same: see 4 Travancore Law Reports 25. The earlier cases in Madras are all cases of males: see *Kunigaratu* v. *Arrangaden* (7). In all these cases the male member's claim was refused. He must satisfy the Court that he is going out for a proper reason. Mere disinclination to live in the Tarwad house will not suffice What is *menchilavu* is defined in *Valia Konikkal Edom Kelu Achen* v. *Lakshmi Nethyer Ammal* (8). It is said to be the balance after deducting from the maintenance what is strictly required for food.

In the present case the claim was based on an alleged custom which has not been proved.

[SESHAGIRI AIYAR, J.—Suppose. instead of managing for his wife, he is doing something else to better his prospects. Do you still say that he is disentitled?]

It has been held that supplementing income is permissible to some extent and no more.

If going out at will is permitted, the Tarwad will become a mere name and the Karvanan a mere disbursing officer. That could never be the purpose of any law.

Mr. *K. Kuttikrishna Menon*, in reply.—The custom is proved (reads out the evidence).

Further, *menchilavu* being less than maintenance and which the male member is given even if he is in the Tarwad house, should be allowed.

JUDGMENT.

OLDFIELD, J.—I agree unreservedly with the conclusion of my learned brother in the judgment, which he is about to deliver, that a person claiming, like the plaintiff, the appellant, separate maintenance must show some good cause for doing so and that a claim to *menchilavu* is on the same footing as a claim to maintenance.

The more difficult question is whether the plaintiff's desire to live with his wife (for that is all the real justification which he can allege for his claim) is such good cause; and I have felt great doubt whether the reasoning by which corresponding claims by female members have been countenanced in *Maravadi* v. *Pamakkar* (1), *Kunhi Amma* v. *Ammu Amma* (5) and *Muthu Amma* v. *Vellathumkara Gopalan* (4) should be extended. For those decisions involve, with all due deference, a radical departure from the view taken by earlier authorities. They have, however, been acquiesced in, so far as we have been shown, for over five years; they proceeded from learned Judges, whose competence in West Coast Law commands respect; and their departure from or extension of recognized principles was deliberate. In these circumstances it seems to me that the principle as regards females must be treated as established; and if it is so, there is no reason against applying it for the benefit also of male members, since it has not been shown how any special consideration such as the right of the Tarwad to any services at their hands or otherwise to their presence in it, as a condition of their right to maintenance, can be sustained against them.

I concur in allowing the appeal, reversing the decree of the District Judge and restoring that of the District Munsif. Each party will bear their own costs throughout.

SESHAGIRI AIYAR, J.—This is a suit by a male member of a Malabar Tarwad for arrears of *menchilavu* from the Tarwad. The case, as it finally developed itself in the Courts below, is that the plaintiff left the Tarwad house to help his wife to manage her Tarwad affairs and also because he did find it inconvenient to live in the Tarwad house: I do not think the fact that the plaintiff wanted to assist his wife to manage her affairs is a good ground for leaving the Tarwad house; nor the allegation that the plaintiff found it more comfortable to live in his wife's house a sufficient ground for claiming separate maintenance. The cases discussed in *Maravadi* v. *Pamakkar* (1), *Kunhi Amma* v. *Ammu Amma* (5) and *Muthu Amma* v. *Vellathumkara Gopalan* (4) support the above proposition. I may say at once that I do not agree with Sadasiva Aiyar, J., in *Kozhipurath Kunnikrishna Menon Karnavan* v. *Kozhipurth Kunhikavamma* (3) that the burden

(6) 8 M. L. J. 294.
(8) 2 M. H. C. R. 12.
(9) 18 Ind. Cas. 234; (1913) M. W. N. 379.

of proving proper cause or the want of it is on the Karnavan. The Customary Law of Malabar, as enunciated in the decisions of this Court, is that ordinarily every member of a Tarwad should live in the Tarwad house and should be maintained there by the Karnavan. He may go out of the house for good and proper cause. The onus of proving that his departure is for such a cause is on the member leaving the Tarwad house. This was laid down in *Kunhi Amma* v. *Ammu Amma* (5) to which Sadasiva Aiyar, J., was a party. *Maravadi* v. *Pamakkar* (1) is also to the same effect. In *Muthu Amma* v. *Vellathumkara Gopalan* (4) Sadasiva Aiyar, J., did not start his present theory of burden of proof. I am, therefore, unable to agree with the learned Judge that everything would be regarded as a proper cause which the Karnavan cannot show to be improper.

Now comes the important question whether a male member of a Tarwad leaving the Tarwad house solely for the purpose of living with his wife is entitled to separate maintenance. Mr. Ananthakrishna Aiyar did not question the correctness of the rulings which laid down that a female member leaving the Tarwad house for the purpose of living with her husband would be entitled to separate maintenance: see the three cases reported in 36 Madras Series. Nor did he take exception to the principle that maintenance is given to a member of a Malabar Tarwad by reason of the proprietary interest possessed by the member in the Tarwad property: see *Ammini Ammal* v. *Padmanabha Menon* (2)

It is not denied that a male member of a Tarwad has a proprietary interest in the Tarwad property. Further in the case of a female member, the customary law is that she should ordinarily reside in the Tarwad house and that the husband should visit her there. That being the normal state of affairs in a Tarwad, the permanent residence of a husband in the wife's Tarwad cannot be regarded as an improper act on his part. The law, as we have construed, has made an inroad upon custom to this effect, namely, that a female member leaving the Tarwad house solely for the purpose of living with her husband in his Tarwad is entitled to separate maintenance. I fail to see why the same reasoning is not applicable to the converse case. I am almost inclined to regard the latter as an *a fortiori* case. But it is not necessary to go that length. There are expressions in the judgments of this Court which deduce the propriety of the cause from the ground that it is conducive to morality that the wife should be encouraged to live with her husband. It would serve the cause of morality no less that the husband should be encouraged to make his permanent home with his wife in her Tarwad. Therefore, I am of opinion that the present case is within the rule relating to the right of a female member making her home in her husband's Tarwad.

Mr. Ananthakrishna Aiyar's complaint that we shall be disrupting the Tarwad if the plaintiff succeed, comes too late in the day. Disintegration commenced long ago.

On one point I agree with him. *Melchilavu* is part of the maintenance. I do not think that there is any reason, as suggested by Mr. Madhavan Nair, for placing it on a higher footing. I agree with the reasoning in *Valia Konikkal Edom Kelu Achen* v. *Lakshmi Nethyer Ammal* (8) on this point.

I would, therefore, reverse the decree of the District Judge and restore that of the District Munsif and I agree with the order as to costs made by my learned brother.

M. C. P.

Appeal allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 782 OF 1917.

May 2, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Adami.

DULHIN SUNDARI CHOUDHURAIN—DEFENDANT—APPELLANT

versus

BEHARI LAL—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 59—Mortgage—Attestation—Burden of proof—Question of law or fact.

It is a mixed question of law and fact whether or not the evidence adduced by a mortgagee suing on his mortgage on whom the onus rests is sufficient to show that the terms of section 59 of the Transfer of Property Act have been duly complied with. [p. 330, col. 1.]

DULEIN SUNDARI CHOUDHRAIN *v.* BEHARI LAL.

Appeal from a decision of the District Judge, Mozafferpore.

Messrs. *Sharoshi Charan Mitra*, *S. M. Mullick* and *Sudhangsu Kumar Mitra*, for the Appellant.

Messrs. *Purnendu Narain Sinha* and *Murari Prosad*, for the Respondents.

JUDGMENT.

MULLICK, J.—This appeal has been preferred by the mortgagor in respect of a mortgage-deed alleged to have been executed by her in favour of Hanuman Prasad, who was the grandson of one Lachmi Ram. The suit was brought by *Musammat* Nouji Kuer, the widow of Lachmi Ram, on the allegation that Hanuman Prasad was a mere namelender and that the mortgage money was in fact advanced by her out of the estate of her deceased husband, to which she had succeeded under the law applicable to Jains. During the pendency of the suit, that is to say, on the 18th of April 1913 *Musammat* Nouji died and on the 25th of April 1913 a petition was made by Behari Lal through his grandmother, *Musammat* Tarwati, alleging that he was the adopted son of Hanuman and was, therefore, entitled to his estate.

It was further alleged that under the Will of Lachmi Ram *Musammat* Nouji only took a life interest as a Hindu widow and that a vested interest in the estate was created in favour of Lachmi Ram's grandson, Hanuman, and that upon the death of Hanuman during the lifetime of *Musammat* Nouji that vested interest passed to Hanuman's son. The trial Court allowed the application of Behari Lal and amended the plaint, holding that he was competent to continue the action against the defendant. The trial Court made a decree for the full amount of the claim against the defendant and that decree has been affirmed by the learned District Judge of Muzafferpur. The learned District Judge has held that upon a true construction of the Will of Lachmi Ram what was given to the widow was a mere life estate with a vested remainder in Hanuman. He declined to accept the contention that *Musammat* Nouji's interest was an absolute estate and that of Hanuman a mere contingent remainder.

Now, we have been taken through the document and we agree with the interpretation put upon it by the learned District Judge. The estate created in favour of *Musammat* Nouji was clearly a limited one. Her powers of alienation were fettered and the document draws such a sharp distinction between the nature of her interest and that of Hanuman that it is impossible to accept the contention that an absolute estate is given in the first instance to the lady and in the event of her decease to Hanuman. In our view the true construction of the Will is that Hanuman took a vested interest from the date on which the Will came into operation. Therefore, the plaintiff Behari Lal, if he can prove the adoption, has a good title to the mortgage money in this case.

Now the learned District Judge has found as a fact that the adoption did take place. The only way in which the learned Vakil for the appellant before us can attack that finding is by contending that the learned District Judge has accepted in evidence an *ekrarnama* marked as Exhibit 4 which in law was not legally admissible.

It is contended that the recital in this *ekrarnama*, which was a kind of deed of family arrangement executed by *Musammat* Nouji, *Musammat* Bhagirathi, the mother of Behari Lal, and by *Musammat* Tarawati, the grandmother, to the effect that Behari Lal had been adopted by *Musammat* Bhagirathi, was at most an admission which could not be evidence against anybody but the maker.

Now, that would be so if the document did not come, as has been contended by the learned Vakil for the respondent, under the purview of section 13 of the Evidence Act. That section contemplates that recitals in the nature of hearsay when made in a transaction recognising a right or custom are evidence. In this case a recital by Bhagirathi that she had adopted Behari Lal was, in my opinion, rightly accepted as evidence by the lower Court. There is also other evidence upon which the learned District Judge has founded his conclusion as to the validity of the adoption. Therefore the second ground urged also fails.

But the third ground is one of substance and it seems that it is not concluded by the finding of the learned District Judge. It is contended that the bond in

question has not been proved to have been duly attested by two witnesses as required by the provisions of the Transfer of Property Act. Section 68 of the Evidence Act does not require the evidence of both these witnesses. One is sufficient, but the witness must come into Court and say not only that he signed the deed himself but that he saw the executant of the deed sign in his presence. There was some divergence of opinion on this point in the earlier decisions of the various Courts of this country, but the matter has now been settled by the decision of their Lordships of the Judicial Committee of the Privy Council in *Shamu Patter* v. *Abdul Kadir Rowthan* (1) and *Ganga Pershad Singh* v. *Ishri Pershad Singh* (2), and it is a mixed question of fact and law whether or not the evidence adduced by the plaintiff on whom the onus rests is sufficient to show that the terms of section 59 of the Transfer of Property Act were duly complied with.

Now, the only attesting witness called at the trial was witness No. 2 for the plaintiff. It is true that in examination-in-chief he said that the document was signed by the executant in his presence, but he has materially altered or modified that statement in cross examination and the effect of his evidence taken as a whole is that he did not see the executant sign at all.

It is, however, sought to bring this case within the rule laid down by their Lordships in *Tadarath Halwai* v. *Ram Nrain Upadhia* (3), where a witness deposed that he saw the hand of the executant and knowing her voice was able to form the conclusion that the hand that signed the document was the hand of the person to whom the voice belonged. That, however, is not anywhere near the facts of the present case. Here witness No. 1, the scribe, does indeed endeavour to say that he heard the voice of the executant but he admits that he had never heard her voice before and it is quite clear that he is not in a position to prove that the hand that signed the document was the hand of the defendant. Therefore in this case the onus, which lies upon the plaintiff as to the due attestation of the document and due proof thereof, has not been discharged.

An attempt was made to seek the assistance of section 70 of the Indian Evidence Act, which says that if execution is admitted in the course of a trial the act of signing need not be proved. It is not necessary to go into the question whether or not this section relieves a party from the necessity of proving attestation. In the present case there is no clear indication that the defendant did at the trial admit execution of the document on which the suit is founded.

The result, therefore, is that as the document has not been proved to be a mortgage-deed, the only decree which can be made is a simple money decree for money lent. The claimant is within time and, therefore, the decree of the learned District Judge will be set aside and a simple money decree will be substituted in lieu thereof for the principal sum with interest at the bond rate from the date of the bond to the date of the first Court's decree and interest thereafter at six per cent. per annum until realisation.

Having regard to the special circumstances of this case we do not give costs to either party.

Decree varied.

(1) 16 Ind. Cas. 250; 35 M. 607; 23 M. L. J. 321; 16 C. W. N. 1009; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.).

(2) 45 Ind Cas 1; 27 C. L. J. 548; 4 P. L. W. 349; 16 A L. J. 409; 34 M. L J. 545; 22 C. W. N. 697; 20 Bom. L R. 587; 23 M. L. T. 388; (1918) M. W. N. 382; 8 L. W. 176; 45 C. 748; 45 I. A. 94 (P. C.).

(3) 30 Ind. Cas 366; 37 A. 474; 29 M. L J. 159; (1915) M. W. N 709; 18 M L. T. 85; 2 L. W. 639; 22 C. L. J. 165; 17 Bom. L. R. 617; 13 A. L. J. 809; 19 C. W. N. 991; 42 I. A. 163 (P. C.).

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 34 OF 1919.

April 26, 1919.

Present :—Mr. Justice Rafique and Mr. Justice Walsh.

FIRM G. S. BHARGAVA AND CO. THROUGH L. KESHAVDEO—DEFENDANTS—PETITIONERS

versus

FIRM JAGAN NATH-BHAGWAN DASS THROUGH L. BANKEY LAL—PLAINTIFFS—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 20, 21, 115—Place of suing—Jurisdiction, objection to—Order disallowing objection—Revision, whether lies—High Court, examination of evidence by—Contract made by broker in contravention of authority Ratification by principal—Suit on basis of contract—Forum, *proper.*

Defendants, who were carrying on business at Delhi, authorised their broker to sell certain goods at a certain price. The broker agreed to sell the goods to the plaintiffs at Agra at a lower price. This agreement was subsequently ratified by the defendants at Delhi. Plaintiffs brought a suit against the defendants for damages for breach of the contract in the Agra Court:

Held, that the contract having been made at Delhi, the Agra Court had no jurisdiction to entertain the suit [p. 333, col 2.]

Where an objection to the place of suing is investigated and a formal order is passed by the Court in respect thereof, the High Court has jurisdiction to interfere with the order in revision. [p 332, col. 1.]

When a Court of Revision looks into the evidence, it does so with a view to determine whether the subordinate Court has assumed a jurisdiction which it did not possess [p. 332, col. 1.]

Revision against the order of the Subordinate Judge, Agra, dated the 6th February 1919.

Mr. *L. M. Banerji*, for the Appellants.

The Hon'ble Mr. *Narain Pershad Asthana*, for the Respondents.

JUDGMENT.—We have come to the conclusion that this application must be granted. The circumstances of the case are exceptional and the form in which the matter comes before us is also exceptional. We do not propose to lay down any general proposition as to what ought or ought not to guide this Court in interfering in revision with what may be called preliminary, interlocutory or subsidiary orders made by the Courts below. In this particular case a substantial dispute has arisen with regard to a contract made between two business men carrying on business respectively at Agra and Delhi. The purchasers under the contract, having reason, as they allege, to complain of the performance of the contract, sued the vendors for damages in the Subordinate Judge's Court at Agra The defendants were the vendors carrying on business at Delhi and at the earliest possible opportunity they took the objection that, inasmuch as the contract was made at Delhi and was by its terms to be performed outside the Agra jurisdiction, the Court at Agra had no jurisdiction to entertain the suit at all. Thereupon without objection by either party, the Subordinate Judge entertained that objection as a matter wholly independent of the merits of the suit which he had to determine, if it turned out that it was within his jurisdiction to determine, and evidence was called on both sides and considerable argument took place on either side and eventually an elaborate judgment was written upon the sole but important question, "is the suit cognizable by this Court?" The learned Judge himself says it was thought proper to decide the question of jurisdiction first. He decided that question in favour of the plaintiffs on the ground that the contract was made in Agra. An order was drawn up on the 2nd of February 1919 in the following terms:—"This case coming on for disposal on the 6th of February 1918, it is ordered that the case is cognizable by this Court." It is not contended that there is an appeal from that order. We have come to the conclusion that it is impossible to say that such an objection, dealt with in the way this objection was dealt with by what really amounted to a trial by a very careful and thorough judgment ending in the formal order of the Court, is not a case decided in which no appeal lies within the meaning of section 115, Civil Procedure Code. We think sufficient justification for taking that view is to be found in the recent decision of the Privy Council in *Balakrishna Udayar* v. *Vasudeva Aiyar* (1).

We do not desire to differ in any way from the general rule which has been laid down that an application of this kind in

(1) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I A. 261 (P. C.).

revision ought not to be treated as an appeal; that findings of fact bearing upon an issue properly before a Court cannot be and ought not to be reviewed by the Court exercising revisional jurisdiction; but without discussing the cases upon the point, we think the trend of authority in the various High Courts in India is to this effect:—It cannot be more clearly stated than in the language of Mr. Justice Mookerjee in the case of *Rashmoni Dasi* v. *Ganada Sundari Dasi* (2) that "when a Court as a Court of Revision looks into evidence, it does so with a view to determine whether the subordinate Court has assumed a jurisdiction which it did not possess." The same view has been recently given effect to by a judgment of Mr. Justice Ryves as he was then sitting in this Court in June 1918 in a case reported as *Behari Lal* v. *Baldeo Narain* (3), the reasoning of which we entirely approve and adopt.

We have, therefore, to consider whether on the evidence before the learned Judge there was really anything which could justify him in holding that he had jurisdiction to entertain this suit on the ground that the contract was made at Agra We heve come to the conclusion that there is nothing. As a matter of fact, with certain important exceptions, we do not differ from his conclusions of fact but the learned Judge unfortunately wholly misdirected himself and confused the negotiations with the bargain, and the terms of the contract with a binding acceptance. The facts as sworn to may be simply stated. One Kanhaiya Lal, who is said to be a broker or agent for the defendants, was endeavouring to obtain a purchaser for this cloth, which is suitable for use as tents, for the defendants at Delhi from persons in Agra. It may here be observed that it has been assumed that he was an agent of the defendants. There is not a scrap of evidence to that effect except the bare statement of the plaintiffs, and that statement is consistent with the broker being, as they often are, agent for both parties. He may have been an agent for the purchasers; he may have been an agent for the vendors; he may have been an agent for both parties. Like most brokers he was extremely anxious about earning his commission, as is made clear by the evidence, but it is not clear from whom he expected to receive it. The best test of a man's employment is the question, who is liable to pay his commission. It may be assumed for the purpose of this enquiry only that he was the agent of the defendants. He had an interview with one of the members of the defendant firm in Delhi and having represented that there were purchasers of this *dusuti* at Agra he obtained from them two typewritten forms. This method of making a contract is one very commonly adopted among mercantile people; one document constitutes the offer, and the other constitutes the acceptance, both of them being left blank both as regards the name of the purchaser and the contract rate, neither of which were known at that time. He was told that the defendants were ready to sell at Rs. 1-13-0 or Rs 1-12-6 per lb and he went to Agra with these two documents. Eventually he obtained an offer for Rs. 1-12 0 from the present plaintiffs. That offer was signed by Bankey Lal, a member of the plaintiff firm, addressed to the defendants at Delhi and the blank for the price was filled in with Rs. 1-12 0 per lb. At the same time according to the plaintiffs' evidence which we see no reason to discredit upon this point, the plaintiffs' clerk filled in upon the other form intended for acceptance the name of the plaintiffs' firm as purchasers and the price. It is to be observed that this price was less than the price which the defendants had told Kanhaiya Lal they were prepared to accept and there is not a scrap of evidence, indeed everything in the case including the documents points to the contrary, that the defendants authorised Kanhaiya Lal to complete a binding contract on their behalf on any terms that he was able to negotiate. This conclusion, we understand, the learned Judge came to as a matter of law or inference. What invalidates the finding to our mind is that it is absolutely out of the question that the defendants armed their agent with documents formally signed by them as binding contracts with the price left blank, and with *carte blanche* authority to fill them up for any price

(2) 26 Ind. Cas. 275; 20 C. L. J. 213; 19 C. W. N. 34.

(3) 48 Ind. Cas. 14; 16 A. L. J. 717; 40 A. 674.

which he saw fit to arrange. Such a proceeding is almost incredible on the part of a reasonable business firm. What actually happened is testified to by the direct evidence of Keshab Deo, one of the members of the defendant firm, and is confirmed in every possible way by the documentary evidence. Having arranged this price with the plaintiffs and confident that he would persuade the defendants to accept it, he wired to the defendants at Delhi that he had sold. The learned Judge attaches great importance to this telegram. So do we; but we think it points exactly in the opposite direction to that which the learned Judge thinks it ought to be taken. So far as Kanhaiya Lal was concerned, he had sold in the sense that he had arranged a sale for his principals but he had no authority to complete the contract and if he had, there would have been no necessity for his journey to Delhi. He went to Delhi personally to report what he had done. He was at once rebuked by his principal for having used the word "sold" in the telegram. His explanation was that it was a piece of commercial license to prevent the defendants disposing of the goods anywhere else and he then, and we are satisfied for the first time, at that interview disclosed to the defendants the price at which he had arranged to sell. The defendants not unnaturally pointed out that it was not the price which they had told him they were willing to accept. According to Keshab Deo he made an almost piteous appeal to them in his own interest as well as in the interest of the defendants to close the bargain and the bargain was then accepted. There are to our minds two pieces of internal evidence upon the document itself which the learned Judge has wholly left out of view which conclusively show the truth of this story. The signature of the vendors, the accepting firm, is dated the 8th of August, the day after the telegram, the day after the blanks had been filled in at Agra, the day of Kanhaiya Lal's interview with his principals at Delhi. The second point is that the writing of the signature of the name of the firm across the stamp accepting the contract is the same as the initials G. S. B. against the price which had been filled in in the contract. The plaintiffs' clerk made a feeble attempt to claim that these initials had been put there by him but receded from that position on looking at the document. We are satisfied that the terms were initialled by the same person who signed the document. Under these circumstances the learned Judge, having wholly ignored the importance of the fact that the document was in fact signed and the contract completed by the defendants themselves as principals, has, therefore, failed to investigate the question where and under what circumstances that which alone would make the contract a binding contract in law at all took place. He has assumed jurisdiction over a matter which, if he had properly applied himself to the facts, he was bound to hold he had no jurisdiction to try.

Revision is a discretionary jurisdiction but in an important matter of this kind, if the law enables us to do it, it is to the best interests of the parties themselves and of the public that if these preliminary questions can be finally determined by an authoritative decision before all the expense, annoyance and waste of time of a prolonged litigation, it is better that it should be done, and we, therefore, quash the order of the 10th of February and direct the plaint to be returned for presentation to the proper Court. The applicants must have their costs of this application.

Order quashed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1373 OF 1917.

March 12, 1919.

Present :—Justice Sir Ernest Fletcher, KT., and Mr. Justice Cuming.

PARAMESHWAR DAW AND OTHERS —DEFENDANTS—APPELLANTS

versus

ANANTH BANDHU DAW—PLAINTIFF— RESPONDENT.

Transfer of Property Act (IV of 1882), s. 73—Mort.

PARAMESHWAR DAW *v.* ANANTH BANDEU DAW.

gage—Mortgaged property sold in execution of rent decree against mortgagor—Charge on surplus sale-proceeds—Mortgagee, right of, to proceed against property.

Where property subject to a mortgage is sold in execution of a rent-decree against the mortgagor after the mortgagee has got a decree on his mortgage, the mortgagee has a charge under section 73 of the Transfer of Property Act upon the surplus sale-proceeds that remain in Court after satisfaction of the rent decree, and that charge continues to subsist notwithstanding that the amount is drawn out of Court by the judgment-debtors and others. The mortgagee in the first instance must see how much he can recover from the judgment-debtor and others who have drawn out the surplus money, and that sum and any money which by reasonable diligence he could have obtained out of the surplus proceeds in or towards the satisfaction of the mortgage decree cannot be a charge on the mortgaged property. For any sum beyond that the mortgage decree will be capable of being executed in the usual manner against the mortgaged property. [p. 335, col. 1.]

Appeal against the decree of the District Judge, Burdwan, dated the 21st May 1917, reversing that of the Munsif, 3rd Court at that place, dated the 30th June 1916.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitra* (with him Babu *Atul Chandra Dutt*), for the Appellant.—The case of *Ram Ratan Sahu* v. *Mohant Sahu* (1), is against me. I rely on *Prem Chand Pal* v. *Purnima Dasi* (2) and *Beni Prosad Sinha* v. *Rewat Lall* (3). Assuming section 73 of the Transfer of Property Act applies, I have not been able to get any money which is in Court.

Sir *Rash Behari Ghose* (with him Babus *Sarat Chandra Rai Chaudhury* and *Dhirendra nath Sen*), for the Respondents, was not called upon to reply.

JUDGMENT.—This is an appeal against the decision of the learned District Judge of Burdwan, dated the 21st May 1917, reversing the decision of the Munsif of the same place. The suit was brought to annul an encumbrance, that right being given under section 167 of the Bengal Tenancy Act, on the footing that the plaintiff had purchased the property in execution of a rent decree and that he had been in possession. The plaintiff also asked for a further relief, namely, for a declaration that a decree in a mortgage suit obtained by the defendants was not enforceable. The facts are clearly found by the learned Judge of the lower Appellate Court. What happened is this: This mortgage which was a small mortgage was dated in 1905. A suit was brought to enforce the mortgage in July 1913 and a decree was obtained for Rs. 400. The plaintiff purchased in execution of a rent decree the property on the 17th December 1913. The amount he paid into Court was more than sufficient to satisfy the rent decree and, therefore, there was a surplus amount remaining in Court after satisfaction of the rent decree. The present defendants, on the 9th January 1914, applied for payment of the mortgage decree out of the surplus money remaining in Court after the satisfaction of the rent decree and, on the 20th February 1914, the surplus money was attached. By some means or other, the attachment was withdrawn. We need not go into that in the present appeal. But the result was that, instead of the money being received by the defendants, the mortgagees, in discharge of their mortgage decree, part of the money went to the judgment-debtor and a portion apparently to another encumbrancer The defendants also suggest that the plaintiff got a portion. That is not established in the present case and it must be left open. It is in dispute as to whether the plaintiff did or did not receive a portion of this surplus money. On the 2nd August 1915 notice was served under the provisions of section 167 of the Bengal Tenancy Act for the annulment of the mortgage decree and, on the 12th August 1915, this suit was instituted.

The first point in this case is: "Had the defendants under their mortgage and mortgage decree a charge on the surplus proceeds?" The case is covered by authority that they had a charge. The decision in *Gobind Sahai* v *Sibdut Ram* (4) is clearly in point. If they had this charge on the money, then *prima facie* they ought to have their mortgage satisfied out of that charge, because the charge was given under the provisions of section 73 of the Transfer of Property Act and that charge would subsist notwithstanding that the money had been drawn out of Court by the judgment-

(1) 6 C. L. J. 74: 11 C. W. N. 732.
(2) 15 C. 546; 7 Ind. Dec. (N. S.) 948.
(3) 24 C. 746; 12 Ind. Dec. (N. S.) 1165.
(4) 33 C. 878.

debtor and others, who only took subject to the charge in favour of the defendants-mortgagees. It is quite clear that, in the first instance, the defendants mortgagees ought to proceed against these surplus proceeds drawn out by the judgment-debtor and others and, in so far as the said proceeds, the surplus assets, are insufficient or would be insufficient if the defendants had used reasonable diligence to obtain the same after the time they had been paid into Court, the mortgaged property can be sold to make up the deficiency. It is alleged that the plaintiff or his father has drawn out a portion of this money and that, instead of making an absolute declaration that the property is not liable to be sold in execution of the mortgage decree obtained by the defendants, we ought to make a declaration that the property is liable to be sold if and in so far as the surplus proceeds remaining in Court after satisfaction of the rent decree were insufficient to pay the amount due to the defendants mortgagees, and if and in so far as those proceeds are not insufficient to pay that amount, then the defendants cannot set up the mortgage against the property. In the result, we vary the decree of the lower Appellate Court in the manner mentioned. The defendants, in the first instance, must see how much they can recover from the judgment debtor and others who have drawn out this surplus money and that sum and any money which by reasonable diligence they could have obtained out of the surplus proceeds in or towards the satisfaction of their mortgage decree must not be a charge on the mortgaged property. For any sum beyond that, of course, the mortgage decree will be capable of being executed in the usual manner. Subject to this variation, we affirm the decision of the learned District Judge. As both parties have partly succeeded, we make no order as to the costs of this appeal.

Decree varied.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No 239 OF 1917.

February 3, 1919.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Panton.

NAGENDRA NATH MUKERJEE—PETITIONER—APPELLANT

versus

Srimati SARAT KUMARI DABI—OBJECTOR—RESPONDENT.

Will—Probate, grant of—Procedure—Court, power of, to refuse grant, on point not raised by parties.

In granting Probate of a Will the Court must satisfy itself on all points regarding the Will, and in coming to its conclusion must proceed on the evidence on the record and have due regard to the contentions of the parties [p 336, col. 1.]

Where the Court refused to grant Probate of a Will on consideration of a point not raised in the written statement or in the issues, the High Court in appeal set aside the order refusing to grant Probate and directed the grant of Probate to the petitioner. [p. 336, col, .]

Appeal against the decree of the District Judge 24 Perganas, dated the 31st of August 1917.

Babu *Monmatha Nath Mookerjee*, for the Appellant.

Babus *Khitish Chunder Chuckerbutty* and *Nitish Chunder Lahiri*, for the Respondent.

JUDGMENT.

CHITTY, J.—This is an appeal by Nagendra Nath Mukerjee against an order of the District Judge of the 24 Pergannahs refusing Probate of the Will of the petitioner's wife Raja Bala Debi. The lady died on 3rd May 1917. The Will propounded by the executor is said to have been executed on 8th April 1917 a little less than a month before her death. The caveat was filed by Sarat Kumari Debi, the only daughter of the testatrix who herself is a widow with one son and two daughters, all under age. The petitioner presented his application for Probate on 7th June 1917, so that there was no delay in that proceeding after Raja Bala's death. The contest between the father and his daughter has really reference to a suit which is pending and which was brought by Raja Bala and her mortgagee Kumar Arun Chandra Singha in 1916. Raja Bala had purchased a two-thirds share in a property known as Thakur Mahasay's garden in 1912 and in 1914 she granted an usufructuary mortgage of it to Kumar Arun Chandra Singha to secure Rs. 3,000. The Will has reference

almost entirely to this suit and the property with regard to which that suit was brought. Indeed we are told that except for a few ornaments left by Raja Bala, which ornaments the caveatrix says that her mother gave her before her death, it does not appear that the lady died possessed of any other property. In her petition of objection the caveatrix maintained throughout that the Will propounded by her father was never, in fact, signed by her mother or executed by her as her Will. She did in paragraph 6 say that the alleged Will was not and could not have been executed by Raja Bala of her own free will and accord; but her case being one of forgery, no issue was raised except as to *factum* of execution of the Will and the learned District Judge in commencing his judgment says that the case of the caveatrix would appear to be that the Will was not duly executed by the deceased. He only raised one issue. Is the Will propounded the last Will and testament of Raja Bala Debi and was it validly executed by her? He came to the conclusion on the evidence, and this finding is not now disputed, that the Will was signed by Raja Bala Debi on the date specified and was duly executed in the sense that it was attested by two witnesses and that the formalities necessary for the execution of a Will were duly observed.

The learned Judge then proceeded to consider a point which was not raised in the written statement or in the issues, namely, whether Raja Bala was of free disposing mind at the time when she executed this Will. It is perfectly true that the Court must be satisfied on all points regarding a Will before it can direct Probate of that Will to issue; but in coming to its conclusion the Court must proceed on the evidence upon the record and have due regard to the contentions of the parties. Here it is in evidence and it is not disputed that Raja Bala Debi was a lady of good education. She could write and speak both English and Bengali. She was suffering from internal tuberculosis; but at the time when she is said to have made this Will, though her life was despaired of, her death was not supposed to be imminent. The evidence of the witnesses to the Will Annoda Prosad Bhattacharjee and Kishori Mohan Das shows that she read the Will herself though not aloud and signed it after doing so. There is no indication that her husband took any part in the proceeding by way of persuasion, still less of coercion or anything of that kind, nor does the caveatrix in giving her evidence say that anything of that kind happened. The learned Judge goes entirely on the fact that the Will purports to leave everything to the husband Nagendra Nath and is in his handwriting. That no doubt could be of importance in a case where a testator is leaving the whole of his property to the person who has written the Will and is in close relationship to him; but in this case it appears that the property, which is in question in the suit to which I have referred, is the only property to which the lady had any title excluding the ornaments which her daughter now holds. The value of this property to Raja Bala or her heir is extremely problematic, inasmuch as it appears probable that the value of the property will be more than swallowed up by the mortgage and the expenses in that suit. Indeed, in the petition for Probate the executor in stating particulars of the estates makes out that the liabilities will very largely exceed the assets. In the case which was cited by the learned Judge, the Privy Council were careful to remark that the decision in such a case must be come to after a careful consideration of all the evidence. Here admittedly there is no direct evidence of anything like undue influence or coercion, nor, indeed, is there any evidence which would point to any such influence or coercion. The learned Judge was bound to proceed upon the evidence and I do not think that he was justified in saying that he was not satisfied with regard to the free disposing mind of the testatrix in view of the circumstances which had been laid before him. The result is that I would allow the appeal and grant Probate to the petitioner Nagendra Nath Mukerjee. Having regard to the relationship between him and his daughter, the caveatrix, we think that the parties should be left to bear their own costs throughout.

It is unnecessary to pass any order on the Rule, which is discharged without costs.

PANTON, J.—I agree.

Appeal allowed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 757 OF 1918.
December 13, 1918.
Present :—Justice Sir George Knox, KT.
SAKHAWAT ALI—APPLICANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *ss.* 145, 435, 439—*Government of India Act*, 1915 (5 *&* 6 *Geo. V, C.* 61), *s.* 107—*Proceedings under s.* 145—*Revision—High Court, power of interference of.*

Proceedings under Chapter XII of the Criminal Procedure Code are not proceedings within the meaning of section 435 of the Code and cannot, therefore, be called up by the High Court under that section. [p. 337, col. 2.]

Semble.— The High Court has no power under section 107 of the Government of India Act to revise proceedings taken under Chapter XII of the Criminal Procedure Code. [p. 338, col. 1.]

Criminal revision from an order of the Magistrate, First Class, Basti, dated the 7th September 1918.

Dr. *S. M. Sulaiman*, for the Applicant.

Mr. *Iqbal Ahmad*, for the Opposite Party.

JUDGMENT.—Early in November last an application was presented to a learned Judge of this Court which is described as being a criminal revision against the order of M. Mumtaz-ul-lah Khan, Magistrate of the first class of Basti, dated the 7th of September 1918, charge under section 145 of the Criminal Procedure Code. It is subdivided into three heads. The first is: —Because there being no order showing that the learned Magistrate was satisfied that a dispute likely to cause a breach of the peace exists and he not having made any order in writing stating the grounds of his being so satisfied, the whole proceeding was without jurisdiction and the order is *ultra vires*. I need not, at any rate at present, go into the second and third grounds set out in this application. The application is endorsed by an order of this Court which runs as follows:—"I admit this under section 107 of the Government of India Act. Let notice go to show cause whether proceedings were taken and order made without jurisdiction." In pursuance of this order a notice went to the other party Shukr-ul-lah and also to the Magistrate whose order was attacked. They were told that the case would be heard and they were informed that they might show cause accordingly.

The point then that I have to consider is whether the proceedings taken before or by the Magistrate and the order made by him were or were not without jurisdiction. The reason for this order being passed is, no doubt, on account of what is stated in section 435, clause 3, of the Criminal Procedure Code. It must be remembered that that clause sets out that proceedings under Chapter XII are not proceedings within the meaning of section 435. I know of no section in the Criminal Procedure Code, other than section 435, and none other has been pointed out to me, whereby this Court can call for records of subordinate criminal Courts. Section 195 of the Code may indirectly give this power, but the case before me is not one under section 195 of the Code and it has been laid down by this Court more than once that proceedings under Chapter XII are not proceedings which can be called up by section 435 of the Criminal Procedure Code. To this matter I shall again refer. But if the case is as stated by me, then this Court has no power under section 435 to call up any proceedings under Chapter XII. The learned Counsel who appears for the applicant seems to have felt this obstacle in his path, and to have in consequence moved the learned Judge of this Court to call up the proceedings under Chapter XII by virtue of what he appears to have stated as being an enabling power that this Court has in this direction under section 107 of the Government of India Act, 1915. I find some difficulty in following the line or course taken by him. Section 107 cited above is either a section consolidating the existing procedure or it is a new section creating some new jurisdiction or conferring some new powers. I will look at it from both sides. The powers vested in this High Court of Judicature, at the time the Government of India Act of 1915, commenced, are set out in section 29 of the Letters Patent under date the 17th of March, 29 Victoria. According to that the proceedings in all criminal cases other than criminal cases which shall be brought before this High Court in the exercise of its ordinary original criminal jurisdiction shall be regulated by the Code of Criminal Procedure prescribed by an Act of the Governor-General in Council and being Act No. XXV of 1861 or by such further or other laws in relation to criminal

procedure as may have been or may be made by such authority as aforesaid. The present case does not fall under the latter class of cases, *viz.*, cases brought before this Court in the exercise of its ordinary original criminal jurisdiction. Act XXV of 1861 has been repealed, and has been replaced by Act V of 1898. If section 107 is some new section conferring new powers or extending powers, then it is subject to what is known as the rule of strict construction [See Maxwell on Interpretation of Statutes, 5th Edition, page 475. See also *Flower* v. *Lloyd* (1).] The remarks made by Lord Justice James appear to me to have a strong bearing upon the case before me, and upon the power of this Court to entertain motions of this kind. I have a still further difficulty in understanding how section 107 can, in any way, apply to the present application. Looking to the language of section 107 I find that this Court has superintendence over all Courts subordinate to its appellate jurisdiction and that it may do certain things, namely, call for returns, direct transfer of suits and appeals, make and issue general rules regulating the practice and proceedings of inferior Courts, prescribe forms in which books, entries, etc., are to be kept in the offices of the inferior Courts, and settle table of fees.

The application before me certainly does not fall under returns nor under transfer of suits. Even if it does fall under rules, forms and tables, which is open to doubt, such rules, forms and tables must not be inconsistent with the provisions of any Act for the time being in force, let us say Act V of 1898 for instance, and must have the previous approval of the Local Government. I know of no rules bearing upon Chapter XII which have been issued by this Court and none such has been pointed out to me. I am then forced back upon the conclusion that if any power such as that claimed exists anywhere it exists in section 29 of the Letters Patent and as I have already said, I have not been satisfied that any such power exists under this section.

In the case of *Ananda Chandra Bhuttacharjee* v. *Carr Stephen* (2) this point was raised. In fact, Petheram, C. J., says regarding it in his judgment that the point most pressed in the appeal was that the Court had no jurisdiction to interfere with this order at all on the ground that orders made under section 144 are, by the last clause of section 435, exempted from the operation of that section. His reply to this was divided into two sections.

First, the mere statement that an order is made under section 144, if it is not such an order as is contemplated by the section and could not be made under it, does not make it an order under that section.

The second was that under section 439 the Court has the general power of revision of all orders made by inferior criminal Courts which come before it in any way whatsoever, and it is clear that this Court, under clause 15 of the Charter, has a general power of superintendence and under that power can send for any record which it may desire to see. He also added that the Court has power to interfere under the Charter Act if the proceeding of a Magistrate is *ultra vires* and could not be made under section 144. He pointed out that this had been accepted in the Calcutta Court for a great many years, both under section 144 of the present Code and section 518 of the old Code. He added a list of decisions to that effect with which the Court deciding that case agreed. With every respect to the Calcutta Court in this matter, it appears to me that sufficient consideration was not given to the words of section 435. If we read section 435 as a whole, it seems to amount to this. The High Court may call for and examine the record of any proceeding, proceedings under Chapter XII, etc., being excepted, for the purpose of satisfying itself as to the legality or propriety of the finding, etc., and as to the regularity of any proceedings of the inferior Courts other than proceedings under Chapter XII of the Code of Criminal Procedure. When read in this light the difficulty of calling for records or proceedings under Chapter XII again crops up and I am face to face with the same difficulty that I had on which I pronounced my judgment in *Jhingai Singh* v. *Ram Partap* (3). But I need not go further into this matter, for I

(1) (1877) 6 Ch. D. 297 at p. 301; 46 L. J. Ch. 838; 37 L. T. 419; 25 W. R. 793.
(2) 19 C. 127; 9 Ind. Dec. (N. S.) 530.
(3) 1 Ind Cas. 762; 31 A. 150; 6 A. L. J. 113; 9 Cr. L. J. 382.

have already dealt with it at length in previous decisions, except to add that in *Sundar Nath* v. *Emperor* (4), the view was maintained by another Judge of the Court that under the circumstances the Court cannot send for records.

There is one case which calls for consideration and that is the case of *Girdhari Singh* v. *Hurdeo Narain Singh* (5), in which the Privy Council upheld the High Court of Bengal in a decision arrived at by that Court upon an application under section 15 of the Charter Act. The Privy Council (see page 238) there said of a Subordinate Judge whose procedure was impugned that "it was competent to the High Court, by a proceeding in the nature of mandamus, to order the lower Court to do that which it ought to have done, namely, having rejected the objections to the sale, to confirm it; and the High Court proceeded upon that section and made the order. But the High Court did not merely treat the judgment of the Subordinate Judge...as a nullity; they entered into the question as to whether the objections to the sale were valid or not valid. In fact, they treated the case in their decision as if the lower Court had actually confirmed the sale, and there had been an appeal to them—against the confirmation. Their Lordships think that they may look at the case now in the way in which the Judges looked at it then." The Privy Council then went into the merits and upheld the High Court and recognised that the duty of the High Court on such applications is to look into the merits and make a final order. With reference to this decision by which of course I am bound, it must be noted that the decision refers to the civil jurisdiction of the Court and not to the criminal. Section 9 appears to give wider powers.

I now turn to the arguments by which the learned Counsel for Saiyid Sakhawat Ali sought to support his application. Before me he put in an affidavit to which I have already referred. This affidavit says that the person swearing to it personally inspected the record of the section 145 proceedings and found that the very first order passed by the learned Magistrate was that of the 14th of February 1918, of which he had obtained a certified copy. If that paper be read as it stands, it is open to attack in that it makes no specific mention of the Magistrate having been satisfied that a dispute likely to cause a breach of the peace existed. The learned Vakil for Shukr-ul-lah on the other hand points out that this copy is only part of the Magistrate's order and that the whole order if read is conclusive that the Magistrate had not only been satisfied but in his order had stated that he was satisfied. I find he is right.

The net result is that so far as has been shown, the Magistrate had jurisdiction to hold this enquiry and was properly seised of the case. The case is one which is entirely in conformity with the case of *Syeda Khatun* v. *Lal Singh* (6). This Court has no jurisdiction to interfere and the application is dismissed. I wish to add that I am much indebted to the Counsel on either side for their careful and elaborate arguments. I have not gone into those arguments at greater length because, as I say, I hold that I have no jurisdiction to interfere in this case. The following cases were cited to me and I add them here by way of reference.

For Applicant:—*Bihari Lal* v. *Chhajju* (7), *Dhan Pershad* v. *Ganesh* (8), *Jhengar* v. *Baij Nath* (9), *Ram Lochan* v. *Emperor* (10), *Nathu Ram* v. *Emperor* (11) and *Sheorani* v. *Baij Nath* (12).

For Opposite Party:—*Debi Prasad* v. *Sheodat Rai* (13), *Jhingai Singh* v. *Ram Partap* (3), *Syeda Khatun* v. *Lal Singh* (6), *Har Prasad* v. *Pandurang* (14), *Goluck Chandra* v. *Kali Charan* (15), *Matukdhari*

(4) 44 Ind. Cas. 673; 16 A. L. J. 189; 19 Cr. L. J. 369; 40 A. 364.
(5) 3 I. A. 230 at p. 238; 26 W. R. 44.
(6) 25 Ind. Cas. 324; 36 A. 233; 12 A. L. J. 344; 15 Cr. L. J. 572.
(7) 2 A. L. J. 272; 2 Cr. L. J. 222.
(8) 20 Ind. Cas. 751; 11 A. L. J. 696; 14 Cr. L. J. 495
(9) 19 Ind. Cas. 709; 11 A. L. J. 586; 14 Cr. L. J. 277.
(10) 22 Ind. Cas. 171; 12 A. L. J. 162; 15 Cr. L. J. 27; 36 A. 143
(11) 39 Ind. Cas. 701; 15 A. L. J. 270; 18 Cr. L. J. 557.
(12) 33 Ind. Cas. 625; 14 A. L. J. 146; 17 Cr. L. J. 145.
(13) 4 A. L. J. 705; 30 A. 41; A. W. N. (1907) 265; 6 Cr. L. J. 352.
(14) A. W. N. (1905) 260; 3 Cr. L. J. 48.
(15) 13 C. 175; 6 Ind. Dec. (N. s.) 615.

Singh v. *Jaisari* (16) and *Chinnappudayan, In the matter of* (17).

Nowhere throughout the case was any allegation ever raised by the applicants that they had been prejudiced, although the case was argued for a month and a mass of evidence taken.

Application dismissed.

(16) 41 Ind. Cas. 652; 15 A. L. J. 576; 39 A. 612; 18 Cr. L. J. 828.

(17) 30 M. 548; 3 M. L. T. 18; 7 Cr. L. J. 28.

PATNA HIGH COURT.

CRIMINAL REVISION No. 114 OF 1919.

May 8, 1919.

Present:—Mr. Justice Das.

RAM CHARITAR KAHAR—

PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Police Act (V of 1861), s. 34 (VII)—Ingredients of offence—Obstruction, etc. proof of.

Unless it is proved that an act complained of was to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers, there cannot be a conviction under section 34 of the Police Act. [p. 341, col. 1.]

Criminal revision against the order of the Additional District Magistrate, Patna, convicting the petitioner under section 34 of the Police Act and varying in appeal the conviction of the petitioner by the Deputy Magistrate, Patna, under section 34 of the Bye Laws of the Patna Administration Committee.

Messrs. *Hasan Imam*, *Sarat Kumar Banerji*, *D. N. Sircar*, *Abani Bhusan Mukerji* and *Panchanan Banerji*, for the Petitioner.

JUDGMENT.– This application is directed against an order of the Additional District Magistrate of Patna convicting the petitioner under section 34 of the Police Act and sentencing him to pay a fine of Rs. 2. The petitioner was, in the first instance, tried for an offence under section 34 of the Bye-Laws of the Patna Administration Committee and was convicted under that section by a Deputy Magistrate and was sentenced to pay a fine of Rs. 2. There was an appeal to the Court of the Additional District Magistrate of Patna, who, in view of the fact that sanction had not been obtained for trying the petitioner under section 34 of the Bye-Laws of the Patna Administration Committee, set aside the conviction under that section, but convicted him, as I have stated, under section 34 of the Police Act and imposed a fine of Rs. 2 on the petitioner.

Section 34 of the Police Act provides that "Any person who, on any road or in any open place or street or thoroughfare within the limits of any town to which this section shall be specially extended by the Local Government, commits any of the following offences, to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers shall, on conviction, before a Magistrate, be liable to a fine...." The offence of which the petitioner has been convicted is set out in the seventh clause of section 34, which runs as follows:—"Any person who wilfully and indecently exposes his person, or any offensive deformity or disease, or commits nuisance by easing himself, or by bathing or washing in any tank or reservoir not being a place set apart for that purpose." It will be noticed, therefore, that before a person can be convicted under section 34 of the Police Act, it must be established that the act complained of was to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers. It is not suggested that the act complained of was to the obstruction, inconvenience, risk, danger or damage of any person, but it is suggested by the judgment of the learned Additional Magistrate that it was presumably to the annoyance of the residents or passengers. There is absolutely no evidence on the record that the act complained of was to the annoyance of the residents or passengers, nor, as I read the judgment of the Additional District Magistrate, does he say that there is any evidence on the record to that effect; but he comes to the conclusion that the act having been proved, it must have been to the annoyance of the passengers. I cannot assent to the proposition that we are at liberty to assume the existence of that which the Legislature

says is an essential ingredient of an offence. It is not without some reason that the Legislature has laid down certain conditions precedent for a conviction under section 34, and it seems to me that if the learned Additional District Magistrate's view of law be correct, then the following words appearing in the section, "to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers," are purely ornamental and therefore wholly unnecessary for the purpose of legislation. I hold that unless it is proved that the act complained of was to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers, there cannot be a conviction under section 34 of the Police Act. There is absolutely no evidence on the record to show that there was any resident or passenger present at the time when the act complained of took place, nor that it took place within sight of any resident or passenger nor that any annoyance was caused to any resident or passenger. It is also very doubtful if the place where the act complained of took place is visible from the public road as the two witnesses called by the prosecution contradict each other on this point In my view, therefore, the conviction under section 34 of the Police Act cannot be sustained. In view of this finding, it is unnecessary to consider the other points that have been argued by Mr. Hasan Imam. I would set aside the conviction and sentence passed on the petitioner and direct that the fine, if paid, be refunded.

Conviction set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 139-B OF 1918.

February 7, 1919.

Present:—Mr. Mittra, A. J. C.

MAHAMMED SARWAR—ACCUSED—APPLICANT

versus

SECRETARY, CAMP MUNICIPALITY, AMRAOTI—COMPLAINANT—NON-APPLICANT.

Berar Municipal Law, 1886, *ss.* 79, 116—*Bye-law depriving public of right, legality of—Approval by Local Government, whether confers validity.*

Section 116 (1) (*j*) of the Berar Municipal Law empowers a committee to make rules for certain purposes and generally for carrying out the purposes of the Municipal Law, but it does not, even by implication, authorise a Committee to make a bye-law depriving the public of a right long enjoyed by it. [p. 342, cols. 1 & 2.]

The Camp Municipal Committee of Amraoti made a bye-law under section 79 read with section 116 (1) (*j*) and (2) of the Berar Municipal Law prohibiting, within the limits of that Committee, a particular class of traffic on certain specified roads, the effect of the bye-law being to deprive the public of a right, in respect of the prohibited traffic, which it had long enjoyed:

Held, that the bye-law was illegal and *ultra vires*, and a conviction for a breach of its terms could not be maintained. [p. 343, col. 2.]

The mere fact of the Local Government having signified its approval to a bye-law would not render the bye-law valid, in the absence of clear and unmistakable language in the Act empowering a Committee to make such a bye-law. [p. 343, col. 2.]

Petition for revision under section 435 of the Criminal Procedure Code.

Mr. *G. R. Deo*, for the Applicant.

The Hon'ble Mr. *G. S. Dick*, Standing Counsel, for the Crown.

JUDGMENT.—The applicant has been summarily tried by the Magistrate and fined Rs. 2. The order of the Magistrate is a short one and runs as follows:

"In this case the Secretary, Camp Municipal Committee, has brought a complaint under the rules framed under section 116 (1) (*j*) of the Berar Municipal Law against one Mahamed Sarwar for driving his springless cart on the Club Road in contravention of the said rules. The accused was present and the substance of the accusation was explained to him. He admits to have driven his springless *damni* on the Club Road. He is fined Rs. 2 and he should in addition to the amount of fine pay annas eight towards the Court-fee expenses."

The bye-law in question was published as Notification No. 7200 dated the 29th June 1904, and is to the following effect:—

"With reference to sub-section 2 of section 150 of the Berar Municipal Law, 1886, it is hereby notified that the following rules have been framed by the Amraoti Camp Municipal Committee under section 79 read with clause (*j*) of sub section (1) and sub-section (2) of section 116 of the Law, and that they have received the confirmation of

the Officiating Chief Commissioner, as required by sub-section (3) of section 116.

"1. The following roads are closed to all wheeled traffic other than that of vehicles running on springs, and shall also be closed against herds of cattles.

(Here follows the description of the roads.)

2. Any breach of the above rule shall be punishable with a fine not exceeding Rs. 50."

Section 79 of the Berar Municipal Law, 1886, is reproduced below:

"The Committee may close temporarily any street or any part thereof for the purpose of repairs, or for the purpose of constructing or repairing any sewer, drain, culvert or bridge or for any other public purpose, and may divert, discontinue or permanently close any such street."

Section 116 declares that a Committee may, from time to time, at a special meeting, make rules for certain purposes and generally for carrying out the purposes of this Law.

There is no section corresponding to section 52 (1) (*g*) of the C. P. Municipal Act, 1903, under which all streets vest in, and belong to, the Committee. I do not say this fact in any way affects the decision of the case, for the Amraoti Camp Municipality has admittedly the management of all streets within its limit. It is admitted that the road in question is one of the roads closed to springless carts under the notification.

The contention on behalf of the applicant is that the bye-law is bad and the conviction is illegal. It is urged that section 79 does not empower the prohibition of a particular class of traffic.

It may be as well at this stage to dispose of an argument faintly advanced on behalf of the Crown by the learned Standing Counsel. It is contended that the sanction of the Chief Commissioner renders the bye law valid, even if otherwise invalid. This position is utterly untenable. Mathew, J., in *Kruse* v. *Johnson* (1) says:—

"It was decided in very early times that the approval of the bye-law by the authorities mentioned in the Statute did not give it validity if not otherwise legal * * * the validity of the bye-laws must be determined by the Judges when they are properly brought before them."

The question is whether section 79 authorises the prohibition of a particular kind of traffic. The analogue of section 79 is to be found in all the Statutes relating to Municipalities in British India. The first part of the section relates to the temporary closing of a street. The concluding portion authorises a diversion, discontinuance or permanent closing of any street. The question is whether an authority to close a street permanently authorises a closing of it to a particular kind of traffic. The closing a street is what is called in English Law its stopping up. It refers to a permanent closing of the street as a street.

It cannot be denied that springless carts were used over the road in question prior to the date of the notification. It is not suggested that the road is a new road. If such carts enjoyed the right of passage over the street before the notification, then the road must be deemed to have been dedicated for, among other purposes, such user. The public, therefore, had a right before 1904 to use springless carts over this road. This is a primitive but very common mode of locomotion in these parts. The question has sometimes arisen with reference to new modes of locomotion, as in the case of the perambulator in 1831, whether the dedication extends to it; *Regina* v. *Mathias* (2) It was decided in the affirmative in favour of perambulators. But no such question can arise with reference to an ancient type of vehicle.

The English Common Law doctrine is, once a highway always a highway. The mere fact that since 1904 under colour of this notification the user may have been prohibited, cannot affect the rights of the public, for such rights can only be lost under a Statute or a bye-law duly made under it. Whilst, therefore, it is open to the Committee to close the road permanently, it has no power to close it to a particular kind of traffic within the dedication.

It is correctly pointed out that whilst section 79 corresponds to section 84 of

(1) (1898) 2 Q. B. 91; 67 L. J. Q. B. 782; 78 L. T. 647; 46 W. R. 631; 62 J. P. 469; 14 T. L. R. 416; 19 Cox. C. C. 103.

(2) (1861) 2 F. & F. 570; 121 R. R. 816.

the Burma Municipal Act, Act III of 1898, there is a special section under which a notification of this kind can be issued in that Province. Section 85 of Act III of 1898 is as follows:—

"The Committee may by a public notice prohibit the driving, riding or leading of animals or vehicles of any particular kind along any street or part of a street vested in it."

Section 116 of the Berar Municipal Law, 1886, contains no express provision for the regulation of traffic such as is to be found in the C. P. Municipal Act, section 105 (1) (*r*). But even if there had been express power to regulate traffic, it does not follow that a particular kind of traffic could be prohibited in any street: *Toronto Municipal Corporation* v. *Virgo* (3), *Attorney-General* (*Ontario*) v. *Attorney-General* (*Dominion of Canada*) (4). In the last case the following passage from the earlier judgment has been cited:—"Their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it; and indeed, a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

Section 116 (1) (*j*), which enables the Committee to make rules for carrying out the purposes of the Municipal Law, cannot be read as authorising by implication the taking away of an existing right on the part of the public. Clearer words in the Statute are necessary to justify such a bye-law. Such words are to be found in section 85 of the Burma Municipal Act already referred to and also in another Local Act to which I shall presently refer.

There is an interesting case reported as *Emperor* v. *Bal Kishan* (5). It appears from the report that section 128 of the N. W. and Oudh Municipalities Act, 1900, lays down that the Board may by rules provide for the regulation or prohibition of any description of traffic in the streets where such prohibition appears to the Board to be necessary for the prevention of danger or grave inconvenience to public. The Municipal Board of Naini Tal purporting to act under this section, framed the following bye-law:—

"No coolie, whether bearing loads or not, no servant, except in attendance on his master, and no prostitute shall use the Upper North Mall at any time."

Bal Kishan, a servant, and not in attendance on his master, was found walking with a letter towards Talli Tal along the Upper North Mall. He was fined but the order was set aside by Knox, J., on the ground that the bye-law was unreasonable.

I do not suggest that the bye-law now before me is unreasonable, but I would point out that the wording of section 128 above cited indicates that wherever the legislation intends to arm a Municipality with powers to prohibit a particular kind of traffic, it says so in clear and unmistakable language.

The conclusion I come to is that the bye-law in question, not being warranted by the terms of the Statute, is *ultra vires* and the conviction is illegal. The order of the Magistrate is set aside and the applicant is aquitted. The fine of Rs. 2 and the 8 annas compensation ordered to be paid must be refunded.

Order set aside.

(3) (1896) A C. 88; 65 L. J. P. C. 4; 73 L. T. 449.
(4) (1896) A. C. 348 at p. 363; 65 L. J. P. C. 26; 74 L. T. 533.
(5) 24 A. 439; A. W. N. (1902) 117.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 17 OF 1919.

AND

CRIMINAL MISCELLANEOUS PETITION No. 143 OF 1919,

April 4, 1919.

Present:—Sir John Wallis, Kr., Chief Justice, Justice Sir William Ayling, Kr., and Mr. Justice Sadasiva Aiyar.

IN CRIMINAL APPEAL No. 17 OF 1919

P. VARADARAJULU NAIDU—ACCUSED —APPELLANT

versus

EMPEROR—RESPONDENT.

IN CRIMINAL MISCELLANEOUS PETITION No. 143 OF 1919

THE PUBLIC PROSECUTOR— PETITIONER

versus

P. VARADARAJULU NAIDU— RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *ss* 196

VARADARAJULU NAIDU *v.* EMPEROR.

428—*Penal Code (Act XLV of* 1860*), s.* 124 *A—Sedition—Sanction by Government for prosecution, requisite of—Sanction by telegram—Proof that telegram was sent by Local Government, absence of—Presumption—Evidence Act (I of* 1872*), s.* 88*—Supplementary sanction after filing of complaint, legality of—Additional evidence, when may be taken by Appellate Court.*

The sanction of a Local Government to prosecute a person for an offence under section 124A, Penal Code, communicated by telegram must be proved to have emanated from the Government. The Court is forbidden by the express provisions of section 88 of the Evidence Act to make any presumption as to the person by whom the telegram is sent. [p. 346, col. 2; p. 347, col. 1.]

A sanction given after the filing of a complaint does not fulfil the requirements of section 196, Criminal Procedure Code. [p. 346, col. 2.]

Barindra Kumar Ghose v. *Emperor*, 7 Ind. Cas. 359; 37 C. 467; 11 Cr. L. J. 453; 14 C. W. N. 1114, followed.

The sanction must, in order to satisfy the section, have been the act of the Local Government and not of a single member of such Government. [p. 347, col. 2.]

An Appellate Court has jurisdiction, under section 428, Criminal Procedure Code, to take additional evidence or direct additional evidence to be taken to supply a formal defect, but the power has to be exercised with great care and only when the Court is satisfied that the case is one of formal proof only. [p. 347, cols. 1 & 2.]

Per *Sadasiva Aiyar, J.*—The power of an Appellate Court to take additional evidence under section 428, Criminal Procedure Code, should be exercised against an accused person only in very exceptional cases. [p. 350, col. 1.]

Appeal against the order of the Court of the Sub-Divisional 1st Class Magistrate, Madura Division, in Calendar Case No. 53 of 1918.

Petition, praying that for the reasons stated therein the High Court will be pleased to pass an order directing the taking of additional evidence in the said Calendar Case No. 53 of 1918, on the file of the Court of the Sub-Divisional 1st Class Magistrate, Madura.

FACTS appear from the judgment.

Mr. *S. Srinivasa Aiyangar*, for the Appellant.—A complaint cannot be entertained without the formal sanction satisfying the provisions of section 196, Criminal Procedure Code. The prosecution ought to have proved the sanction before the trial.

[WALLIS, C. J.—The matter has already been before this Court and decided by it. We are not going to allow it to be re opened]

The point has not been finally decided: see *Varadarajulu Naidu, In re* (1). The sanction as produced was taken subject to proof immediately the complainant was examined. Assuming that the telegram was sent by the Government, it delegates, instead of issuing a sanction, the power of giving sanction to the District Magistrate in his discretion. And apart from the sending of the telegram there is nothing to show that the sanction was given by Government (*e. g.*, the Chief Secretary's signature, etc.). The supplemental sanction was given on the 30th August 1918, while the complaint was instituted on 27th August 1918. Section 8 of the Indian Evidence Act clearly says that there is no presumption in favour of the contention for the prosecution that the telegrams emanated from the Government.

[AYLING, J.—There must be some proof to that effect.]

Yes. In *Barindra Kumar Ghose* v. *Emperor* (2) it was held that a supplemental sanction will not suffice for offences not specified in the sanction as originally given. Section 537, Criminal Procedure Code, expressly omits cases of sanction under sections 195 and 196. The reference to the Telegraphic Guide is irregular, as it is not a public or other referrable document under the Evidence Act. Section 114 of the Evidence Act does not apply, for until the act is proved to have been done there can be no presumption and no judicial notice: see section 57 of the Act.

[SADASIVA AIYAR, J.—"Madras" is the Code word for telegrams. Why can it not be taken judicial notice of ?]

There is nothing in the Act to warrant it, for judicial notice is allowed only of matters published in the Gazette.

[SADASIVA AIYAR, J.—Can we not take judicial notice of the fact that the Chief Secretary usually styles himself so in telegrams ?].

[WALLIS, C. J.—Can it not be taken as the telegraphic 'style' of the Madras Government ?]

The Telegraphic Code is not a public document.

[WALLIS, C. J.—It is issued to the public.]

But every book issued to the public is

(1) 49 Ind. Cas. 602; 42 M. 180; 25 M. L. T. 15; 36 M. L. J. 64; (1918) M. W. N. 926; 20 Cr. L. J. 186.

(2) 7 Ind. Cas. 359; 37 C. 467 at p. 487; 11 Cr. L. J. 453; 14 C. W. N. 1114.

not a public document: see section 74, Evidence Act.

[AYLING, J.—Won't it come under section 84 ?]

It would, if published under the authority of Government, but this is only by the Director-General of Posts and Telegraphs. Nor does section 87 of the Evidence Act apply, for the section relates only to matters of public or general interest.

[WALLIS, C. J.—I think that we can assume that the Code is correct.]

No. Section 87 does not apply at all. A certified copy has to be proved. See section 78.

Mr. *Osborne* (Public Prosecutor), for the Government.—The objection was specifically raised in the grounds of the petition adjudicated by this Court: [*Varadarajulu Naidu, In re* (1)]. It was never suggested that the telegram did not come from the Government of Madras. The Public Prosecutor stated on oath that the telegram had emanated from the Government.

[WALLIS, C. J.—Taking it that 'Madras' denotes the Government of Madras, the Evidence Act says that we are not to presume that it came from the Government of Madras.

The Court was satisfied that it so came by the evidence of the Public Prosecutor. And that is sufficient. *Subramania Siva In re: Chidambaram Pillai, In re* (3).

[On the 3rd April, the High Court decided that Government sanction for the prosecution had not been proved. The Public Prosecutor thereupon prayed for an opportunity of proving the sanction as the prosecution had been lulled into security by the objection not being taken notice of by the Court in the order on the objection petition.]

Mr. *A. Krishnaswami Aiyar*, for the Appellant.—The application is most extraordinary.

(1) The sanction is a pre-requisite to the commencement of the prosecution and it was the duty of the prosecution to have proved it before anything else. They had opportunities on our objection, even after the arguments, in the lower Court. The question was elaborately argued in the criminal revision case here and even after that the proof could have been adduced.

(2) This is not a case for additional evidence. Section 428 of the Criminal Procedure Code allows additional evidence to be taken only in case the Appellate Court finds the evidence on record insufficient to enable it to come to a decision. There is no provision enabling the Court to order further evidence on further enquiry except what is found in section 428. A gap in the prosecution evidence is not intended to be so filled up. See *Empress of India* v. *Fateh* (4), which lays down the law clearly. In *Jeremiah* v. *Vas* (5) the view taken is that if the prosecution was misled by the Court, a further enquiry may be ordered. There is no such allegation here. And even there the Court acted upon the affidavit of the complainant.

Mr. *Osborne* (Public Prosecutor), for the Government.—*Empress of India* v. *Fateh* (4) case where the gap in the evidence in proof is the of a charge was not allowad to be filled up. But here there is no allegation that the charge has not been proved. The non proof of sanction is a mere technical defect: see *Mohideen Abdul Kadir* v. *Emperor* (6).

[WALLIS, C. J.—Supposing additional evidence to be admitted, that will necessarily open up the question contended for by the other side that you must prove that the telegram was sent by the Government, *i.e.*, the whole Government and not any one member of it.]

Mr. *Dorai Rajah*, for the Public Prosecutor.—We are prepared to prove that the telegram was sent by or under the authority of "Government" as defined in section 17 of the Indian Penal Code and clause 29 of section 3 of the General Clauses Act. It all depends upon who has the executive portfolio.

JUDGMENT.

WALLIS, C. J.—In this case the accused appeals from a conviction under section 124A of the Indian Penal Code, and Mr. K. Srinivasa Aiyangar who appears for him has raised the contention that the conviction is bad for want of legal proof of the sanction required by section 196 of the

(3) 1 Ind. Cas. 22 & 36; 32 M. 3; 5 M. L. T. 1 & 16; 2 Cr. L. J. 108 & 130.

(4) 5 A. 217; A. W. N. (1882) 227; 3 Ind. Dec. (N. S.) 176.

(5) 12 Ind. Cas. 961; 36 M. 457 at pp. 461, 467, 469; (1911) 2 M. W. N. 576; 10 M. L. T. 506; 12 Cr. L. J. 585; 22 M. L. J. 73.

(6) 27 M. 238; 2 Weir 408; 1 Cr. L. J. 566.

Criminal Procedure Code in the case of prosecutions under this section.

The telegram which contains the sanction on which reliance is placed was filed with the complaint, and the defence, having obtained a copy, took several objections to it, which were overruled by the trial Magistrate on the 26th September 1918. On the same day the trial began, and the Public Prosecutor of Madura went into the box as the first prosecution witness and deposed to receiving a letter marked Exhibit A-1 from the District Magistrate, Madura, enclosing a telegram marked Exhibit A. The defence objected that the telegram was not proved and it was marked Exhibit A for purposes of identification. In October, while the trial was going on, the defence filed a revision petition in the High Court against the Magistrate's order and in ground No. 6 (*a*) alleged the Magistrate ought to have held that there was no proof of the sending of the telegram by the Governor in Council or the Local Government. At that time the Magistrate had only held that the telegram might be marked for purposes of identification. Mr. K. Srinivasa Aiyangar explains that this ground of objection was not pressed before the learned Judges as it was still open to the prosecution to supply the necessary proof. They did not do so. We are told that accused's Vakil in his address to the Court at the close of the case again raised this point and that it was argued on both sides, but the Magistrate's judgment does not refer to this. In these circumstances we proceed to deal with it.

The telegram, Exhibit A, was as follows:—

"Ootacamund State
22-8-18 3 to 5.

Clear line, District Madura.

Your letter 20th instant. Under section 196, Criminal Procedure Code, Government authorize Public Prosecutor prefer complaint under section 124A, Indian Penal Code, against Varadarajula Naidu in respect of speech made at Madura on 18th August. Public Prosecutor may act on this authority immediately if, after consultation with him, you are satisfied that this is desirable. Complaint prepared should be submitted at once to Government for issue of supplemental sanction.

Madras."

The word "Madras", as it appears from the official Telegraphic Guide, and as is matter of general knowledge, is the telegraphic name of the Chief Secretary to the Government of Madras, and it may be taken that the telegram purports to come from the Chief Secretary.

The witness also filed Exhibit A-2 which he subsequently received from the District Magistrate. Exhibit A-2 is in the following terms:—

"Confidential
Public Department.

Extract from G. O. No. 787, dated 30th August 1918.

Under section 196, Criminal Procedure Code, His Excellency the Governor-in Council sanctions the prosecution of P. Varadarajulu Naidu for an offence under section 124A, Indian Penal Code, in respect of a speech entitled "the present political situation" delivered at Madura on the 18th August 1918.

* * * * * *

(True extract)
(Sd.) L. Davidson,
Ag. Chief Secretary."

Exhibit A 2 is legal proof under sections 76 to 78 of the Indian Evidence Act that sanction to prosecute the accused was duly given by the Government of Madras on the 30th August 1918, but unfortunately that was after the filing of the complaint, and it has been held in *Barindra Kumar Ghose* v. *Emperor* (2), the authority of which has not been questioned before us, that a sanction given after the filing of a complaint does not fulfil the requirements of section 196 of the Criminal Procedure Code.

We have, therefore, to see whether the alleged sanction of the 22nd August contained in the telegram Exhibit A is duly proved. The Evidence Act does not contain any special provisions as to telegrams purporting to emanate from Government and they are governed like other telegrams by the provisions of section 88 of the Indian Evidence Act, which is as follows:—

"The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but

the Court shall not make any presumption as to the person by whom such message was delivered for transmission."

We are, therefore, forbidden by the express provisions of the section to make any presumption as to the persons by whom the telegram, Exhibit A, was delivered for transmission. That the telegram, Exhibit A, was despatched from Ootacamund on the 22nd of August 1918 may be considered proved, but we are forbidden to raise any presumption as to the person by whom it was sent; and, therefore, we cannot hold, in the absence of proof, that it was sent by the authority of the Madras Government.

In view of our decision that it was not proved by whom the telegram Exhibit A was sent, the Public Prosecutor applied to the Court to take additional evidence under section 428 of the Code of Criminal Procedure, which requires an Appellate Court, if it thinks additional evidence to be necessary, to record its reasons and empowers it to take the evidence itself or cause it to be taken. The terms of the present section are perfectly general, and are subject only to the condition that the Court should record its reasons—a provision introduced by way of amendment in 1897. As recently observed by Lord Reading, L. C. J., in admitting additional evidence for the prosecution under the similar power now possessed by the Court of Criminal Appeal in England, the jurisdiction must always be exercised with great care, *Rex* v. *Robinson* (7), but I cannot agree with the contention that it is inapplicable in a case of this kind. It would not, in my opinion, be creditable to the administration of justice, or in accordance with modern ideas on the subject, that a conviction or a charge such as this, if otherwise sustainable, should be upset owing to a misconception on the part of the prosecution as to the proper mode of proving a statutory requisite not affecting the merits, a misconception which was shared by the trial Magistrate. When the Appellate Court has statutory power to prevent such a miscarriage by directing fresh evidence to be taken on the point, I am unable with great respect to agree with the observation of one of the learned Judges in *Jeremiah* v. *Vas* (5), in so far as they question the propriety of taking action under section 428 in such a case to supply a defect in formal proof. The learned Judges before whom the case first came differed in opinion as to the scope of the section and the decision of Mr. Justice Benson, to whom the case was referred, proceeded entirely on facts peculiar to that case. But before allowing the prosecution to tender additional evidence in this case we ought, I think, to be satisfied that the case is one of formal proof only. The sanction communicated in the telegram Exhibit A must, in order to satisfy the section, have been the act of the Local Government, and not of a single member of such Government.

We have now elicited in Court that this is not the case for the prosecution and in these circumstances we must decline to order fresh evidence to be taken.

We are, therefore, constrained to allow the appeal, set aside the conviction and sentence and discharge the accused's bail bond on the ground that the requisite sanction has not been proved. I do so with great reluctance, as the point in no way affects the merits of the case but the law leaves us no alternative.

AYLING, J.—I agree.

SADASIVA AIYAR, J.—After we had pronounced our order answering in the negative the question whether there was legal proof that the Governor in Council, that is, the Local Government, had sanctioned the complaint (the existence of which sanction was the indispensable foundation on which the validity of the whole prosecution rested). Mr. Osborne made an oral application to us requesting us to exercise our powers as an Appellate Court under section 428, Criminal Procedure Code, to take "additional evidence" in proof of the genuineness of the telegram which had been marked Exhibit A by the Magistrate only "for the purpose of identification."

Section 428 says (omitting words unnecessary for our purpose): "The Appellate Court, (*a*) if it thinks additional evidence to be necessary, (*b*) shall record its reasons, and (*c*) may.....take such evidence itself."

When the learned Public Prosecutor asked us to exercise our indubitable power under the above section in favour of the prosecution, I expected that he would make his

(7) (1917) 2 K. B. 108; 86 L. J. K. B. 773; 117 L. T. 160; 81 J. P. 152.

application in writing setting forth his reasons, because the law required the Appellate Court to record its own reasons before taking what the Legislature evidently considered as the exceptional course of allowing additional evidence to be adduced in appeal. If I remember aright, it was even suggested to him that though we heard his oral application he was expected to file a written application in the course of the day. No such written application was, however, filed yesterday. The failure on the part of the prosecution to establish by evidence the very foundation of their case, notwithstanding that the existence of that foundation was denied even during the course of the examination of the very first witness for the prosecution (namely, Mr. C. Krishna Nair) who produced Exhibit A on the 26th September 1918, notwithstanding that that alleged foundation was again disputed in October 1918 (see ground No. 6 (*a*) of the revision petition) in the revision case in this Court and notwithstanding that the defence insisted on that fundamental defect in the prosecution case during the final arguments before the trial Magistrate, this glaring failure is, to say the least, extraordinary. The only explanation given by the learned Public Prosecutor was that the prosecution erroneously thought that there was nothing in the objection (as to want of legal proof of the sanction required by section 196) as it was not argued during the hearing of the revision petition in this Court. I regret to state that this explanation is to my mind unsatisfactory.

Then it was argued that there could be no reasonable doubt from the common sense point of view that Exhibit A represented a real sanction given by the Governor in Council, that evidence of a conclusive character to prove its character as a real sanction was and is easily available, that to refuse to allow that evidence to be produced in appeal would lead to the failure of the prosecution on a mere technicality and that because even if the present prosecution fails on this technicality, a new prosecution could and would be launched at once on the undoubtedly genuine sanction, that it would tend to the convenience of both sides, to the saving of expense to both sides and to economy of time of Courts if the additional evidence is allowed to be let in.

As regards the first point, there would have been greater force in it if Exhibit A-2 had referred to the existence of a previous sanction like that stated in Exhibit A and if the trial Magistrate had not altogether ignored the objection to the want of legal proof of the requisite sanction in his judgment.

As regards the second argument, the tendency of my mind (if I may be permitted to say so) is against allowing mere technicalities to stand in the way of a decision on the merits, if it could be reasonably helped. But in a matter of discretion, it has been almost an invariable rule with Courts not to exercise it against the accused in favour of the prosecution unless in exceptional cases or where the merits are clearly against the accused. (For example unsuccessful complainants are very rarely allowed to apply in revision against orders of discharge or acquittal though our power to interfere cannot be doubted.) As we have not heard the appeal yet on the merits, we cannot at this stage say that on the ground of not allowing a clearly or confessedly guilty man to escape, we should exercise our discretion in favour of the prosecution. In fact, in a case involving the consideration of a very difficult question as to the scope of the obscure explanation to section 124-A it is almost impossible to hold any definite view as to the *prima facie* guiltiness of the appellant at this stage or whether his guilt is grave enough to justify the view that it is desirable to allow additional evidence in order not to allow an offence of a grave and clear character to go unpunished.

As regards the convenience of all parties and the saving of expense and time to both sides, the appellant's Vakil Mr. A. Krishnaswami Aiyar refused to see the benefit of the course proposed so far as his client is concerned. Further, it is only if we could be reasonably sure that, on the failure of the present prosecution, the Governor in Council would at once launch a fresh prosecution that the alleged conveniences and savings of time and money would accrue through the cure of the defect in the present prosecution by the reception of additional evidence. There is nothing on the re-

cord to show that the Governor in Council may not drop the matter altogether on failure of this prosecution on the technical ground (of want of proof of the alleged sanction of the 22nd August 1918). It has to be remembered that the offence under section 124A occurring in Chapter VI is an offence against the State. Further, the body of the section is supplemented by three explanations of which the second and third are more in the nature of exceptions than explanations. The question whether a particular passage alleged to offend against the provisions of the body of section 124A is or is not saved by one or other or both of those explanations 2 and 3 is almost always a contested matter and frequently one of great dubiety. That the gravity of the offence varies according to the time, the place and the circumstances in which the words were spoken or written is clear from the convicting Court having the discretion to impose sentences ranging from a mere fine to transportation for life. [See *Queen-Empress* v. *Ramchandra Narayan* (8) as to severe sentences being reserved for violently seditious writings in times of public disturbance.] Liberty of free expression of the discontents and the disapprobation of the acts and policies of Government with a view to obtain desirable alterations and the ameliorations is a fundamental constitutional right recognised by the British Government. Whether such expression passes the prescribed bounds and becomes a danger to the stability of the State, and whether even when it had passed reasonable limits, it is desirable on grounds of State policy to launch a prosecution are questions which the Governor in Council has deeply and anxiously to consider before sanctioning a prosecution and the like considerations apply in the case of prosecution once launched. Hence, such cases are concerned not merely with the guilt or innocence of the accused person and are not, therefore, governed to the same extent as other cases by the consideration that a presumably guilty party should not be allowed to escape from justice on mere technicalities. As Jenkins, C. J., said in *Barindra Kumar Ghose* v. *Emperor* (2) "the policy of this safeguard" (that is to safeguard of a sanction under section 196 by the highest executive authority, the Governor in Council) "is manifest; the maintenance of this control is of the highest importance; and it is beyond the competence of the Local Government to delegate to any other body or person this controlling power and the discretion it implies. The question whether action should be taken under Chapter VI is more than a matter of law; considerations of policy arise and these can only be determined by the authorities specially designated in the section." "It would, I think, be opposed to the true intendment of section 196 for the Local Government to abandon to" (its legal and other advisers) and I might add, even to the Court "the discretion and responsibility that properly belongs to itself, and I should hesitate to take a view of this section that might permit the Government to entrust to the zeal of an Advocate or of those by whom he may be instructed the determination of the serious questions involved." I think that the important considerations of policy referred to in the above weighty observations apply not only to the desirability or otherwise of initiating a prosecution under Chapter VI but also to the question whether it is desirable to launch a fresh prosecution if the first prosecution fails or is likely to fail on account of technical defects. Such questions are intended by the Legislature to be left to the sole determination and discretion of the Governor in Council. We cannot safely assume that the reasons of State policy which led to the issue of Exhibit A 2 still continue in the opinion of the Governor in Council; that therefore they are sure to launch a fresh prosecution if this fails, and that, therefore, there would be less waste of time if the fundamental defect in this prosecution is allowed to be remedied by additional evidence. The above considerations, in my opinion, distinguish this class of cases, to which section 196, Criminal Procedure Code, applies, from other similar cases where failure of justice for want of sanction under section 195, Criminal Procedure Code, is prevented by the application of section 537, Criminal Procedure Code. I think that the intention of the Legislature to give unfettered discretion to the Governor in Council in the matter of the desirability of creating public

(8) 22 B. 152 (F. B.); 11 Ind. Dec. (N. S.) 693.

exciteement by launching prosecutions for offences under Chapter VI is likely to be rather furthered by throwing out this case on the record as it stands, leaving it to the Government to fully consider the present conditions and if they consider it still desirable to do so, to initiate a fresh case against the appellant than to act on the learned Public Prosecutor's application to take additional evidence in this case itself.

Even assuming that the above distinction is not sound, is it desirable to set up the precedent of permitting an Appellate Court to take additional evidence, not because the Appellate Court feels a reasonable doubt whether, on the evidence as it stands, the conviction is justified, but because, after being convinced that the prosecution fails on the evidence on record, it considers that the negligence of the prosecution might be excused? I do not deny the power of the Appellate Court to do so under section 428, Criminal Procedure Code, but I am clearly of opinion that it should be exercised against the accused only in very exceptional cases. Sitting with Napier, J., to try a criminal appeal recently I felt a doubt whether the medical evidence of a subordinate Medical Officer was sufficient to arrive at the conclusion that the injuries to rib bones found on a buried and disinterred corpse had been caused by *ante mortem* violence. We had, therefore, the additional evidence of a higher Medical Officer taken who supported the evidence of his subordinate, and we then arrived at a decision satisfactory to both our minds and confirmed the conviction for murder. But the present is not a case where there is evidence which, if reliable, proves a relevant fact but the Appellate Court feels a doubt on the point and thinks that additional evidence might throw fresh light which would enable it to arrive at a definite and satisfactory conclusion. In *Empress of India* v. *Fateh* (4) Mr. Justice Mahmood says: "When .....that Court" (Sessions Court) "takes all the evidence produced by the prosecution and that evidence fails to sustain the charge, this Court" (that is, the High Court) "will not, except in very exceptional circumstances, direct that additional evidence should be taken. The powers conferred by section 282, Criminal Procedure Code (of 1872), are not, in my opinion, intended to be exercised in cases like the present, in which the prosecution having had ample opportunities to produce evidence have done so and that entire evidence falls short of sustaining the charge." In *Jeremiah* v. *Vas* (5) Sundara Aiyar, J., at page 467* says: "At any rate, it (section 428) does not appear to be applicable where the prosecution having had ample opportunities to produce evidence has failed to do so." When that case went before Benson, J., owing to a difference of opinion between Sundara Aiyar and Phillips, JJ., that learned Judge did not dissent from the above enunciation of the law but on the affidavit of the complainant's Counsel in the Magistrate's Court and "the report of the Magistrate" held it to be clearly established "that the prosecution was prepared to adduce evidence of the publication of the libel, but that when Counsel proceeded to adduce his evidence the Magistrate intervened and stated that it was unnecessary." Thus Benson, J., differed from Sundara Aiyar, J., on the question whether the prosecution had "had ample opportunities of adducing evidence" and yet had "failed to do so," and so he felt himself justified in calling for additional evidence.

There is no affidavit filed in the present case to the effect that the prosecution, while prepared to adduce evidence, were not given opportunities to adduce it and as I have said already, the learned Public Prosecutor was not even prepared to state in a written application the grounds on which he desired indulgence for the prosecution and (if I understood him aright) was not prepared to say definitely which witness or witnesses he was going to examine and whether the additional evidence related only to the fact that the message delivered at the Ooty Telegraph Office transmitted from Ooty and corresponding with Exhibit A was signed by the Chief Secretary or also to the questions whether the Local Government in this case, (that is, the persons authorised by law to administer the Executive Government of the Madras Presidency as defined in clause 29, section 3, of the General Clauses Act) sanctioned the prosecution or one member alone of the Government gave the sanction taking on himself the sole responsibility of the Local Government. (I do not intend to express

* Page of 36 M.—*Ed.*

any opinion at this stage whether such a decision by a single member under departmental rules would, in the eye of the law, be treated as the act of the Local Government, but it has to be noted that the defence took the objection at the earliest stage that an "individual member or members" of the Local Government cannot exercise the power under section 196 in the name of the Government) After I had written this opinion, I find that at the last moment a written application was filed by the prosecution, praying for the taking of additional evidence, but it gives no further definite information and therefore does not materially affect the cogency, to my mind, of the reasons I have attempted to make clear. The statements made by Mr. Dorai Rajah in answer to my Lord's questions in no way tended to the further elucidation of the exact scope of the additional, evidence. The discretion to be exercised by the Appellate Court in taking additional evidence is not an arbitrary discretion as is shown by the provision that it "shall record its reasons." Surely it should not be exercised especially against the accused in a criminal case where, under similar circumstances, the Court of Appeal hearing a civil appeal would not admit additional evidence on appeal under Order XLI, rule 27, of the Code of Civil Procedure (which also directs the Appellate Court to record its reasons before admitting additional evidence). In *Arasappa Pillai* v. *Manika Mudaliar* (9) and *Satis Chandra Bose* v. *Takurdas Mandal* (10) it was held that where no evidence or insufficient evidence had been adduced on a relevant point in the Court of first instance by a party who had ample opportunity to adduce all his evidence, an Appellate Court ought not in appeal to allow his application to adduce further evidence on that point.

For the above reasons I concur with my Lord in allowing the appeal.

M. C. P.

Appeal allowed.

(9) 25 Ind. Cas. 587; 16 M. L. T. 301.
(10) 39 Ind. Cas. 886; 25 C. L. J. 473.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 518 OF 1918.

September 2, 1918.

Present:—Mr. Justice Tudball.

NARAIN DAS AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code Act XLV of 1860), *s.* 448—*House-trespass—Building not in possession of complainant—Intention to annoy or insult, absence of.*

Complainant started a school in a building erected by public subscription. On another school being started his pupils all left him and he closed down and went away. In his absence the accused took possession of the building on behalf of the rival school and started to hold certain classes in it:

Held, (1) that the complainant was not the owner of the building nor had it been entrusted to him and that it was impossible to say that the accused intended to insult or annoy him; [p. 352, col. 1.]

(2) that, therefore, the accused were not guilty of an offence under section 448 of the Penal Code. [p. 352, col. 1.]

Criminal revision from an order of the Magistrate, first (class) of Garhwal.

Mr. *Satya Chandra Mukerji*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The applicants have been convicted of criminal trespass under section 448 of the Indian Penal Code, and have been sentenced to fines of Rs. 10 and Rs. 20, respectively. The Magistrate has written a long and detailed judgment in which he has set out the facts very clearly. The school building, which is the subject-matter of the dispute, was clearly not the property of the complainant in the case. It was built by public subscription and he started a school in it with the assistance of certain persons whom he subsequently refused to allow to interfere with his management of the school. On another school being started his pupils all left him and he closed down. He went away and in his absence the applicants and certain others took possession of the main building on behalf of the other school, which is also a public institution, and started to hold certain classes in it. The complainant returned and put a lock upon the building which the opposite party at once removed. On these facts the Magistrate has held that the applicants have committed criminal trespass in that they entered upon the property with the intention of annoying

the complainant. It is quite clear that there was no such intention in their minds at all. The intention with which they entered upon the property had nothing to do with the annoying of the complainant, and it is also very doubtful whether he was in possession of the building at the time when the entry was made. It was not his building nor had it been entrusted to him. He had closed the school and had gone away, and it is impossible to say that the applicants entered upon the building in order to insult or annoy him. On the facts found the applicants ought to have been acquitted. I allow the application and set aside the convictions and sentences. The fines, if paid, will be refunded.

Application allowed.

PATNA HIGH COURT.
CRIMINAL REVISIONS NOS. 44 AND 101 OF 1919.
April 29, 1919.
Present:—Mr. Justice Atkinson
and Mr. Justice Coutts.
TRILOCHAN DAS AND ANOTHER
—PETITIONERS
versus
JOGESHWAR DAS AND
OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Proceedings under s. 145, whether can be struck off—Procedure.

Where proceedings under section 145 of the Criminal Procedure Code have once been started, the Magistrate has no jurisdiction to strike them off. He must pass an order either under section 145 or under section 146 of the Code.

Criminal revision against the order of the Deputy Magistrate, Singbhum, dated the 12th December 1918.

Mr. *S. N. Bose*, for the Petitioners.
Mr. *A. K. Ray*, for the Opposite Party.

JUDGMENT.

COUTTS, J.—This application arises out of a proceeding under section 145 of the Criminal Procedure Code. Proceedings were started on the 22nd November on a Police report and the Sub-Inspector of Bahragora was directed to attach the crop on the land, to reap it when ripe, and to secure it until further orders were passed. The date fixed for hearing was the 9th of December. Both parties on the 9th of December applied for time, and time was allowed until the 12th of December. On the 12th December the first party alone was present and prayed for time. On this the order of the Magistrate was "proceeding struck off. Crop to remain in the Sub-Inspector's custody till orders in respect of it are passed by competent Civil Court." The next order of the Magistrate is dated the 19th December on which date the second party filed a petition, praying for release of the attached crops. The petition was not disposed of on that date, the order of the Magistrate was that this would be done when he knew what the value of the attached crop was and when the second party desposited the money in case of proof afterwards that he was not entitled to the crops. He directed the Sub-Inspector to report on the 3rd January. On the 3rd January the first party prayed that the crops might be made over to him. Finally, on the 27th January, the 1st party appeared, and the Magistrate after looking at Settlement papers ordered the crops to be made over to the 1st party. Against the order of the 12th December and all subsequent orders applications have been filed that they should be set aside on the ground that they are illegal and have been passed without jurisdiction.

It appears to us perfectly clear that after the proceeding had been struck off and there were no proceedings before the Magistrate, he acted entirely without jurisdiction in passing orders with regard to crops which were not then the subject-matter of any proceeding. In addition to this, however, his order directing the proceeding to be struck off was also without jurisdiction. The proceeding was under section 145 and it was open to the Magistrate to pass orders either under section 145 or under section 146. He certainly did not pass an order under section 146, and it does not appear that he has passed an order under section 145. The whole of the orders from and including the order passed on the 12th December are without jurisdiction, and should, in my opinion, be set aside, with a direction that the Magistrate should take up the proceeding from the point at which they were before the 12th December and proceed with them in accordance with law.

ATKINSON, J.—I agree.

Orders set aside.

BOMBAY HIGH COURT.

SECOND CIVIL APPEALS NOS. 1033 OF 1915 AND 323 OF 1916.

November 19, 1918.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Shah.

KHIMJI BHIMSI—DEFENDANT—APPELLANT

versus

CHUNILAL AMBAIDAS—PLAINTIFF—RESPONDENT

AND

CHUNILAL AMBAIDAS—PLAINTIFF—APPELLANT

versus

GOVINDJI KHIMJI—DEFENDANT—RESPONDENT.

Hindu Law—Damdupat, *rule of, applicability of—Capitalisation of interest—Interest exceeding principal, whether can be recovered.*

Where in a suit to recover a sum of money, the amount it is sought to recover is, for the most part, made up of interest which largely exceeds the principal, and there is an agreement in writing whereby the debtor agrees to pay interest upon interest, there is nothing to prevent the Court from awarding the full sum claimed, both as a matter of natural inference from the agreement and as a matter of Hindu Law. [p 354, col. 2.]

Per *Shah, J.*—The rule of *damdupat* requires that the interest in the course of one transaction shall not exceed the principal. But it does not prevent an agreement between the debtor and the creditor to capitalize interest at a stage when the interest does not exceed the principal. All the Smriti writers and the commentators are agreed that there must be an agreement between the debtor and the creditor to capitalize interest in order to justify the calculation of interest in future on the sum made up of the principal and the interest thus agreed to be capitalized. [p. 354, col. 2; p 355, col. 1.]

Second appeals from the decision of the District Judge, Khandesh, in Appeal No. 242 of 1914, modifying the decree passed by the Joint Subordinate Judge, Dhulia, in Civil Suit No. 293 of 1912.

Mr. *D. C. Virkar*, for the Plaintiff-Appellant.

Mr. *G. S. Rao*, for the Defendant-Respondent.

JUDGMENT.

SCOTT, C. J.—In Appeal No. 1033 of 1915 it is agreed between the parties that there is a mistake in the figure mentioned in the District Judge's judgment, and that "983," should read "933" and it may be taken that the judgment is inaccurate in that respect. Whether the judgment should stand in its amended form is a question which has to be decided in the other appeal, No. 323 of 1916. Chunilal brings this suit against Nathu Shivji. Ambaidas, the father of Chunilal, and Nathu Shivji were partners in equal shares in a cotton business. The partnership was dissolved on the 3rd of November 1899, the business having resulted in a loss. On the 24th September 1900 Nathu Shivji admitted by an acknowledgment in the accounts that he was indebted to Ambaidas in the sum of Rs. 1,022-12-0. The acknowledgment runs as follows :—"Cotton was pressed into bales in partnership between you and me. Therein a loss was sustained. As to the amount of loss falling to my share an account in respect thereof was made and Rs. 1,022-12-0 were found due as up to this day." On the 22nd September 1903, just before the expiry of three years from the date of the last acknowledgment in account, a fresh acknowledgment was signed by Nathu Shivji stating that an account in respect of the previous Khata was made and a balance of Rs. 1,033-10-0 was found due. Before the expiry of three years from that date, another acknowledgment was signed by Nathu Shivji stating that an account in respect of previous Khata was made and Rs. 1,694 were found due, and a little less than three years later a further acknowledgment was signed by Nathu Shivji stating that an account in respect of the previous Khata was made and Rs. 2,071 were found due. Rs. 2,071 together with interest from the date of the acknowledgment, namely, 19th of September 1909, until the date of suit amount to Rs. 2,600. For that sum the plaintiff has instituted this suit.

The learned trial Judge passed a decree for the amount claimed with costs and interest on Rs. 2,600 at 6 per cent. from the date of suit to payment.

On appeal to the District Judge the decree was modified by the reduction of the decretal sum from Rs. 2,600 to Rs. 1,877-10-6, the reason being that the learned Judge was of opinion that the rule of *damdupat* applied and prevented the recovery of any more than the last mentioned sum, thereby differing from the conclusion arrived at by the learned trial Judge. The decision appears to have been based upon the penultimate paragraph in the case of *Shankar* v. *Mukta* (1), in which it was said "how much of this is due for principal and how much for interest is a matter of calcula-

(1) 22 B. 513 at p. 520; 11 Ind. Dec. (N. s.) 923.

tion, but the interest recoverable by suit is limited by the amount of principal originally advanced." There was in that case no discussion of the texts in Hindu Law bearing upon the rule of *damdupat*, and the decision is expressed to be based upon an unreported case of *Motilal* v. *Shivram*, Second Appeal No. 43 of 1894. In a later case in this Court, *Sukalal* v. *Bapu* (2), the texts relating to *damdupat* in the matter of loans were fully considered in the judgment of Sir Lawrence Jenkins, and the Court was of opinion that in the case of a bond where there was an express agreement for payment of interest, which involved in effect an agreement for payment of interest on capitalized interest exceeding the original principal, there was nothing to prevent a decree for a larger sum than the principal originally advanced.

In the present case we are dealing with mercantile accounts which are ordinarily made up from year to year with yearly rests for interest calculated at the time of Diwali. But owing to the business having ceased to be a going concern, presumably the practice of yearly rests was not followed from the date of first adjustment referred to, but rests were taken at intervals of three years at the times when acknowledgments were required to prevent the operation of the law of limitation.

In the present case we have had the advantage of an argument on behalf of the respondent from Dewan Bahadur Rao, in which he attempted to meet the case made upon the Hindu Law texts relied upon by the learned trial Judge and adverted to in the judgment of the Court in *Sukalal* v. *Bapu* (2). His argument resolves itself into this: that there is nothing in the texts which would prevent an agreement amounting to a new transaction between the parties, the debtor and the creditor, for payment of a larger sum than double the amount of principal, provided the agreement was clearly proved; that by reason of certain expressions in texts of Brihaspati and Manu that proof could only be by a document in writing, and that the acknowledgments signed in the books in the present case could not be held to be writings satisfying the necessities of the rule, because in *Shankar* v. *Mukta* (1) it has been held that a signed Ruzukhata cannot, in the Bombay Courts, be taken as anything more than an acknowledgment of liability for the purpose of saving limitation, and does not give rise in itself to a fresh cause of action, and, therefore, that the Ruzukhatas cannot be taken to amount to a fresh agreement such as was contemplated by the Hindu Smriti writers. It appears to me, however, that the decision in *Shankar* v. *Mukta* (1) must be taken subject to a recognised mercantile usage, that interest can be capitalized between Hindus at the end of each year, and *a fortiori* no objection can be taken to the capitalization at the end of every three years in relation to mercantile accounts, where the yearly settlement of accounts has ceased owing to the ceasing of the business.

As regards the requirements of proof under the Hindu Law, if that can be considered as part of the substantive Hindu Law, and not now rendered obsolete by the rules of procedure in Anglo-Indian Courts, it is to be observed that the translators of the text of Manu relied upon by Dewan Bahadur Rao are by no means unanimous in agreeing that Manu thought a writing to be necessary, and that out of several Hindu Law texts which have been referred to, Brihaspati is apparently the only one in which the necessity for a writing is clearly mentioned. We have in each of Ruzukhatas a written document in which there is the clearest implication that the party liable agrees to pay interest upon interest, because the sum mentioned in each of the three last Ruzukhatas is only arrived at by calculating interest upon interest, and that is the sum which is acknowledged to be due. It, therefore, appears to me that both as a matter of natural inference from the documents and as a matter of Hindu Law there is nothing to prevent the Court from awarding the full sum claimed, and that, therefore, the judgment of the District Judge should be set aside and that of the trial Judge restored in its entirety with costs throughout upon the respondent.

SHAH, J.—I agree. I desire to add with reference to the rule of *damdupat* that it requires that the interest in the course of one transaction shall not exceed the

(2) 24 B. 305; 2 Bom. L R. 18; 12 Ind. Dec. (N. S.) 738.

principal. But it does not prevent an agreement between the debtor and the creditor to capitalize interest at a stage when the interest does not exceed the principal. All the Smriti writers and the commentators are agreed that there must be an agreement between the debtor and the creditor to capitalize interest in order to justify the calculation of interest in future on the sum made up of the principal and the interest thus agreed to be capitalized. The question whether that agreement should be in writing or not is one upon which the Smriti writers are not unanimous. But in my opinion in the present case whatever agreement there is between the parties is in writing, and, therefore, the difference on that point between the Smriti writers is not a matter of any practical importance in the present case. The question really is whether the acknowledgments passed by the debtor from time to time afford a fair basis for the inference that the debtor agreed to capitalize the interest. On that point, having regard to the four acknowledgments passed by the debtor, it is clear that he agreed to capitalize interest at the intervals at which he passed those acknowledgments. In this respect the present case is really different from the case of *Shankar* v. *Mukta* (1). The transaction here is one between two merchants; and there is no reason to suppose that when the debtor acknowledged the particular amount to be due on calculating the interest not only on the original principal, but on the principal *plus* the interest which was acknowledged on a previous occasion, he meant anything but an agreement on his part to treat the sum thus agreed to be due as principal for the calculation of interest in future. Whether such an acknowledgment can form the basis of an action or not is not the question in the present suit, and it may be that in the case of *Shankar* v. *Mukta* (1) there was not sufficient basis for an inference as to the agreement between the debtor and the creditor for the capitalization of interest. But in the present case it seems to me that the trial Court was right in inferring such an agreement, and the passing of the acknowledgments by the debtor seems to me to be consistent only with that inference.

Decree set aside.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 119 OF 1917.

August 20, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

ABDUL RAHMAN *alias* LUN MAUNG—APPELLANT

versus

MAUNG MIN—RESPONDENT.

Probate and Administration Act (V of 1881), s. 50—Letters of Administration, revocation of—Applicant, right of, to share in estate, barred, effect of.

Where in an administration suit it is found that the plaintiff's claim against the administrator for a share in the estate is barred by limitation, the determination of that issue is *res judicata* as regards an application by the same plaintiff for a revocation of the grant of administration. [p. 356, col. 1.]

If an applicant has no right to claim his share of an estate from the administrator, he has no interest which would support an application for the revocation of the grant of Letters of Administration. [p. 356, col. 1.]

Mr. *R. N. Burjorjee*, for the Appellant.

Mr. *Ba Dun*, for the Respondent.

JUDGMENT.—The appellant applied to the District Court for revocation of the grant of Letters of Administration to his maternal uncle, the respondent, in respect of the estate of appellant's father who died in June 1902. Letters were granted to the respondent in August 1902. The respondent filed his account as administrator in 1914 at the instance of the present appellant. In May 1915 the present appellant sued for the administration of the estate, the present respondent being one of the defendants in that suit. It was dismissed in August 1915 on the ground that the claim for a share in the estate was barred by limitation under Article 123, Indian Limitation Act, and the Divisional Court on appeal upheld that decision. Then in April 1916 the appellant filed the present application. Two issues were framed: (1) Was the present application *res judicata* by reason of the decision in the suit for administration? and (2) Was the grant of Letters of Administration obtained fraudulently by the respondent? Only documentary evidence was put in before the District Judge. He found that the present application was not barred by reason of the administration suit and that the present appellant had not only failed to prove that the grant had been obtained fraudulently but that he was a consenting party and tacitly accepted the accounts

rendered by the respondent; and the application was dismissed. The appellant in his application not only relied upon the allegation that the grant had been originally obtained by fraud, but he asked for the revocation of the grant on the ground of subsequent fraud on the part of the administrator in respect of the accounts rendered by him. But no issue was framed on the allegations of subsequent fraud.

Under the 5th Explanation to section 50 of the Probate and Administration Act, the exhibition by an administrator of an account which is untrue in a material respect is "just cause" for the revocation of the grant. If the appellant's right to bring this application was not, in our opinion, clearly barred by limitation, we should send the case back to the District Court to frame the necessary issue as regards the allegations of subsequent fraud in the inventory or account and to try that issue. But as it was held in the suit for administration between these parties that the appellant's claim for a share in the estate was barred by limitation under Article 123, the determination of that issue is *res judicata* as regards the present application. No period of limitation is expressly provided for an application to revoke the grant of Letters of Administration; but it is clear that if the applicant has no right to claim his share of the estate from the administrator, he has no interest which would support an application for the revocation of the grant of Letters of Administration. The question was not raised in the lower Court, but it is a matter that appears on the face of the proceeding and we feel bound to take cognizance of it. The appeal is, therefore, dismissed with costs—three gold *mohurs*.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES Nos. 2500 AND 2501 OF 1916.

April 4, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Panton.

GOBER SHEIKH AND OTHERS —DEFENDANTS—APPELLANTS

versus

ALIPUDDIN SHEIKH AND OTHERS —PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Relinquishment of tenancy—Abandonment—Non-payment of rent, effect of—*Res judicata—*Rent suit—Decision on question of title, whether* res judicata.

Where a *raiyat* goes away without giving notice from land which he has occupied and neither cultivates it nor pays rent, the landlord is justified in assuming that he has relinquished it and the *raiyat* has no right to ask to be re-installed on the ground that he never formally relinquished the land. Mere non-payment of rent is not evidence of abandonment, but non-payment of rent coupled with non-occupation of land is evidence of an intention to abandon it. [p. 357, col. 1.]

Where a suit for rent, in which the defendant denies the relationship of landlord and tenant and sets up the title of a third person who is not made a party to the suit, is dismissed and an adverse finding is given against the plaintiff's title, the decision cannot operate as *res judicata* on the question of title in a subsequent suit between the parties. [p. 359, col. 1.]

Appeals against the decrees of the District Judge, Assam Valley Districts, dated the 15th June 1916, reversing those of the Munsif, Dhabri, dated the 30th September 1915.

Mr. *B. Chackrabutty*, Babus *Basant K. Bose* and *Mohini Mohan Chackerbutty*, for the Appellants.

Babus *Sarat Chandra Roy Chowdhury* and *Satya Charan Sinha*, for the Respondents.

JUDGMENT.—These two appeals arise out of two suits for declaration of title to, and recovery of possession of, two small plots of land appertaining to a big *jote* of 960 *bighas*.

The Court of first instance dismissed the suits. On appeal to the lower Appellate Court, that decree was reversed and the suits were decreed. The defendant has appealed to this Court.

The questions raised in this appeal are, *first*, whether there was an abandonment of the *jote* by the plaintiff's predecessor, *secondly*, whether the decision in the rent suit brought by the plaintiff against the defendant No. 1 operates as *res judicata*;

and *thirdly*, whether the claim is barred by special limitation contained in section 27 of Act VIII of 1869.

The first question, namely, the question of abandonment arises in this way. Four brothers Manuddi, Kalamdi, Sanabdi and Bajaruddi held a certain *jote* consisting of 960 *bighas* under the Raja of Gouripore, defendant No. 3. It is found that the *jote* was their ancestral *jote*, that they acquired a right of occupancy in it and also that it was a valuable property, that in 1304 (1897) there was a great earthquake which "disturbed the levels of the country and caused subsidence of the river banks, the lands in this neighbourhood became subject to heavy inundations and this *jote* with others became uninhabitable and unculturable for some years. Most of the inhabitants then left the place but Manuddi, who appears to be one of the recorded *jotedars*, stuck to it till his death some 3 or 4 years after the earthquake." After Manuddi's death, his two wives found it impossible to remain there any longer and one of his wives and children removed to a distant place, but the other wife and her children (some of the plaintiffs being her children) removed to a place only two miles off and took shelter there with her relations. The learned Subordinate Judge says: "It is thus clear that Manuddi did not quit the land or abandon his residence until his death and that his heirs were compelled to leave their residence by unusual natural calamities over which they had no control." Then he considers the question whether the heirs of Manuddi should be taken to have abandoned the land. We think that the learned Subordinate Judge lays down the law correctly when he says "when a *raiyat* without giving notice goes away from the land he has occupied and neither cultivates it nor pays rent, the landlord is justified in assuming that he has relinquished it and the *raiyat* has no right to ask to be re-installed on the ground that he never formally relinquished the land. Mere non-payment of rent is not evidence of abandonment, but non-payment of rent coupled with non-occupation of land is evidence of an intention to abandon it."

Manuddi, according to the finding of the Court of Appeal below, died in 1307 or 1308 and so his heirs left the place after that. If Manuddi died in 1307, the holding was left unoccupied for about a year; but if it be in 1308, there was perhaps no interruption of occupation. It appears that there were several sub-tenants under Manuddi before the earthquake, and one of the questions was whether Kudrat was one of them. The learned Subordinate Judge finds that he was and that he came upon the land in 1308 shortly after Manuddi's wife and children had left the place.

One of the principal questions in controversy in the case was whether Kudrat held the land on behalf of the plaintiff or on his own account.

The Munsif found that he was a mere squatter as alleged on behalf of the Zemindar and that he occupied a part of the *jote* on his own account. The Munsif arrived at that finding on a consideration of a certain petition and other evidence and circumstances mentioned in his judgment. But they have been dealt with by the Subordinate Judge, who came to the conclusion that Kudrat was a former sub-tenant of the *jote* and that he temporarily left it after the earthquake but came back in 1308. The Munsif found that Manuddi paid rent partly at least down to 1306 and that there was absolutely no evidence produced by the plaintiffs to show that they paid rent for 1307 or 1308 B. S. or for any subsequent period. But the learned Subordinate Judge points out that the Zemindar did not produce the Touzis for 1307 and 1308 although they were called for by the plaintiffs, nor explain the reasons for their non-production, and he accordingly presumed that if the Touzis for 1307 and 1308 were produced, they would show that some rent was paid for those years. There was no payment in 1309 and in 1310 some rent was paid by Kudrat. The Zemindar's *amlah* would not take the same as paymant on behalf of Manuddi, although it was actually credited in his name. The learned Subordinate Judge held that the payment must be taken to have been on behalf of the *jotedars*. In 1311 the Zemindar settled the *jote* with one Durga

Nath. The plaintiff went to pay rent but the Dewan of the estate would not accept it. On these facts the learned Subordinate Judge found that there was no intention on the part of the heirs to abandon the *jote*, that there was no voluntary abandonment, and that the heirs were compelled to leave the place under circumstances beyond their control. The bulk of the land became unculturable; only a small portion was cultivated and was occupied by Kudrat who, according to the learned Subordinate Judge, paid rent on behalf of the plaintiff. The Court below was of opinion that the Zemindar did not proceed against the *jotedars* under section 52 of Act VIII of 1869 because the tenant would be entitled to considerable abatement of rent. On the whole, the Court below held that there was no abandonment As stated above, the learned Subordinate Judge correctly lays down the law on the point and on the findings arrived at by him we are unable to hold that he was wrong in his conclusions.

The second contention is whether the decision in the rent suit operates as *res judicata*. That was a suit brought by the plaintiff against the defendant No. 1 for rent and was based upon a registered Kabuliyat. The defendant denied the relationship of landlord and tenant, pleaded that the Kabuliyat was obtained by misrepresentation and set up a tenancy under the defendant No. 2 in the present case, who had derived title to the property in suit through one Durga Nath with whom the land was settled by the Zemindar, defendant No. 3. Two issues were raised in the case, namely, whether there was relationship of landlord and tenant between the plaintiff and the defendant No. 1 and whether the Kabuliyat was genuine. The Munsif decided the question against the plaintiff and he expressly said "An incidental inquiry into the title is necessary". On appeal the learned Subordinate Judge considered the question whether the *jote* was abandoned by the plaintiff's predecessor and decided the question against the plaintiff.

Reliance was placed on behalf of the appellant on the case of *Radhamadhub Holdar* v. *Monohur Mukerji* (1). But in that case the defendant set up a title in himself. Here the defendant set up the title of Dhula Prodhania (defendant No. 2) in the present case. As pointed out by Mitra, J., in the case of *Sahadeb Dhali* v. *Ram Rudra Haldar* (2), "The decisions of this Court on the question of *res judicata* when the previous suit was one for recovery of rent may be classed under two heads. The first class of cases is when the defendant, the alleged tenant, sets up his own rights to the land and denies the relationship of landlord and tenant, denying the plaintiff's title to the land, and the substantial issue raised is—does the land covered by the suit belong to the plaintiff or the defendant." The case of *Kasiswar Mukhopadhya* v. *Mohendra Nath Bhandari* (3) belongs to this class.

The second class of cases bearing on the question of *res judicata* is where the defendant either sets up the title of a third person, and denies the relationship of landlord and tenant or where the defendant pleads that he is not either in occupation of the land, or that the tenancy which existed had expired. In this class of cases the only issue is—did the relationship of landlord and tenant exist between the parties during the years covered by the suit. The case of *Srihari Banerjee* v. *Khitish Chandra Rai Bahadoor* (4), in which the case of *Radhamadhub Holdar* v. *Monohur Mukerji* (1) was distinguished, belongs to this class.

In *Run Bahadur Singh* v. *Lucho Koer* (5) the Judicial Committee observed as follows:—"Having regard, however, to the subject-matter of the suit, to the form of the issue (which has been above set out) and to some expressions of the learned Judge, their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, *viz.*, whether any

(1) 15 C. 756 (P. C.) 15; I. A. 97; 12 Ind. Jur. 297; 5 Sar. P. C. J. 211; 7 Ind. Dec. (N. S.) 1088.
(2) 10 C. W. N. 870.
(3) 25 C. 136; 13 Ind. Dec. (N. S.) 93.
(4) 24 C. 569; 1 C. W. N. 509; 12 Ind. Dec. (N. S.) 1048.
(5) 11 C. 30' (P. C.); 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960.

and what rent was due from the tenant, and that on this ground also the judgment was not conclusive."

The Full Bench decision in the case of *Dwarkanath Roy* v. *Ram Chand Aich* (6) may also be referred to. There a previous suit for rent was dismissed, the defendant having set up the title of a third person who was no party to that suit. In a subsequent suit against the defendant and the person whose right was set up by the defendant, the Court held that "having regard to the nature of the relief sought in the previous suit, and the relief sought in the present suit, it is impossible to say that the plaintiff is barred in this suit from establishing his title to the land both against the alleged tenant and also against the person whose title as landlord the tenant defendant had set up in the rent suit."

We are accordingly of opinion that the decision in the previous rent suit does not operate as *res judicata*.

The last question is whether the claim is barred by special limitation under section 27 of Act VIII of 1859.

The appellant relies upon the case of *Srinath Bhattacharji* v. *Ram Ratan De* (7). But in that case the tenant sought to recover possession of the holding from his landlord who had wrongfully ejected him. In the present case the plaintiff says that he wants to have his title declared as superior *jotedar* against the defendant No. 1, his tenant, and to obtain possession of the land by ejecting the defendant No. 1. The decree for *khas* possession has been passed by the lower Appellate Court against the defendant No. 1 alone. No decree for possession has been passed against the defendant No. 3 nor against the defendant No. 2, whose rights were set up by the defendant No. 1 as his superior *jotedar*. It is contended that there is no cause of action against the Raja, defendant No. 3, because the cause of action was stated in the plaint to have arisen from the 21st January 1913, when the defendant filed a written statement. In that written statement he set up defendant No. 2 as his superior landlord and stated that after the earthquake the land came into the *khas* possession of defendant No. 3 That was the cause of action for making the defendants Nos. 2 and 3 parties to the suit. There was no dispossession alleged by the plaintiff as against the defendant No. 2 or defendant No. 3 and the defendant No. 3 himself does not say that he had dispossessed him but that the *jote* was abandoned by the plaintiff. In these circumstances the suits are not barred by special limitation.

The result is that the appeals are dismissed with costs.

Appeals dismissed.

(6) 26 C. 428 (F. B.); 3 C. W. N. 266; 13 Ind. Dec. (N. S.) 876.

(7) 12 C. 606; 6 Ind. Dec. (N. S.) 412.

PATNA HIGH COURT.

CIVIL REVISION CASE No. 11 OF 1919.

May 1, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

BRIJ KISHORE LAL—PETITIONER

versus

PRATAP NARAIN—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Hindu Law—Execution of decree—Sale—Reversioner, whether entitled to apply to set aside sale.

A reversioner to a Hindu widow's estate is entitled to apply to set aside a sale under Order XXI, rule 90 of the Civil Procedure Code. [p. 360, col. 1.]

Appeal from a decision of the District Judge, Patna, dated the 20th December 1918, reversing that of the Sub-Judge, Patna, dated the 5th August 1918.

Messrs. *Kulwant Sahay, Khurshaid Husnain, Kailashpati, Siveswar Dayal* and *Nawal Kishore Prosad II*, for the Petitioner.

Messrs. *P. K. Sen, Ganesh Dutt Singh* and *Jalgobind Singh*, for the Opposite Party.

JUDGMENT.

MULLICK, J.—The first question is whether a reversioner to a Hindu widow's estate is entitled to apply under Order XXI, rule 90, Civil Procedure Code, to set aside the sale of immoveable property.

In order to consider the effect of the amendments to section 311 of the Code of 1882, which is now replaced by rule 90, it will be helpful to consider also the provisions of the cognate section 310A, which is now represented by rule 89.

Under section 310A a person whose immoveable property had been sold was compe-

tent to make a deposit to have the sale set aside, and it was held that the provision applied to a reversioner whose interest purported to have been sold by the Court. *Pankhabati Chaudhurani* v. *Nonihal Singh* (1). In my opinion what has to be looked at, whether under section 310A of the Code of 1882 or under Order XXI, rule 89 of the present Code, is not what the Court can sell but what it purports to sell and if in that which has been sold any person has an interest as distinguished from mere personal claims relative to the property, then that person is certainly competent to make a deposit. It follows, therefore, that those who have an interest paramount to that of the judgment-debtor are not affected by the sale and cannot apply. It is not necessary that the applicant should have an interest *in præsenti*. It is now settled that, although the reversioner has only a *spes successionis* which is not a transferable interest within the meaning of the Transfer of Property Act, he has an interest which entitles him to protect the *corpus* and to obtain declarations with the object of ultimately recovering it when the reversion opens, and I agree that he would be still entitled under the present Code to apply under Order XXI, rule 89.

Under section 311 of the Code of 1882 the reversioner would have been no less competent to apply to set aside the sale; for that section, too, conferred the power to do so upon a person "whose immoveable property had been sold."

Order XXI, rule 90, of the present Code goes, in my opinion, still further and the words "whose interests are affected by the sale" would seem to include not only a reversioner but possibly also persons who have no interest in the property itself, such as persons entitled to specific performance under a contract for sale, or licensees. It is not necessary, however, to decide for the purposes of the present case how wide the scope of the word 'interests' is; it is sufficient to say that it includes a reversioner in the position of the petitioner before the Subordinate Judge.

The next question is whether assuming that the petitioner in question can apply, we should interfere with the order of the learned District Judge. Now the Subordinate Judge held that the petitioner was incompetent to apply and also that there had been no inadequacy of price.

The District Judge disagreed on both points and set aside the sale.

The decree-holder then moved this Court and obtained a Rule only in respect of lots Nos. 4, 5 and 6. In support of the Rule it is contended before us that the learned District Judge has declined to exercise jurisdiction by coming to no finding on the point whether there has been any inadequacy of price in respect of these lots. The learned District Judge appears to have thought that there was some doubt as to what, if any, saleable interest the judgment-debtor had in these lots by reason of a previous auction-sale, and, as there was no clear finding upon the point by the Subordinate Judge, he set aside the sale of these lots too.

I think under the circumstances the learned Judge acted quite rightly, and there was no refusal on his part to exercise jurisdiction.

The result is that the application is rejected with costs. Hearing fee three gold *mohurs*.

JWALA PRASAD, J.—I agree.

Application rejected.

(1) 21 Ind. Cas. 207; 19 C. L. J. 72; 18 C. W. N. 778.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 155 OF 1917.

August 19, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

JOGENDRA LALL CHOWDHURY—DEFENDANT—APPELLANT

versus

MI ASHA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Covenant running with land—Covenant for renewal, nature of—Transfer of property, whether carries right of renewal.

A covenant for renewal being a covenant running with the land, where a grantee of land for a term of years with the right of renewal transfers his right in the property, the benefit of the right of renewal goes with the transfer unless there is an express or implied intention in the document of transfer to the contrary. [p. 362, col. 2.]

Mr. *Giles* (with him Messrs. *J. R. Das* and *Lambert*), for the Appellant.

Mr. *McDonell*, for the Respondents,

JOGENDRA LALL CHOWDHURY *v.* MI ASHA.

JUDGMENT.

TWOMEY, C. J.—The question in this appeal is as to the construction and effect of a document dated 8th June 1897, by which the first respondent Mi Asha as executrix of the estate of her late husband Abdul Hashim deceased transferred a piece of land measuring about 1824 acres, in the Akyab District and known as the Taung Chaung grant, for the sum of Rs. 18,000 to one Obborno Charun Chowdhury, who has since died and who is represented by his executor, the present defendant-appellant Jogendra Lall Chowdhury.

This land was originally granted in 1844 under the Arakan Waste Land Rules of 1839 and 1841. Those rules authorised the Local Revenue Officers to give grants of land—which were to be rent-free for a specified period and were then to be assessed at certain prescribed rates which were to be in force for a specified period, and at the end of this period it was provided that the grantees would "be entitled to a new lease of 20 years' duration and on the expiration thereof to further renewal for a similar period and the same on the lapse of each successive lease." At each renewal the payment to be made by the grantee was to be subject to revision and no alteration was to take place until the expiration of the period of the lease. At the time of the transfer in 1897 the grant was held by Mi Asha under a renewal made in favour of her husband Abdul Hashim by the Settlement Officer, Akyab District, on the 9th July 1884. The transaction of 1884 between Government and Abdul Hashim consisted of two documents. By the first document the Government granted the land to Abdul Hashim, his heirs, executors, administrators and assigns, Abdul Hashim for himself, his heirs, etc., on the other hand, undertaking to pay Rs. 1,700 per annum to Government and to abide by the conditions in the second document executed on the same date. By the second document Abdul Hashim undertook to pay the sum of Rs. 1,700 annually for a period of 30 years and he expressly waived his claim to abatement on account of bad seasons or other specified causes. These two documents are clearly the *patta* and *kabuliyat* referred to in rule 6 of the rules.

On the 10th of May 1897, Mi Asha as executrix petitioned the District Court for permission to sell the grant land in order to pay off a certain decree and this petition was granted by the Court. It was in pursuance of this permission that she transferred the land to O. C. Chowdhury on the 8th June following. The document of transfer is drawn up in the form of an assignment of the remainder of the term of 30 years computed from the 9th July 1884, when the last renewal was granted as mentioned above. It recites that Mi Asha has agreed with Chowdhury for the absolute sale to him of the grant land. Subsequently on the 9th August 1897 she put in a petition to the Deputy Commissioner objecting to the transfer of the grant to Chowdhury's name. In this petition she represented that there was a contemporaneous oral agreement by which the sum of Rs. 18,000 was to be paid back in the sum of Rs. 30,000 within six years, which sum of Rs. 30,000 includes the principal and all interest. She apparently meant to represent that the transfer was intended to be only a usufructuary mortgage for six years. The petition was dismissed and she was referred to the Civil Court and Chowdhury was registered as proprietor of the grant in due course. In her written statement in two subsequent suits, Civil Regular No. 20 of 1897 and Civil Regular No. 15 of 1898 in the District Court of Akyab, Mi Asha repeated her plea as to the transaction being only a mortgage for six years. The present suit was filed on the 11th of May 1917, Chowdhury having obtained from the Deputy Commissioner on the 28th October 1914 a fresh lease for twenty years from the 1st October 1914 in pursuance of the provision for renewal in the Waste Land Rules. Mi Asha's suit was a suit against J. L. Chowdhury, the legal representative of the original transferee, for possession of the grant and for payment of Rs. 30,000 as mesne profits. In her plaint she abandons the position formerly taken up by her, *viz.*, that the transfer was intended to be for a period of six years. Her claim is that she sub-let the land to Chowdhury for the unexpired portion of the 30 years' term in respect of which a renewal was granted in 1884. The sub-lease according to this plea would be for a period of 17 years from June 1897 to September 1914.

Mi Asha claims that the renewal of the grant obtained by the respondent in 1914 must be taken to have been obtained on her behalf, as he was her tenant and was bound to protect her interests and any act done by him to improve or add to the land must be taken to have been done on behalf of Mi Asha as his landlord.

The District Court has decreed the plaintiffs' suit. The learned Judge, after detailed examination of the rules, expressed the opinion that leases granted under these rules savoured of a freehold and that the land was not merely leased to the grantees but became their absolute property subject only to the payment of revenue. He was much impressed by the provision in rule 6, which provides that all land assigned under these rules shall be the "hereditary property" of the grantees and he considered that the rules gave more than a lease with the right of renewal. He was satisfied that in the case of a mere lease the right of renewal is a covenant running with the land and that the right to renewal would, therefore, accrue to the transferee of the lease; but as he considered that Mi Asha had a higher tenure than that of mere lessee and as she purported to assign and convey the land only for some 17, years, *i.e.*, the remainder of the term of 30 years from 1884 without any reference to the right of renewal, the learned Judge could not see how she could be held to have conveyed away her right of renewal by mere implication. He considered that the absence of any mention of that right in the document of June 1897 was far more significant than the absence of a covenant to re convey the land to Mi Asha at the end of the period for which she parted with possession.

In construing rule 6 of the Waste Land Rules as favourable to the notion of a freehold, the learned Judge appears to have overlooked the concluding words of that rule which provide that on the execution of a *kabuliyat* the grantee shall be entitled to a *patta*. The words *kabuliyat* and *patta* are capable of various meanings, but when they are used in association with one another it is clear that the word *patta* has the meaning of a lease, and that the word *kabuliyat* means the tenant's agreement to pay rent to the landlord. This is exemplified by the terms of rule 15 of these very rules which speak of a *patta* given to a *ryot* or tenant in exchange for a *kabuliyat* received from the *ryot*. It is plain also that the Waste Land Rules make no clear distinction between revenue and rent. In rule 1 the word "rent" is used for the payment made by the grantee to the Government, while in rules 14 and 15 we find the word "revenue" used indifferently to describe payments by the *ryots* to the grantee and by the grantee to the Government.

It matters not for the purposes of this case whether the holders of grants under these rules are correctly described as lessees or grantees. The essential point is that their tenure, whatever it may be called, is subject to periodical renewal and the point which we have to determine is whether the right of renewal passed to the transferee by the document of 8th June 1897. There can be no doubt that the intention of the parties was that Mi Asha should transfer her whole interest in the property. There was an agreement for an absolute sale, and the document was drawn up in the form of an assignment of the remainder of the term of a lease only because it appeared that that was the apt way of transferring Mi Asha's whole interest under the *patta* and *kabuliyat* of 1884. Section 8 of the Transfer of Property Act was not in force, but that section merely puts in statutory form the ordinary law as to the operation of transfers of property. It shows that if Mi Asha desired to retain for herself the right of renewal, she could only do so if the intention was expressed or necessarily implied in the document of transfer. A covenant for renewal is a covenant running with the land and this is true not only in the case of ordinary leases, but also in the case of other tenures which are subject to periodical renewal.

On these grounds I would set aside the decree of the District Court and dismiss the plaintiff's suit. The plaintiff Mi Asha should pay the defendant appellant's costs in both Courts and the second respondent Abdul Hamid, who was joined as a party in the appeal in this Court, should be made jointly liable for the costs in this Court. Costs of two Counsel will be certified. The plaintiff-respondent should be

ordered to pay the Court fees which would have been paid by her in the District Court if she had not been permitted to sue as a pauper.

ORMOND, J.—I agree.

Decree set aside.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 272 OF 1915.

November 26, 1918.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Shah.

VAMAN GURURAO DESHPANDE—

PLAINTIFF—APPELLANT

versus

KRISHNAJI TIMMAJI KULKARNI

AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Patita, *whether can adopt—Adopted son, position of.*

A person who acquires a share in property by partition and afterwards becomes a "*patita*" by the commission of a crime of which he is found guilty, is not prohibited by the Hindu Law from adopting a son, and there is no disqualification in such adopted son from inheriting to his father's property. [p. 364, col. 2; p. 365, col. 2.]

First appeal from the decision of the first class Subordinate Judge, Bijapur, in Civil Suit No. 44 of 1914.

Mr. *Jayakar* (with him Mr. *H. B. Gumaste*), for the Appellant.

Messrs. *Coyajee* and *Rangnekar* (with him Mr. *R. A. Jahagirdar*), for Respondent No. 1.

JUDGMENT.

SCOTT, C.J.—This suit is filed by the plaintiff to recover possession of certain Vatan property which belonged to one Narsingrao, who died in December 1910. The plaintiff claims to be the nearest heir of Narsingrao, and impleads the 1st defendant who claims to be the adopted son of the deceased, and the 2nd and 3rd defendants who, it is said, are nearer heirs than the plaintiff in the event of there being no adopted son.

Narsingrao was concerned in the murder of a Mahar many years ago, and having been found guilty was transported to the Andamans. He returned about the year 1884 from his transportation, and went to Benares before returning to the Bijapur District where his property was situated, and performed the *prayaschitta* or penance for purification prescribed by the Hindu texts. The fact that he performed this *prayaschitta* is proved to our satisfaction, as it was proved to the satisfaction of the lower Court.

The issues raised in the trial Court were whether the plaintiff was the nearest heir of Narsingrao; whether Narsingrao adopted defendant No. 1; whether he was competent to adopt on account of the conviction; whether the incompetency was removed by the *prayaschitta* he took; and whether he took the *prayaschitta*.

All these issues have been found against the plaintiff and in favour of the 1st defendant.

The question whether the plaintiff is the nearest heir of Narsingrao is immaterial, if the 1st defendant is proved to have been adopted by Narsingrao validly so as to vest in him on Narsingrao's death the property of the deceased.

The first question then to be considered is the question of fact: Did Narsingrao adopt the defendant. The 1st defendant's case is that he was adopted on the 6th of September 1910, and on the 22nd of November an adoption deed was executed by Narsingrao in his favour. The interval of time which passed between the date of the alleged adoption and the execution of the deed is strongly relied upon on behalf of the appellant as a suspicious circumstance which should induce the Court to hold that the adoption is not proved. If the fact of the adoption is satisfactorily established as having taken place on the 6th September, there can be no doubt whatever that the adoption deed was the concluding part of the acts which Narsingrao thought necessary, for not only has the deed been attested by various witnesses, some of whom have been called, and believed by the lower Court, but Narsingrao had the document registered in his lifetime and acknowledged his execution of the deed. The fact of the adoption on the 6th September is proved by the evidence of various witnesses. There are relations of the parties and there are castemen of the deceased and certain Lingayat witnesses also, all of whom speak to the *factum* of the adoption, and the document, Exhibit 77, which is the deed acknowledged by Narsingrao before the Registrar, refers to the adoption

as having taken place on the 6th of September.

The learned Counsel for the appellant, in order to parry the direct evidence of adoption, has suggested various defects which he said should induce the Court to hold the adoption not proved. I have already referred to the interval which took place between the ceremony and the execution of the deed, which is one of the points relied upon. The learned Counsel says that there was a state of pollution off and on in Narsingrao's family in consequence of which it is unlikely that anything would have been done in the matter of an adoption, and there were astrological objections to the performance of the adoption, which, however, relate to dates subsequent to that on which the ceremony is said to have taken place, and there was an unpropitious conjunction of planets during a time between the date assigned for the adoption and the date of the execution of the deed; it is not, however, suggested that the unpropitious conjunction of Jupiter and Venus would invalidate a previously performed ceremony.

Then it is said that if the adoption had taken place on the 6th of September, the adopted son would have changed his name earlier than he did. He was in fact a schoolmaster who is on the rolls of the educational establishment under a particular patronimic, that of his natural father. It appears that until he got the authority of his superiors to assume the name of his adoptive father, he continued to sign himself in the school registers or attendances of pupils under the name of his natural father. His family name did not change with the adoption, as he was a Deshpande before and a Deshpande after the adoption. Another reason why he should not at once assume the name of his adoptive father was that as he passed into a Vatandar family, it was necessary for him to advise the Collector upon the subject. These seem to be sufficient reasons in the circumstances of the case for the delay in the adoption of the new name. The delay itself is not sufficient having regard to the direct evidence of the adoption and the recital in the adoption deed, acknowledged by the deceased, for holding that there was no adoption in fact. We, therefore, have no hesitation in accepting the conclusion of the learned Judge upon the second issue that Narsingrao did adopt the defendant No. 1.

The third issue is whether he was competent to adopt on account of the conviction, and the fourth is whether the incompetency was removed by the *prayaschitta* which he took. We have not been referred to any text or any judicial authority for the proposition that one who has become '*patita*'(**) owing to his having committed a murder is disqualified from adoption of a son. On the other hand the high authority of Mr. Mayne has been referred to by the learned Counsel for the respondent, who states that there seems to be no reason why the adopted son of a disqualified person should not succeed to all the property which had already vested in his father or which was acquired by him.

Now the property which we are concerned with in this suit is the share of Vatan property falling to Narsingrao on partition between himself and his co-parcener, Swamirao. That share had been acquired by him on partition prior in date to his becoming a '*patita*' by the commission of the crime of which he was found guilty. The author of the Mitakshara, in dealing with the text of Yajnavalkya which relates to the exclusion of persons from inheritance in section X of Chapter II, pl. 6, observes : "They (*i.e.*, disqualified persons) are debarred of their shares, if their disqualification arose before the division of the property. But one already separated...is not deprived of his allotment." A person, therefore, who has already separated and obtained his share before his disqualification is not a person who is disinherited by reason of such defect, and if there is no prohibition of adoption by such a person, and if the highest authority obtainable is to the effect that the adopted son of such a person is not disqualified from inheriting to his father's property, it follows logically that the 1st defendant is entitled to inherit. This is the real question in the suit, although it is not raised as a specific issue in the lower Court or stated in the memorandum of appeal.

If it be necessary to go further, it may be pointed out that in pl. 7: Vijnanesvara says "If the defect be removed by medicaments or other means as penance and atonement at a period subsequent to partition,

the right of participation takes effect, by analogy to the case of a son born after separation," that is to say, that the effect of *prayaschitta* is to enable a disqualified person to re-open the partition and assert his right to a share in the property.

Again pl. 9 seems to tell against the contention of the appellant: The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds: 'But their sons, whether legitimate or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects', so that even in the case of one who has not acquired his property before pollution, and who has not performed such *prayaschitta* as would entitle him subsequently to assert his right to the property, his *aurasa* son would not be disentitled to succeed, presumably to the grandfather's property, while in the case of persons who have acquired their property before a pollution or defect, or who have performed satisfactory *prayaschitta*, and asserted their right thereafter successfully, there is no text which indicates any disqualification for inheritance in the natural or adopted sons of such persons.

For these reasons it appears to me that the conclusion arrived at by the learned Judge in favour of the 1st defendant is correct. I would, therefore, affirm the decree and dismiss the appeal with costs.

SHAH, J.—I concur. I desire to state briefly my reasons for the conclusion on the question of law that has been raised on behalf of the appellants as to the validity of the adoption of defendant No. 1 by the deceased Narsingrao. The contention is that the adoption is invalid, because Narsingrao was a *patita* at the date of the adoption, and that a *patita* cannot make a valid adoption. He is said to be a *patita* within the meaning of the word as used in Yajnavalkya's verse and as explained by Vijnanesvara in the Mitakshara on account of his having committed the murder of a Mahar about the year 1864.

In the first place, it is not made out that Narsingrao was a *patita* at the time of the adoption in 1910. Narsingrao performed the necessary *prayaschitta* at Benares when he returned to India in 1885 after serving out the sentence of transportation for life. Vijnanesvara points out that if the defect be removed by medicaments or other means, the disqualification ceases to exist: (see Mitakshara, Chapter II, section 10, paragraph 7, Stokes' Hindu Law, page 457). The expression 'or other means', according to Balambhatti, would include *prayaschitta*, (penance). Thus if the defect were capable of removal by penance, it had been removed in the present case. Further the word *patita* according to Vijnanesvara means *brahmahadih* (...) and he includes a person guilty of a secondary sin *upapataka* (.....) among the persons indicated by the word *adi*(...)in Yajnavalkya's verse. It is probable that Vijnanesvara interprets the word *patita* as meaning a person guilty of any of the *mahapatakas* enumerated by Yajnavalkya in the Prayaschitta Adhyaya, verse No. 227, beginning with the word *brahmaha*, and it is clear that he could not have meant to include in that term persons guilty of *upapatakas* mentioned in verses Nos. 234 to 242. It may be, however, that Narsingrao was subject to the disqualification arising in consequence of his having committed a murder, being a person indicated by the word *adi* as explained by Vijnanesvara (see Mitakshara, Chapter II, section 10 paragraph 3). The proposition, however, has no practical importance in this case, as Narsingrao had already taken his share of the family property before he became thus disqualified: and according to the Mitakshara he would be deprived of his share if the disqualification arose before the division of the property, but as one already separated from his co-parceners, he would not be deprived of his allotment (Mitakshara, Chapter II, section 10, paragraph 6, Stokes' Hindu Law, page 456).

The next question is whether Narsingrao could make a valid adoption, assuming that he was otherwise disqualified, though not a *patita*, from inheriting or claiming a share at the time of the adoption. No text or authority has been cited on behalf of the appellants to show that such an adoption would be invalid. It is conceded that an adoption is not a *sanskara* according to Hindu Law. I see no reason to hold that a person subject to the disqualification, to which Narsingrao is assumed to have been subject at the time of the adoption, could not make a valid adoption. Mr. Jayakar has relied upon Mitakshara, Chapter II, section 10, paragraphs 9, 10 and 11 as showing

that a son other than an *aurasa* or *kshetraja* son is subject to the same disqualification as his father as regards inheritance and partition. This, however, does not affect the validity of an adoption by a person subject to a disqualification mentioned in Yajnavalkya's verse as explainad by Vijnaneswara. The meaning is that an adopted son cannot claim any share in the property, to which his father is disqualified from putting forward any claim. But there is nothing to prevent an adopted son from claiming the property already vested in the adoptive father on partition before the disqualification arose, though he may be prevented from claiming a share in the ancestral property not so vested. The adoption would be valid, but ineffective for the purpose of securing a share in the property, from which the adoptive father is excluded on account of the disqualification. Mr. Mayne has expressed the same opinion in his work on Hindu Law (8th Edition, section 598, page 83:). The author of the Dattaka Chandrika in section 6, paragraph 1, takes the same view, and suggests by implication that a disqualified person is not prevented from making an adoption, though the adopted son may have no right to the estate of the paternal grandfather.

I am, therefore, of opinion that the appellants have failed to establish either that Narsingrao was *patita* at the date of the adoption : or that, assuming that he was subject to a disqualification at the time, he could not make a valid adoption.

It is not necessary to consider the question whether the plaintiff No. 1, who is the grandson of the brother of Narsingrao, is entitled to succeed in preference to defendants No. 2 and 3, who are the sons of Narsingrao's father's brother, according to the Mitakshara.

Appeal dismissed;
Decree confirmed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 32 OF 1918.

February 7, 1919.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

GULAM MAHABOOB KHAN SAHEB, TRUSTEE OF THE ENDOWMENT OF THE TOMB AND MOSQUE AT ANAMASAMUDRAMPET—PLAINTIFF No. 3—RESPONDENT.

Dharmadayam inam—*Crown grant for charity, for upkeep of mosque and feeding poor—Construction of document—Alienation, temporary, by trustee—Lease and mortgage of endowed property—Performance of services—Resumption of* inam, *right of—Suit for possession—Limitation Act (IX of 1908), Sch. I, Arts.* 14, 144.

Dharmadayam inams granted by the Crown for charitable objects, on condition of certain services being performed, cannot be resumed merely because the trustee has made a temporary alienation of the endowed properties, so long as the services mentioned in the deed of grant are performed, even though less efficiently, and the endowed property is not wholly lost to the charity.

A grant of some villages was made by a Nawab of the Carnatic for the upkeep of a mosque, for performing the usual festivals and for feeding travellers and poor men. The grant was not in the nature of a personal *inam* but was a charitable or *dharmadayam inam* and was to subsist so long as the service was performed. The British Government confirmed the grant and exempted the villages from payment of Government revenue. The trustee having leased one of the villages for 12 years and usufructuarily mortgaged another for 30 years, the Government resumed the *inam*. The services, however, continued to be performed. The plaintiff trustee sued Government for possession of the villages more than a year after the order of resumption was passed:

Held, (1) that a temporary alienation whereby the property was not altogether lost to the charity did not justify resumption; [p. 369, cols. 1 & 2; p. 371, col. 1.]

Sikkandar Rowther v. *Secretary of State*, 38 Ind. Cas. 200; 5 L. W. 402, explained.

(2) that as the object of the suit was to recover possession of the villages, whatever the form of the prayer, the order of resumption should be treated as a nullity; [p. 370, col. 2.]

(3) that the suit was in time under Article 144 of Schedule I of the Limitation Act; [p. 371, col. 1.]

Subbanna v. *Secretary of State*, 31 Ind. Cas. 267; (1915) M. W. N. 915, distinguished.

Per *Abdur Rahim, J.*—Any default in the performance of services, of however minor a character, would not come within the condition of the grant, 'so long as the service is performed'. What is contemplated by the said condition is that, if the charity fails altogether or substantially, for instance, through the disappearance of the mosque or of persons who would resort to the institution for prayer, etc. or if the charity is entirely discontinued, then the Government would be entitled to resume the grant. But the resumption is not justified

where the services are still maintained, though not as efficiently as they ought to be, and some at least of the objects of the grant are of an unfailing character. [p. 370, col. 2.]

Gunnaiyan v. *Kamakchi Ayyar*, 26 M. 339, explained.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Nellore, in Original Suit No. 14 of 1916, dated the 6th August 1917.

FACTS appear from the judgment.

Mr. *V. Ramesam* (Government Pleader), for the Appellant.—The condition of the grant was that the services should be regularly performed, the income of the endowed property should be kept intact and applied for purposes of the charity. The lease and mortgage of the two villages, though not of a permanent character, is a diversion to purposes alien to the grant, and amounts to a violation of the condition of the grant.

In the case of Dharmadayam the doctrine of *cypres* cannot be applied: *Gunnaiyan* v. *Kamakchi Ayyar* (1).

Even a partial diversion may justify resumption. Appeal No. 342 of 1915 (unreported).

The suit is barred. It should have been brought within one year from the date of the order resuming the Inam. That is the cause of action for plaintiff's suit.

Mr. *T. V. Venkatrama Aiyar*, for the Respondent.—This Inam cannot be resumed at all under section 2 of Regulation XXXI of 1802.

[ABDUR RAHIM, J.—But you have not taken this point in the trial Court.]

Suppose the villages are liable to be resumed, my submission is that the condition of the grant has not been violated. The mosque is still resorted to by worshippers and the poor are being fed. So long as the charity is not made entirely to disappear and the property is not entirely dissipated, there is no breach of the condition. Mere temporary alienation will not justify resumption. At date of resumption, the lease in respect of one of the villages had expired. The lower Court has found, as a fact, that the mosque was maintained in good repair and that the services were regularly performed. There has been a substantial compliance with the conditions of the grant. The trustee had in fact reduced the villages to possession by making the tenants to attorn to him. Even if the mortgage of one of the villages is not redeemed, that would not affect the charity as the debt would not be binding on it.

A mere alienation would not entail forfeiture: *Sikkandar Rowther* v. *Secretary of State* (2).

The suit is not barred. The prayer is, in substance, for possession of the resumed villages. The trustee is entitled to ignore the illegal order of resumption.

Article 14 of the Limitation Act does not apply. Article 144 governs the case and the suit is in time.

JUDGMENT.

ABDUR RAHIM, J.—The appellant, the Secretary of State for India, was sued by the respondents for recovery of two villages of Ganduvaripalle and Akbarabad in the District of Nellore. The Government purported to resume these villages, which are described as Dharmadhayam Inams, by an order passed some time in 1903. These two and eight other villages were made Wakf for the maintenance of a mosque, and for feeding the poor and similar purposes in the days of the Carnatic Nawab Wallajah. The history of the grant is set out in the enclosure to the Inam register, Exhibit I. There was a man called Rahim Tulla Sahib Pirzada, otherwise described as the Hazarath, who was regarded as a holy man and it was to him that the Fouzdar of Nawab Wallajah at first made a grant of two villages,—not those with which we are concerned,—so that he might feed Syed Mahomedans and other poor men and "ascribe its virtue to Prophet Mahomed." Then it appears eight other villages, including the two in question, were purchased by the Hazarath at a nominal price from the then Jagirdhar of Udayagiri and he made a gift of them for charitable purposes. He was in possession and enjoyment of the properties in his lifetime and was succeeded after his death, he having died without any issue, by a relation of his wife. The dedication to charity was made some time in the year 1775. After the death of the original founder the properties were held by his successor and the latter's descendants. In a previous

(1) 26 M. 339.

(2) 38 Ind. Cas. 200; 5 L. W. 402.

suit instituted under section 92 of the Civil Procedure Code, the whole history of the institution has been reviewed and it was found that the then incumbent of the office of trustee or 'Sajjada', as he was called, one Mahomed Usuf Sahib, was not fit to hold the office having been guilty of gross mismanagement, misappropriation, and misapplication of trust funds. Even before his time, there had been persistent mismanagement of the trust properties. Some of the previous trustees and he himself made alienations of some villages either by mortgaging them or by granting long leases. The two villages in question, Ganduvaripalle and Akbarabad, were also similarly alienated by the predecessor of the trustee who was the main defendant in the suit under section 92 of the Civil Procedure Code above referred to. Ganduvaripalle was leased for twelve years in 1894 and Akbarabad was usufructuarily mortgaged for thirty years in April 1883. The question for decision is whether these two alienations amount to a violation of the conditions in the Inam Patta so as to entitle the Government to resume the villages. As regards Ganduvaripalle, the lease practically expired sometime in 1906, and the usufructuary mortgage of Akbarabad had still about ten years to run at the date of the resumption if the mortgage debt was not paid in the meantime. The Inam title-deed itself is not forthcoming, but we have the Inam register and there, in column 21, the entry over the signature of Mr. Chentsal Rao is "I recommend the villages to be confirmed permanently so long as the service is performed." And looking at column 8, the service there meant is "for feeding the travellers and poor men and for maintaining an efficient establishment for the service in the mosque at Anamasamudrampeta and for performing the usual festivals, services performed." The order of the Inam Commissioner, Mr. Taylor, is as follows:—

"Although there is no Sanad or entry in the old accounts in support of 8 of those villages undoubted (?) the Sanad uninterrupted possession of them all as Inams for nearly a century must be respected.

The ten villages are confirmed in one deed and continued to the parties in column 16 for the maintenance of the religious objects for which they were granted."

Admittedly this is not what is called a personal Inam; nor is it an Inam in which the grant is made to a person on condition of his performing certain services of a religious character. The learned Government Pleader conceded that it was a charitable Inam or Dharmadhayam, that is to say, that it was an Inam for the maintenance and support of certain charitable and religious objects. What is granted here, so far as the Government is concerned, is the Government assessment; that is to say, the British Government confirmed the grant and exempted the villages from payment of the Government revenue. I might mention that Mr. Venkatarama Aiyar appearing for the respondents argued that this was not an Inam which the Government was entitled under any circumstance to resume because it comes within the description of the Inams specified in section 2 of the Regulation XXXI of 1802. Under that section the Inams which are declared to be non-resumable are certain grants for holding lands exempt from the payment of public revenue. But the question whether the present grant is one of that category having been exempt from payment of public revenue at the date mentioned therein was not raised before the Court of trial, and as pointed in *Sikkandar Rowther* v. *Secretary of State* (2), this is a question which should not be entertained for the first time in this Court if it was not properly raised in the Court of trial. I shall proceed on the assumption that the case is not covered by section 2 of Regulation XXXI of 1802, but that the villages were liable to be resumed if the condition on which the villages were held had been violated. I will also assume that the recommendation of Mr. Chentsal Rao forms part of the order of the Inam Commissioner, the effect of which would be that the grant was to continue so long as the services mentioned are performed. It will be noticed that some of the charitable objects are of an interminable character, such as feeding the travellers and poor men. One of the main objects of the grant is the maintenance of the mosque. It appears that on the death of the founder of these charities his tomb became an object of considerable veneration in the locality and by a long course of usage the proper maintenance of that tomb

the celebration of Urus and other ceremonies in commemoration of that holy personage became incorporated with the objects of the Wakf. The learned Subordinate Judge has gone into the evidence and come to the conclusion that the mosque is maintained in good repair and the services are regularly performed there and similarly the Hazrath's tomb is properly maintained and the services in connection with the tomb are observed. But there has, undoubtedly, been considerable mismanagement for a long time and it may be taken that the religious and charitable observances have not been uniformly performed either on the scale or in the manner in which they should have been. At the same time there can be no doubt whatever upon the evidence that there has been a substantial performance of the charitable and religious objects of the foundation in spite of misapplication and misappropriation of trust moneys from time to time by the trustees for the time being. In this connection it may be pointed out that in addition to the income of the 10 villages some income is derived also from presents made at the tomb of the Hazarath. Further it has already been held in the suit under section 92 of the Civil Procedure Code that the maintenance of the descendants of the 2nd Mutawalli or Sajjadanishin is also one of the objects of this charitable foundation. Alienation of these two villages and misapplication of the trust funds such as there have been would not, in my opinion, strictly be a breach of the condition of the Inam grant, 'so long as the service is performed'. As found by the Subordinate Judge, the services are performed though not to the full extent of the income actually derived or which could be derived from the properties. It is, however, argued by the learned Government Pleader that the alienation of the two villages, although not of a permanent character, is a diversion of the Inam villages to purposes alien to the grant and, therefore, the villages have become resumable. No doubt in a case where Inam villages are alienated in a manner so that they are lost to the charity and the charity cannot be maintained without their income the forfeiture clause would, in my opinion, come into operation. But I am not prepared to go so far as to hold that a temporary alienation, although for a number of years and as such beyond the power of the trustee for the time being, necessarily amounts to a violation of the condition of the grant. The fact cannot be overlooked that this is not a personal grant.

The grant is to a charity of a permanent character. It is inconceivable that it should have been intended that any act of mismanagement or malfeasance on the part of a trustee of a charity like this should result in the resumption of the grant. If that was the intention, one would have expected that the condition would have been to the effect that an attempt of any character at alienation by the trustee would make the Inam liable to resumption. In the case already mentioned of *Sikkandar Rowther* v. *Secretary of State* (2), it has been suggested that "a mere alienation of the trust property may not entail a forfeiture if the trustees kept the mosque clean and in good repair, put up the lights and kept it as a place fit for worship in the usual manner." It is not necessary for us to lay down any such general proposition, for here the alienation was not such as to deprive the charity of the use of the properties. It was further pointed out by Mr. Venkatarama Aiyar, the learned Vakil for the trustee-respondent, that the lease and the mortgage of the villages in question were not binding on the charity and that the trustee Mahamed Esuf Mia Peerzada in fact took steps to get back the villages from the lessee and the mortgagee. The evidence on that point is to the effect that he managed to obtain possession of the villages by getting the tenants to attorn to him by executing Muchilikas. It is, however, found that the mortgage amount due on Akbarabad was not paid, but the trustee or Sajjadanishin contends that the charity was not bound to pay inasmuch as the debt was not incurred for the benefit of the charity. It seems to me that we must put a reasonable construction upon the language of this grant which is of an extremely laconic character. All that is said is "the villages to be confirmed permanently so long as the service is performed." It cannot possibly mean that any default in the performance of the service, of however minor a character, would come within these words. Putting a reasonable construction on these words what is contemplated is that if the

charity fails altogether, or substantially for instance, through the disappearance of the mosque or of persons who would resort to the institution for prayer, etc., or if the charity is entirely discontinued, then the Government would be entitled to resume the grant. And that seems to be the interpretation placed on such grant by the Board of Revenue, which is the highest Revenue authority in the Presidency, as noticed in the Standing Orders placed before us. See Standing Order No. 54 of the old Order pages 120 to 122, paragraphs 2 and 3. Paragraph 2 says:—"Religious and charitable Inams may be resumed on the ground that the land in respect of which the title deed was issued has been alienated or otherwise lost to the institution or service to which it once belonged or that the terms of the grant are not observed." Then it says in paragraph 3: "In cases of abandonment or discontinuance of service, all reasonable endeavours should be made to secure a continuance or revival of religious and charitable institutions and services before proceeding to the resumption of Inams attached to them." That implies that the resumption is to be made only in cases of abandonment or discontinuance of service. Similarly in paragraph 4 it is said: "Proposals for the resumption of religious and charitable Inams should be submitted to the Board of Revenue except in cases of Inams or money allowances attached to temples, mosques, etc., which have been abandoned or in ruins for 12 years or more." We are not bound by any interpretation of the Board of Revenue. But I allude to it as showing that that is the customary interpretation which the Board of Revenue has placed on these and similar words of grant and which, in my opinion, accords with the proper interpretation of the grant in question in this case. I might here mention that what the Government has done in this case is not to order the revenue to be assessed upon resumption may be paid to the charity but has directed the assessment to be credited to the general revenues. The Government might be entitled to do that if they had a right to resume the grant, but I might here refer to paragraph 7 of the Standing Order already referred to: "When the land has been alienated but the institution or service is still maintained, the Inam will be resumed, converted into a Bariz deduction and re-assigned to the working incumbent or trustee." The assessment is to be credited to the general revenues only in the case of a service Inam, originally granted for the benefit of an institution or service if it has been resumed on account of the disappearance of the institution or cessation of the service which it is found cannot be restored. Here it is found that the services are still maintained, though they are not as efficiently as they ought to be, and some of the objects at least are of an unfailing character. Our attention has been drawn to a well-known decision of this Court in *Gunnaiyan* v. *Kamakchi Ayyar* (1), where there is a *dictum* of Bhashyam Iyengar, J., to the effect that in cases of Dharmadayam or Devadayam there is no room for the application of the doctrine of *cypres* execution. It is unnecessary for us to consider here such a general question. In this case there are certain objects such as feeding the poor and the travellers which it is not alleged have come to an end, or could become extinct. And I am not at present prepared to say that where there is a general charitable object mentioned in the grant, the doctrine of *cypres* execution can have no application to charitable Inams. And it seems that all that the learned Judge meant to lay down by that general *dictum* was that if the charity be of a specific character and it disappears, then the Government would be justified in resuming the grant altogether and crediting the assessment to public revenue. The learned Government Pleader also relied upon an unreported decision of a Bench of this Court in Appeal No. 342 of 1915, where it was held that a partial diversion may justify resumption. But in this case the alienation was not such as to render the villages unavailable to the charity. On that ground alone I think the present case may be distinguished from the unreported decision. I am of opinion that the conclusion of the Subordinate Judge on this point is correct.

The next question argued is as to limitation. It is contended on behalf of the Secretary of State that Article 14 of the Limitation Act applies and that, therefore, the suit not having been instituted within one year of the order passed by the Board of Revenue it was barred. Article 14 says

that for suits to set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for, the period of limitation is one year from the date of the act or order. I think that the Subordinate Judge is right in saying that whatever may be the form of the prayer, the object of the suit is to recover possession of the villages from the Government and that the order of resumption must be treated as a nullity as the contingency on which alone the Government was entitled to make the resumption did not arise. If the plaintiff did not seek to recover possession of the villages but only wanted the order of the Board of Revenue to be set aside and to obtain any relief in consequence of that order as in the case of *Subbanna* v. *Secretary of State* (3), the suit would come within the Article 14. I think the proper Article applicable in a case of this nature is Article 144, and it is not disputed that the suit was brought within 12 years of the Government taking up the villages. I would, therefore, dismiss the appeal with costs.

SPENCER, J.—I too am of opinion that the Government Order of the 18th March 1903 resuming the grant in this case cannot be justified on the facts which are before us. The terms of the grant, as they appear from the Inam register, Exhibit I, are that the Inam was to continue so long as the services, which consisted of (1) feeding travellers and the poor, (2) maintaining an efficient establishment for the services in the mosque at Anamasamudrampeta and (3) performing the usual festivals, continue to be rendered. The Subordinate Judge has found that there has been no cessation or discontinuance of the services specified in the Inam register. He says that the Urus and other usual festivals have been performed without break, though on a less grand scale than before; and there is no reason to question the correctness of this finding. In fact, shortly before the passing of the Government order the Collector, Mr. Butterworth, reported that religious worship was kept up although the expenditure in recent years had been considerably curtailed and that the mosque and appurtenant buildings were then maintained in good repair. He did not recommend the resumption of the Inam. But he considered that the directions of a Court for framing a scheme of administration were necessary and he asked for orders whether he should himself take action in this direction. The Board of Revenue left the matter in the hands of the Government, and the Government decided that those portions which had been mortgaged, leased or otherwise alienated and not redeemed within one year should be resumed. In no sense can it be said that there has been an entire failure of the trust in respect of this Inam, but it appears that the Government resolved to resume the two villages which formed a part of the endowment of the trust on account of the act of one of the former trustees in temporarily alienating them and thus diverting the income from the purposes of the trust. A list of the villages alienated is attached to the Collector's report, dated February 1st, 1901; and from his subsequent report of the 18th May 1903 it appears that all these villages except two were redeemed and freed from encumbrances by the trustee. The two exceptions are the villages of Akbarabad and Ganduvaripalle. The village of Akbarabad was mortgaged with possession for 30 years from 1893, with the condition that at the close of the mortgage period the mortgagee was to give up the property unconditionally and free of debts. The village of Ganduvaripalle was mortgaged with possession and then the mortgage was converted into a lease for 12 years from Fasli 1303. The terms for which these villages were alienated expired long before the suit. There was no permanent dissipation of the endowed property of the trust.

Now that a scheme has been prepared by this Court in Appeals Nos. 191 and 236 of 1914 and in 200 of 1917, it is unlikely that any further abuses of the trust and acts of mismanagement by the trustee will occur. It would not be doing justice to the intention of the founder to allow the institution to suffer for the fault of the office holder for the time being. Moreover the resumption that was ordered in 1903 would be contrary to the spirit of the Board's Standing Orders as amended in 1913 and brought up-to date, which lay down directions for dealing with cases of religious and charitable Inams held on title deeds. This is

(3) 31 Ind. Cas. 267; (1915) M. W. N. 915.

neither a case of a mosque abandoned or in ruins; nor is it one of a permanent loss of title to the land forming the endowment of the institution, in which cases the rules provide for the permanent resumption of the Inam. I, therefore, agree with my learned brother that the judgment of the lower Court must be supported on this point. I also agree with him that the respondent is entitled to the mesne profits awarded to him in the lower Court's decree, that Article 14 of the Limitation Act has no application to the facts of this case, and that the appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 493 OF 1917.

March 26, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

GOPAL CHANDRA SEN AND OTHERS —DEFENDANTS—APPELLANTS

versus

BANKIM BIHARI RAY AND OTHERS— PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 26—Easement, enjoyment of, discontinuance of, effect of—Right of way—Suit for establishment of right of way—Burden of proof.

In a suit to establish a right of way under section 26 of the Limitation Act the plaintiff cannot succeed merely by proof of enjoyment for 20 years; he must show also that such enjoyment ended only within two years before suit [p. 373, col. 1.]

Where there has been no obstruction by the defendant and there is no suggestion that the plaintiff voluntarily abandoned or discontinued the exercise of a right of way, it is not necessary for the plaintiff to prove affirmatively 'actual user' of the way down to a date within two years before the suit. A person may be said to be in "enjoyment" of a right of way during a period of time, though he does not actually "use" the way every moment. [p. 373, cols 1 & 2.]

Mere non-user for a time of an easement which the owner might, if he pleased, enjoy during every hour of that time, but which for some good reason he does not care to enjoy, is not necessarily discontinuance of enjoyment of the right. The cessation of user is not an invariable indication of abeyance of the enjoyment of a right. [p. 373, col 2.]

Appeal against the decree of the Officiating Subordinate Judge, Midnapur, dated the 10th January 1917, modifying that of the Munsif, 1st Court of Contai, dated the 7th October 1915.

Babus *Mohendra Nath Ray, Biraj Mohan Majumdar, Sakani Kant Sinha* and *Sarada Charan Maiti*, for the Appellants.

Babu *Jyotish Chandra Hazra* (with him Babu *Bipin Bihari Ghosh*), for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for declaration of a right of way, for removal of an obstruction thereto, for a permanent injunction and for incidental reliefs. The plaintiff set up a claim to use the pathway for several purposes, namely, (*a*) to obtain access to a public road across sand dunes which lie towards the north of his homestead, (*b*) to enable his workmen to bring materials for the repair and construction of houses, (*c*) to enable his sweepers to remove night soil, and (*d*) to take his cattle to the field. The defendants denied the existence of the alleged way and pleaded the bar of limitation. The trial Court decreed the suit. Upon appeal, the Subordinate Judge held that there was ample evidence to prove that the inmates of the house of the plaintiff had, for a period much exceeding 20 years, used the way for access to the sand dunes where they went to answer calls of nature; but he was not satisfied with the evidence as to the user of the pathway by sweepers, labourers and cattle. In this view the Subordinate Judge modified the decree of the primary Court and limited the declaration of the way for use by the inmates of the house of the plaintiff as a passage for access to the sand dunes on the north of the land of the defendants. The defendants were not satisfied with this partial success and have appealed to this Court, substantially on the ground that the facts found are not sufficient to justify the declaration of a prescriptive right of way under section 26 of the Indian Limitation Act.

To enable a plaintiff to establish that he has acquired, under the Statute, an absolute and indefeasible right of way, he must prove that the way has been peaceably and openly enjoyed by a person claiming title thereto as an easement and as of right, without interruption, and for twenty years. The Subordinate Judge has found that in this case the user extended over a period much longer than 20 years, that the right was peaceably and openly enjoyed,

without interruption, as an easement and not on account of any proprietary interest in the land and that no permission was obtained from the defendants or their predecessors. The plaintiff must accordingly be deemed to have acquired an absolute and indefeasible right of way.

The question next arises whether, as required by the Statute, the period of "enjoyment" for twenty years ended within two years next before the institution of this suit; for the plaintiff cannot succeed merely by proof of enjoyment for twenty years; he must show also that such enjoyment ended only within two years before suit: *Gopee Chund* v. *Bhoobun Mohun* (1), *Luchmee Pershad Narain Singh* v. *Tiluckdharee Singh* (2) and *Janhavi Chowdhurani* v. *Bindu Bashini Chowdhurani* (3). Upon this point, the Subordinate Judge is not explicit. In the eighth paragraph of the plaint, filed on the 19th March 1915, it was alleged that the defendants made the first attempt at obstruction on the 13th March and built the wall across the path three days later on the 16th March, thereby preventing the plaintiff from using the disputed way. In the written statement, although the right of way was denied, the assertion that the wall had been erected on the date mentioned was not expressly challenged. The Court of first instance found that the wall was erected in March and held that no question of limitation consequently arose. This finding does not appear to have been impugned before the lower Appellate Court. The position, then, is that the plaintiff acquired an absolute and indefeasible right of way by "enjoyment" for the statutory period; there was no discontinuance of the "enjoyment" by reason of an obstruction by the defendants, till within a few days previous to the institution of this suit, and there is no suggestion that the plaintiff voluntarily abandoned or discontinued the exercise of the right at any time before such date. In these circumstances, it is not necessary for the plaintiff to prove affirmatively "actual user" of the way down to a date within two years before the suit: *Sham Churn* v. *Tariney Churn Banerjee* (4), *Koylash Chunder Ghose* v. *Sonatun Chung* (5), *Vinayak Moreshwar* v. *Martand Trimbak* (6) and *Ghulam Muhammad* v. *Gulsher Muhamed Khan* (7). A person may, without violence to language, be said to be in "enjoyment" of a right of way during a period of time, though he does not actually "use" the way every moment. As explained by Garth, C. J., in *Sham Churn* v. *Tariney Churn Banerjee* (4), mere non-user, for a time, of an easement which the owner might, if he pleased, enjoy during every hour of that time, but which, for some good reason, he does not care to enjoy, is not necessarily discontinuance of enjoyment of the right; for instance, where the owner of a house does not use a way to it because the house is for a time unoccupied, or where a farmer desists for a time from using a pasture because he happens to have no pasturable cattle or because the herbage is scanty or unwholesome by reason of drought or like cause, each may still be considered as in "enjoyment" of the right of easement. This distinction between "enjoyment" of a right of easement and "actual exercise" of the right was overlooked in illustration (*b*) to section 26 of the Indian Limitation Act, 1877. [as was pointed out by Garth, C. J., in *Koylash Chunder Ghose* v. *Sonatun Chung* (5) which was consequently not reproduced in the Indian Limitation Act, 1908]. To put the matter briefly, cessation of user is not always inconsistent with continuance of enjoyment of a right [*Janhavi Chowdhurani* v. *Bindu Bashini Chowdhurani* (3)] or, in other words, cessation of user is not an invariable indication of abeyance of enjoyment of a right. This was recognised in *Carr* v. *Foster* (8), in which it was ruled that where a commoner had ceased to use the common during two years of the thirty (as he had no commonable cattle at the time), but had used it before and after, the Jury was justified in finding a continued enjoyment of the right during thirty years.

(1) 23 W. R. 401.
(2) 24 W. R. 295.
(3) 26 C. 593; 3 C. W. N. 610; 13 Ind. Dec. (N. S.) 581.
(4) 1 C. 422 at p. 430; 25 W. R. 228; 1 Ind. Dec. (N. S.) 264.
(5) 7 C. 132; 4 Shome L. R. 144; 8 C. L. R. 281; 5 Ind. Jur. 642; 3 Ind. Dec. (N. S.) 635.
(6) 6 Bom. L. R. 287.
(7) 38 P. R. 1886.
(8) (1842) 3 Q. B. 581; 2 G. & D. 753; 11 L. J. Q. B. 284; 6 Jur. 837; 114 E. R. 631; 61 R. R. 321.

See also the decision of the Judicial Committee in *James* v. *Stevenson* (9) and of Lord Chelmsford, L. C., in *Crossley* v. *Lightowler* (10). In our opinion, the disputed way was "enjoyed" by the plaintiff as an easement within two years next before the institution of the suit.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(9) (1893) A. C. 162; 62 L. J. P. C. 51; 1 R. 324; 68 L. T. 539.

(10) (1867) 2 Ch. 478; 36 L. J. Ch. 584; 16 L. T. 439; 15 W. R. 801.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 345-B OF 1917.

August 20, 1918.

Present:—Mr. Mittra, A. J. C.

KARNIRAM-NATHURAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HARDEO JAGANNATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mortgage—Prior and subsequent mortgages—Foreclosure suit by subsequent mortgagee—Purchase of equity of redemption by prior mortgagee—Prior and subsequent mortgagees, rights of—Redemption.

P. held two unregistered mortgages dated 25th December 1897 executed by *D.*, the original owner of the property. In 1909 *D.* executed a registered mortgage in favour of *H.*, who in 1913 instituted a suit for foreclosure without making *P.* a party to the suit and obtained a final decree on 9th May 1914. While this suit was pending, *D.* on 6th January 1914 sold by registered sale-deed the mortgaged property to *P.* who instituted the present suit for possession. The trial Court held that the sale having been made *pendente lite* was inoperative and allowed *P.*, to redeem the mortgage of 1909 in favour of *H.* The first Appellate Court, however, dismissed the suit on the ground that as *P.* could not enforce his mortgage at the date of the foreclosure suit, all his rights were extinguished. *P.* appealed to the High Court and *H.* claimed for the first time to redeem *P.*'s mortgage:

Held, that *P.* had a right to redeem *H.*'s mortgage of 1909, but *H.* as representative of the mortgagor had a better equity to redeem *P.* [p. 375, col. 1.]

Appeal from the decree of the Additional District Judge, Akola, in Civil Appeal No. 54 of 1917, dated the 6th July 1917.

Mr. *M. Y. Shareef*, for the Appellants.

Mr. *V. V. Chitale*, for Respondent No. 1.

JUDGMENT.—The first point for consideration is whether the appeal to the lower Appellate Court was barred by time. It admittedly was so by one day. The appellant before the lower Appellate Court satisfied that Court that there was sufficient cause for the delay in filing the appeal. I am not prepared to interfere with the exercise of discretion by the lower Appellate Court on this point.

The plaintiffs-appellants held two unregistered mortgages dated the 25th December 1897 executed by the defendant No. 1, who was the original owner of the property. In 1909 defendant No. 1 executed a registered mortgage in favour of the defendant-respondent Hardeo, who instituted a suit for foreclosure in 1913 without, however, making the plaintiffs parties to that suit. A decree *nisi* for foreclosure was obtained by the defendant-respondent Hardeo on the 24th July 1913. This decree was made final on 9th May 1914. Pending these proceedings, on the 6th January 1914, defendant No. 1 sold by a registered sale-deed the mortgaged property to the plaintiffs. It has been held by both the Courts below that the sale-deed in favour of the plaintiffs dated the 6th January 1914 was inoperative and it was made *pendente lite*. This finding is not contested in second appeal. The first Court held that as the plaintiffs' mortgages were unregistered, they must be put in the same category as if they were subsequent mortgagees, the mortgage in favour of the defendants-respondents being one by a registered instrument. The result was that the plaintiffs were allowed to redeem the defendant No. 2's mortgage of 1909. This decree has been set aside by the learned Additional District Judge on a ground, which, it is now conceded, cannot be supported. The lower Appellate Court was of opinion that, as the plaintiffs could not enforce their mortgages by applying for sale or foreclosure at the date of the suit, all their rights were extinguished. It has been rightly pointed out that the claim to redeem the defendant No. 2's mortgage is governed by Article 148 of the Limitation Act which gives sixty years for redemption, though a very much shorter period is allowed to the plaintiffs for sale or foreclosure.

There can be no doubt that the judgment of the lower Appellate Court is wrong. The plaintiffs have a right to redeem the defendant-respondent Hardeo's mortgage: but he in his turn now claims to redeem the plaintiffs, a claim which, however, was not put forward in the Courts below. The learned Counsel for the appellant has cited a case [*Mangli Prasad* v. *Pati Ram* (1)], which supports the contention of the respondent Hardeo. The extreme contention on behalf of the respondent Hardeo is that the plaintiffs' suit must be dismissed as they have no right to redeem. I am unable to agree with this contention.

The only case relied upon is *Perumal* v. *Kaveri* (2). In that case the party seeking to redeem held a usufructuary mortgage, and it would appear that the case was decided upon the relative rights of redemption on the part of the parties. It is not, as I read the case, an authority for a proposition that a subsequent mortgagee's right of redemption is lost by reason of the prior mortgagee having foreclosed on his mortgage without making the subsequent mortgagee a party. Whilst I cannot agree with the respondent Hardeo's contention that the plaintiffs have no right to redeem the defendant-respondent Hardeo's mortgage of 1909, I am bound to accede to their contention that they in their turn as representatives of the mortgagor have a better equity to redeem the plaintiffs. This view is supported not only by the case cited from the Allahabad Law Journal just quoted (1) but also by *Patiram* v. *Ghasiram* (3).

Now the principal sum secured by the two mortgages comes to Rs. 99. The third alleged mortgage has not been proved. Therefore, we may ignore it. Under the rule of Damdupat the plaintiffs can only claim Rs. 198. Though the plaintiffs could not have enforced their mortgage as held by the lower Appellate Court, it is always open to the defendant No. 2 Hardeo to redeem that mortgage.

The result is that the decrees of the Courts below are set aside and in lieu thereof it is decreed that the defendant No. 2 Hardeo pay to the plaintiffs the sum of Rs. 198 within four months from this date. In default it will be open to the plaintiffs to redeem the defendant No. 2's mortgage upon payment of Rs. 204-12-10 within four months from the expiry of the first four months fixed for redemption by the defendant No. 2 Hardeo of the plaintiffs' mortgage, and upon the plaintiffs redeeming the defendant No. 2's mortgage, the defendant No. 2 will put the plaintiffs in possession of the field described in the plaint. I order that each party should bear his costs throughout.

Decrees varied.

(1) 1 A. L. J. 360.
(2) 16 M. 121; 2 M. L. J. 281; 5 Ind. Dec. (N. S.) 792.
(3) 3 C. P. L. R. 82.

CALCUTTA HIGH COURT.
FIRST APPEAL FROM ORDER No. 73 OF 1916.
December 13, 1918.
Present:—Mr. Justice Teunon and Mr. Justice Greaves.
JATINDRA NATH BOSE AND OTHERS—PETITIONERS—APPELLANTS
versus
SARAT CHANDRA ADDYA AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 144—Restitution—Attaching creditor, whether representative of decree-holder.

A and *B* obtained a joint decree against certain persons in execution of which certain properties of the judgment-debtors were put to sale. *A* applied to be substituted in place of his co-decree-holder, *B*, on the ground that he had purchased the latter's share in the decree. This application was rejected by the executing Court but was allowed on appeal. In the meanwhile a creditor of *B*, who held a decree against him, attached and withdrew *B*'s share of the sale-proceeds in execution of his decree against *B*. *A* then applied for restitution of the money thus withdrawn by the attaching creditor of *B*.

Held, that the attaching creditor not having been a party to the decree obtained by *A* and *B* or to the substitution proceedings and not being a representative of *B*, the provisions of section 144 of the Civil Procedure Code were inapplicable to the case, and the application for restitution must, therefore, fail. [p 376, col. 2.]

Appeal against an order of the Subordinate Judge, 2nd Court, Hooghly, dated the 12th August 1915.

Babus *Bepin Behary Ghose* and *Narendra Nath Chowdhury*, for the Appellants.

Babu *Manmatha Nath Roy*, for the Respondents.

JUDGMENT.

TWOMEY, J.—This appeal is directed against an order made by the Subordinate Judge of Hooghly, on an application which purported to be one made under section 144, Civil Procedure Code. It appears that the appellants before us, who were petitioners in the Court of first instance, along with one Nolini Mohan Bose obtained a decree against certain persons and in execution proceedings put the properties of the judgment debtors to sale. The sale in execution took place on the 11th June 1911, and on the next following day the appellants before us made an application that they should be substituted in place of their co-decree-holder, Nolini Mohan Bose, on the ground that on the 23rd March 1911 they had purchased his two-third share in the decree that they had jointly obtained. This application was refused on the 1st January 1912. Meanwhile a creditor of the vendor decree-holder, who is now the respondent before us, had on the 15th July 1911 attached Nolini's share in the sale proceeds then lying in the Court of first instance. Against the order refusing their application for substitution the present appellants preferred an appeal to this Court, and by the order of this Court made on the 10th June 1913 the substitution for which they prayed was in fact made. In the interval on the 6th September 1912 the respondent, that is, the attaching creditor, withdrew from the Court the money which he had attached in execution of his decree against Nolini: The application of the appellants then was that he should be called upon to refund this money, and in order to bring the application within the provisions of section 144, Civil Procedure Code, it was contended in the Court below, as it is contended here, that the creditor who thus withdrew the money belonging to his judgment debtor Nolini is a representative of Nolini as decree-holder in the suit in which the original decree was obtained.

In support of this contention we have been referred to three cases, *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (1), *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2) and *Dorasami Ayyar* v. *Annasami Ayyar* (3). Of these cases the first two do not appear to us to have any application to the case before us, and the third case, if at all applicable, goes against rather than in favour of the contention that has been advanced by the appellants. The attaching creditor-respondent was no party to the decree in execution of which the properties of certain judgment-debtors had been attached, and he was also no party to the proceedings in which the substitution sought for by the appellants, was first refused and eventually made. We are not prepared to so extend the scope of section 144, Civil Procedure Code, as to hold that the respondent is a party or the representative of a party to the decree or order in question.

This appeal is, therefore, dismissed with costs. We assess the hearing fee at three gold *mohurs*.

GREAVES, J.—I agree.

Appeal dismissed.

(1) 10 M. I. A. 203; 3 W. R. P. C. 11; 19 E. R. 948; 2 Suth. P. C. J. 103.

(2) 19 C. 683 (P. C.); 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898.

(3) 23 M. 306; 10 M. L. J. 307; 8 Ind. Dec. (N. S.) 616.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 73 OF 1918.

September 6, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

P. MOOLCHAND—APPELLANT

versus

PO THEIN—RESPONDENT.

Amendment of plaint—Abandonment of certain claims, effect of—Suit, whether entertainable in respect of abandoned claims.

If a plaintiff is allowed to abandon a claim, the Court cannot, in allowing such abandonment, be said to be entertaining that claim. The effect of an application to amend a plaint by striking out certain claims is in substance as if the suit had never been commenced in respect of such claims. [p. 377, col. 1.]

Mr. *Barnabas*, for the Appellant,

Mr. *Wiltshire*, for the Respondent.

JUDGMENT.—Defendants Nos. 2 to 5 executed certain mortgages in favour of defendant No. 1, who being indebted to the Burma Rice Trading Company deposited those mortgages and title-deeds with that Company by way of security. The plaintiff is the assignee of the Company's debt and mortgage. He asked for a personal decree against the 1st defendant and for a mortgage decree against defendants Nos. 2 to 5. Defendants Nos. 2 to 5 did not appear. The immoveable property, the subject-matter of the mortgages, were all situated outside the jurisdiction of this Court. The plaintiff applied to amend his plaint by striking out defendants Nos. 2 to 5 and his prayer for a mortgage decree, leaving only his claim against the 1st defendant for a personal decree. The learned Judge on the Original Side held that he had no jurisdiction to entertain the suit ; that by allowing such an amendment he would be entertaining the suit ; and that under Order VII, rule 10, the only order he could make was to return the plaint to be instituted in the proper Court. He relied upon the case of *Hara Lal Banerjee* v. *Nitambini Debi* (1) and he refers to the case of *Jairam Narayan Raje* v. *Atmaram Narayan Raje* (2). The case in 29 Calcutta has very little bearing on the point. The suit was dismissed on the ground that it was a suit for land outside the jurisdiction, and it was held that the claim for the construction of a Will was merely ancillary to the claim for land. In the case reported in 4 Bombay the suit was dismissed as to the property outside the local jurisdiction of the High Court but it is not clear whether it was entertained as regards the rest of the property.

In our opinion, the Court by allowing the plaintiff to abandon a claim cannot be said to be entertaining that claim. The effect of an application to amend a plaint by striking out certain claims is in substance as if the suit had never been commenced in respect of such claims [see *Manindra Chandra* v. *Balaram Das* (3)] Mr. Wiltshire for the respondent cites the case of *Kannusami Pillai* v. *Jagathambal* (4), which was a case decided by the Madras High Court in January 1918, and there apparently the Court was of opinion that where a plaintiff applied to amend his plaint by striking out a portion of his claim so as to bring it within the jurisdiction of the Munsif's Court, the Munsif had no power except to return the plaint to be presented to the proper Court under Order VII, rule 10; but the chief ground of the judgment apparently was that the Munsif exercised a wrong discretion in allowing the amendment and giving leave to the plaintiff to bring a fresh suit, because the plaintiff had grossly undervalued the suit. Mr. Wiltshire also cites the case of *Khimji Jivraju Shettu* v. *Sa Purushotam Jutani* (5), but that was a case where the plaintiff instituted a suit in the Subordinate Judge's Court upon two causes of action, one of which was triable by the Munsif and the other by the High Court. If the two could have been joined together the Subordinate Judge would have had jurisdiction ; and because the Subordinate Judge had no jurisdiction to entertain either of the causes of action, it was held that he should have returned the plaint. The following cases cited by Mr. Barnabas for the appellant :—*Abdul Karim Sahib* v. *Badrudeen Sahib* (6) and *Gudri Lal* v. *Jagannath Ram* (7) are authorities to show that the Court should allow the plaintiff to abandon such portions of his claim as he thinks fit and to proceed upon the remaining causes of action over which the Court had jurisdiction.

The appeal is allowed with three gold *mohurs* costs. The order of the learned Judge on the Original Side is set aside and the case will be proceeded with according to law.

Appeal allowed.

(1) 29 C. 315.
(2) 4 B. 482; 82 Ind. Dec. (N. S.) 830.
(3) 5 Ind. Cas. 725; 11 C. L. J. 161.
(4) 46 Ind. Cas. 265; (1918) M. W. N. 497; 24 M. L. T. 46; 41 M. 701; 8 L. W 145.
(5) 7 M. 171; 2 Ind. Dec. (N. S.) 704.
(6) 28 M. 216.
(7) 8 A. 117; A. W. N. (1886) 32; 4 Ind. Dec. (N. S.) 1154.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1859 OF 1914.

May 9, 1917.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

SULTAN ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Malik AMIR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal, second—Sale of land—Shamilat, *share of, whether passes—Question of fact—Construction of document.*

The question whether the parties to a sale-deed intended the sale to include a *pro rata* share of the *shamilat* is one of fact and not of law, and where the document does not present any difficulty, no question of the construction of the instrument arises in the case.

Miscellaneous second appeal from the order of the Additional Divisional Judge, Attock, at Mianwali, dated the 16th June 1914.

Dr. *Gokal Chand Narang*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The Courts below have concurred in holding that the ancestor of the defendant Mian Muhammad did not, by virtue of the sale deed dated the 25th November 1870, acquire a right to a proportionate share in the *shamilat* of the village. This finding has been arrived at after full consideration of all the evidence, including the terms of the document, and there can be no doubt that the question whether the parties to the transaction intended the sale to include a *pro rata* share of the *shamilat* is one of fact and not of law, *vide, inter alia, Saleh* v. *Musammat Bakhtawar* (1). The language of the document does not present any difficulty, and we are not prepared to hold that any question of the construction of the instrument arises in this case.

It is, however, argued that in 1870 there was no *shamilat* in the village, that a very large area, about 2,67,000 *kanals*, was subsequently awarded by the Government and recorded as *shamilat deh*, and that all the persons who were then proprietors in the estate became *ipso facto* co-sharers in this joint holding. This matter was not specifically raised in the

(1) 36 Ind. Cas. 601; 3 P. R. 1917.

pleadings, and the issues appear to be couched in ambiguous terms. There can, however, be no manner of doubt that the defendant invited the attention of the trial Court to it by an application presented by him on the 29th July 1910, and that the Court in pursuance of the prayer contained therein summoned the Naib Sadar Kanungo and examined him in respect of the entries made at the Settlements of 1854, 1860 and 1878 as to the existence and the extent of the *shamilat* area. Further, ground No. 4 of the memorandum of appeal to the lower Appellate Court refers to the same point, but the learned Additional Divisional Judge did not apparently appreciate the point and omitted to deal with it.

We have heard Counsel on both sides, and while holding that the defendant did not acquire any title to a share in the *shamilat* under the instrument of sale, we consider that the question whether there was any subsequent acquisition of the *shamilat* area and whether the defendant is entitled to a *pro rata* share therein one of some importance, especially when we find that the entry of the Settlement of 1878 lends colour to the contention of the appellants. We are, however, unable to express any definite opinion, and direct the Court of first instance to frame an issue on the point and determine it along with the other issues remanded for decision.

The appeal is accepted *pro tanto* and the parties are directed to pay their own costs in this Court.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FORM APPELLATE DECREE No. 2064 OF 1917.

February 13, 1919.

Present:—Mr. Justice Teunon and Mr. Justice Walmsley.

SRICHARAN BHANDARI—DEFENDANT—APPELLANT

versus

MAKHAN LAL BHANDARI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Arbitration—Award not signed by one of several arbitrators, validity of—Decision in accordance with wishes of parties, whether award—Appeal—Mortgage—Attestation, objection to, whether can be taken in appeal.

SRICHARAN *v.* MAKHAN LAL.

The omission of one of several arbitrators to sign the award does not vitiate the award where the arbitration proceedings took place in the presence of all the arbitrators. [p. 379, col. 2.]

Where a suit having been referred to arbitration, the arbitrators took down the depositions of the plaintiff and the defendant but finally approved an arrangement put forward by the plaintiff and agreed to by the defendant:

Held, that the decision of the arbitrators, though it was in accordance with the wishes of the parties was nothing but an award. [p. 379, col. 2.]

The objection that a mortgage bond is not duly attested cannot be allowed to be taken for the first time in the Appellate Court as it raises a question of mixed law and fact. [p. 380, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Hooghly, dated the 11th of August 1917, affirming that of the Munsif, 1st Court, Arambagh, dated the 24th of May 1916.

FACTS appear from the judgment.

Sir *Rash Behari Ghosh* (with him Babu *Panchanan Ghose*), for the Appellant.—I attack the arbitration as quite illegal and so the award cannot be sustained in law. There were nine arbitrators, but their judgment does not contain the signatures of all the arbitrators. That is a fatal irregularity. Further, there is no indication that the arbitrators exercised their judgment; they merely recorded the unanimous agreement of the parties. So the decision of the arbitrators cannot be supported. Taking of evidence by them cannot cure the illegality. They are required to come to an independent decision. So at least the whole thing can be treated as a deed of partition which is compulsorily registrable. A mortgage bond, which was improperly admitted in evidence, has not been shown to be duly attested. On the above grounds I submit that the award is bad in law and ought to be set aside.

Babu *Baidya Nath Dutt* (with him Babu *Bhupendra Kumar Ghose*), for the Respondents, was not called upon.

JUDGMENT.

TEUNON, J.—This appeal arises out of a suit brought to recover a certain parcel of land on establishment of the plaintiffs' title. The plaintiffs' case was that when the plaintiffs' father and the father of the defendant separated in 1281, the parcel of land now in question fell to their father's share on partition.

The decisions of the Courts below proceed largely on what is described as an award made by certain arbitrators on the 21st Chait 1281.

The objections taken to this award before us are that out of 9 arbitrators who were appointed by the parties only 8 have signed the award; *secondly*, that they did not exercise their judgment as arbitrators but merely recorded an arrangement amicably arrived at between the parties; *thirdly*, that it is thus a deed of partition the registration of which is compulsory; and *lastly* it is contended that a certain mortgage bond has been improperly admitted in evidence.

It would seem to be the case that 9 arbitrators were appointed to settle the dispute between the parties and to make a partition of their properties; and it would also seem from the document containing the award that has been put in evidence that only 8 of these 9 arbitrators signed the award; but the document itself shows that though only 8 signed, the proceedings were taken in the presence of all 9. That being so, we think that the omission of one of the arbitrators to sign does not vitiate the award.

With regard to the second contention, it appears that when the arbitrators proceeded to the spot, they took down the depositions of both the brothers and called upon them to produce evidence, but finally approved an arrangement put forward by the then plaintiff Chaterbhuj and agreed to by the defendant. It is said that this shows that the arbitrators did not in fact exercise their judgment in this matter; and the so called award was not an award. We are not prepared to accede to this contention. It is true that the decision of the arbitrators is in accordance with the wishes of the parties, but it is also the case that they had taken evidence and having taken evidence, it may well be that in their judgment the proposals put forward by the plaintiffs and ultimately agreed to by the defendant were the most fitting and appropriate arrangement to make. Their decision purports to be in fact an award and a decision; and we do not think that we should look upon it as anything else. That being so, the third contention before us need not be further considered.

With regard to the mortgage bond which was admitted in evidence, the objection now taken is that it has not been shown that this mortgage bond was duly attested. But

the objection taken in the Court of the Subordinate Judge was that the mortgage bond was improperly admitted in evidence, inasmuch as no attesting witness had been called. The objection taken in its present form is one of mixed law and fact, and as it was not taken in the Court of the Subordinate Judge, when, if necessary, additional evidence could have been taken, we do not think that we should accede to it now.

In this view this appeal is dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2083 OF 1917.

June 27, 1918.

Present:—Sir Henry Rattigan, KT, Chief Judge.

MUHAMMAD ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

AMIR KHAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Appeal, second—Sale of land—Shamilat, *share of, whether passes—Question of fact—Construction of document.*

The question whether a *pro rata* share of the *shamilat* was intended to be conveyed to the vendees under a sale-deed which is silent on the subject is a question of fact, and no question of the construction of the sale-deed arises in the case.

Second appeal from the decree of the District Judge, Mianwali, dated the 18th April 1917.

Mr. *Badr-ud-Din Kureshi*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—This appeal is intimately connected with Civil Appeal No. 1850 of 1914 [*Sultan Ali* v. *Malik Amir* (1)], which came before a Division Bench for decision on the 9th of May 1917. The deed of sale in both cases is one and the same and though the vendees are different, the question in both cases is whether under the terms of the deed of sale, a *pro rata* share of *shamilat* was intended to be conveyed to the vendees. In this case, as in the other case, the lower Courts have concurred in holding that

(1) 51 Ind Cas. 378; 35 P. R. 1919.

no *shamilat* rights were sold. I have heard Mr. Badr-ud-Din for the appellants and Mr. Nanak Chand for the respondents, and I see no reason whatever to differ from that concurrent finding. As a matter of fact, as pointed out by the Division Bench in the other case, no question of law really arises in these appeals. The deed of sale is admittedly silent on the subject of *shamilat* and consequently there is no question here of construing it in order to discover the intention of the parties. In the case before the Division Bench, the learned Judges remanded an issue for trial regarding the allegation made by the defendant in that case that, subsequently to the sale, Government had granted a large area of land to the village, that this area had been recorded as *shamilat deh* and that in any case all persons, who at the time of the grant were proprietors, were entitled to a share in that area. In the case before me, no such allegation was ever made by the defendant, and it is unnecessary for me, therefore, to set up a new case on his behalf. All that he has ever claimed was that on a proper construction of the sale transaction he was entitled to claim that a proportionate part of the *shamilat*, as it existed at the date of the sale, had been conveyed to him. For the reasons given, I hold that this is a matter which cannot be gone into in second appeal and that I see no reason to differ from the concurrent finding of the Courts below as to the intention of the parties to the sale of 1870. I accordingly reject this appeal with costs.

Appeal rejected.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 326 OF 1914.

September 30, 1918.

Present:—Mr. Batten, A. J. C.

BHUNESHWAR—DEFENDANT—APPELLANT

versus

LAL BAHADUR SING—PLAINTIFF—RESPONDENT.

Landlord and tenant—Ejectment, suit for—Tenan setting up perpetual lease—Burden of proof—Lease for

BHUNESWAR *v.* LAL BAHADUR SINGH.

clearing land—Presumption—Estoppel against ejectment, when may be pleaded—Improvements, compensation for, when can be claimed—Transfer of Property Act (IV of 1882), ss. 51, 108 (h).

Where in a suit for ejectment the right of the landlord depends upon a lease granted for clearing a jungle, settling a village in the village area, and settling agricultural tenants on the land, and the lessees plead that they cannot be ejected without being compensated for improvements and *a fortiori* that they cannot be ejected at all and must be regarded as perpetual lessees, the onus is on them to prove the truth of their allegations. [p. 383, col. 2.]

If the lessees have made only such improvements as were necessary for opening of the village, they cannot be said to have been induced to believe that their tenure would be permanent, and the presumption is that it is not permanent. If permanent works, beyond those agreed upon at the time of the lease, are constructed, and the landlord encourages their erection in circumstances which would lead the lessees to believe that they are accepted as permanent tenants, the new erections would raise an equitable estoppel against ejectment. [p. 384, col. 1.]

At Common Law the general rule as to compensation for improvements is that the landlord is entitled to the possession of everything in the nature of real property on the determination of the term of the tenancy. But this rule is controlled by section 108 (*h*) of the Transfer of Property Act, by which the lessees may remove improvements during the continuance of the lease. [p. 384, cols. 1 & 2.]

A claim by a tenant for compensation for structures erected by him on the land let out to him cannot lie within the scope of section 51 of the Transfer of Property Act, because a tenant cannot possibly believe in good faith that he is absolutely entitled to the land. [p. 384, col. 2.]

Ismail Khan Mahomed v. Jaigun Bibi, 27 C. 570; 4 C. W. N. 210; 14 Ind. Dec. (N. S.) 374, followed.

Appeal against the decree in Civil Appeal No. 8 of 1914, passed by the Divisional Judge, Chhattisgarh Division, on 2nd March 1914, arising out of the decision in Civil Suit No. 34 of 1912, decided by the Sub-Judge, Raipur, on 18th November 1913.

The Hon'ble Mr. *G. P. Dick* and Mr. *J. C. Ghosh*, for the Appellant.

Messrs. *P. S. Kotwal*, *S. Ramdas* and the Hon'ble Mr. *R. S. C. M. Thacker*, for the Respondent.

JUDGMENT.—This is one of seven second appeals which arise out of seven suits brought by the Phuljar Zemindar through the Court of Wards to eject seven separate Thekadars. The plaints were all filed at or about the same date, and the parties were represented by the same Pleaders in all the cases. The judgments of the Subordinate Judge were all delivered on the same day. There were separate judgments in each case, though naturally they were largely repetitions. In the Appellate Court, too, the appellants on the one hand and the respondent on the other were respectively represented by the same Pleaders in all the cases. The learned Divisional Judge's judgment is the same for all the cases, which is accounted for by the fact that the grounds of appeal were identical in all the cases. The facts, however, are not quite identical in all the cases, so I will deal with each second appeal separately, though the grounds of appeal to this Court in all the cases are identical. Counsel have elected to argue the present appeal first.

I may say at once that in this case, as in the others, the case has not been conducted as it ought to have been on behalf of either party. The appellant, of course, is the chief sufferer.

In the plaint it was alleged that the defendant was a tenant from year to year, and refused to quit although due notice was given. The defendant pleaded that he was not a tenant from year to year and relied on an unregistered lease, Exhibit P 2, given by the Court of Wards on the 21st July 1903. The pleadings as to the legal effect of this lease are by no means clear, and the grounds on which the plaintiff asserted the defendant to be a tenant from year to year are nowhere definitely stated. The first issue framed was "whether defendant is a year to year tenant." On this, all that the Subordinate Judge directly says is: "Defendant is clearly a year to year lessee." The first three grounds of appeal to this Court set up the original lease, and an alleged covenant therein to renew the lease, and may be taken to challenge the finding that the appellant was a tenant from year to year. It is in fact alleged in these grounds that the appellant is a perpetual tenant, though the rent is liable to enhancement.

In this case (as in the six others) the following were the grounds of appeal to the lower Appellate Court:—

"(1) That the lower Court was wrong in holding that the notice to quit was proper and sufficient:

"(2) That the lower Court erred in holding that the acceptance of Theka-jama that had accrued due after service of notice to quit did not waive the notice:

"(3) that in any case the lower Court should have allowed compensation for improvements effected after issuing a commission to enquire about the expenses incurred."

It will be observed that none of the grounds of appeal challenge the finding that the appellant was a tenant from year to year liable to eviction on due notice being given. There can be no mistake as to what was meant by the first ground of appeal, for the judgment of the learned Divisional Judge makes it clear that all that was contended was that the date for vacating the Theka, mentioned in the notice, was not a proper date. The questions raised in the first three grounds of appeal involve questions of fact as well as of law, and as the appellant was represented by a presumably competent Pleader in the lower Appellate Court, I cannot allow these grounds to be raised for the first time in second appeal. The learned Counsel for appellant argues that the Divisional Judge has recorded findings in his favour in paragraph 2 of his judgment. I do not find he has recorded any findings in paragraph 2, which consists of introductory matter.

I now come to the fourth ground of appeal: "That his notice was not sufficient in law to terminate the lease," which must be taken to be a repetition of the first ground of appeal in the lower Appellate Court.

This ground of appeal in both Courts illustrates the dangers involved in clubbing cases together, for it really has no application whatever to the suit now before us. In this particular suit there was no pleading by the defendant that the notice was in any way irregular, there was no issue on the subject, and, consequently, there would be, and was, no finding by the Subordinate Judge that the notice to quit was proper and sufficient.

The fifth ground of appeal is in effect a repetition of the third ground of appeal of the lower Appellate Court, which is dealt with, as regards all the suits, in the 5th paragraph of his judgment by the learned Divisional Judge.

The pleadings of the appellant on the question of compensation for improvements are contained in paragraphs 8, 9 and 10 of his written statement in the first Court. The pleadings in paragraph 8 refer to the non-liability to ejectment if substantial improvements were made. The question of improvement, as affecting liability to ejectment, was not made a subject of appeal in the lower Appellate Court. In paragraph 9 it was alleged that improvements to the value of Rs. 7,700 had been made, and paragraph 10 was to the following effect: "That the above improvements were made with clear knowledge and consent of plaintiff, who also went on encouraging the defendant in making the above improvements, and the defendant submits that plaintiff should be ordered to pay back the costs of improvements incurred by this defendant in case it is found that plaintiff is entitled to get back the village." The sub divisions of the third issue put the amount of the improvements and the defendant's right to claim compensation for them in issue.

The above portion of the judgment was written on the 26th July 1915. The hearing was adjourned to the 1st December 1915 for certain translations to be made. Before that date the respondent, the Phuljar Zemindar, came of age and ceased to be represented by the Court of Wards, but no steps had been taken to substitute the respondent as a major for the respondent appearing through a next friend. The hearing was adjourned to the 20th June 1916, but on that date the respondent did not appear, not having been served. On the 17th July 1916 the Judge before whom the case came on for hearing adjourned the case until my return from leave. On the 8th December 1916 the appellant was called upon to give particulars of the expenditure of Rs. 7,700 referred to in paragraph 9 of his written statement, and to state exactly what he meant by the allegation that the improvements were made with the knowledge, consent and encouragement of the plaintiff. The appellant put in a written statement on the 6th March 1917, but the respondent's reply was not put in until the 22nd June 1917. On the 8th October 1917 Counsel asked for an adjournment on the ground that all the seven appeals

were likely to be settled out of Court. On the 19th November 1917 and 30th January 1918 further adjournments were granted on the strong hopes of Counsel that the cases would be compromised. On the 26th August 1918, I have been informed that efforts at a compromise had failed and the appeals were finally and fully argued on the 7th of this month. I am informed that all the seven appellants, except one, were willing to accept fresh leases from the Zemindar who was willing to grant fresh leases, but that one of the appellants was not so willing, and on his advice the others, too, objected. By the time the objecting appellant withdrew his objections, the Zemindar had lost his patience and withdrawn his offers. It is to be observed that while in the first Court the appellant said he had made improvements worth Rs. 7,700, in this Court he has raised the figure to Rs. 8,120. In the final arguments the learned Advocate who appeared for all the seven appellants decided to argue all the seven appeals together, on certain grounds that were common to all the cases. In all the appeals the learned Advocate specifically said he did not intend to press the 4th, 6th and 7th grounds of appeal, relating to inadequacy of notice, waiver and costs. He has pressed only those grounds of appeal which may be said to be covered by the third ground of appeal, identical in all cases, in the lower Appellate Court, already quoted. It is urged that the appellants should not be ejected, or if they are ejected, it should be subject to their being paid compensation for the improvements made by them which should be valued by the issue of a Commission.

In the cases to which the present appeal and appeals Nos. 323, 324 and 329 relate, there were written leases, but the written leases were invalid as they required registration and were not registered. In the other three cases there were no written leases. The learned Advocate for the appellants admits that in none of the cases was a perpetual lease actually granted. On the other hand, it is admitted on behalf of the respondent Zemindar that, until the suits were brought, the appellants were in possession as lessees. It is common ground that when the appellants were first made lessees the villages were jungle, and that the leases were granted for the purpose of clearing the jungle, settling a village in the village area, and settling agricultural tenants upon the land. Though the lease-deed in the present appeal (Second Appeal No. 226) was not registered, the cases have been argued on both sides on the assumption that it fairly represents the kind of terms on which the several appellants were made lessees. It may be taken as admitted that it was agreed that the lessees were to do the necessary works for opening up the villages. No attempt has been made in this Court to traverse the statement in the judgment of the Divisional Judge that the Theka-Jamas were fixed at extremely low figures on the understanding that the lessees would spend money on building tanks, banking up the soil, and similar works necessary for opening up new agricultural villages.

It certainly lies on the appellants to show that they cannot be ejected without being compensated for improvements, and, *a fortiori*, that they cannot be ejected at all, that is to say, that they must be regarded as perpetual lessees. In the earlier arguments reliance was placed upon the principles embodied in section 70 of the Indian Contract Act; but no case was cited in which that section has been held to cover a claim for compensation for improvements made by a tenant. The case cited for the appellants, *Damodra Mudaliar* v. *Secretary of State for India* (1), was not one of landlord and tenant.

The questions whether the tenants are liable to eviction and, if so, whether they are entitled to compensation, are separate questions though, in term of the rulings cited, the two subjects are associated.

On the first question, the law is clearly laid down in *Beni Ram* v. *Kundan Lal* (2) by their Lordships of the Privy Council, who explain the leading case of *Ramsden* v. *Dyson* (3). In this case either the tenants made only such improvements as were

(1) 18 M. 88; 4 M. L. J. 205; 6 Ind. Dec. (N. S.) 410.

(2) 21 A. 496 (P. C.); 1 Bom. L. R. 403; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022.

(3) (1866) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926.

necessary for opening up the villages or they also made permanent structures not contemplated at the time of their lease. It appears to me that if the tenants only made such improvements as were necessary for opening up the village, it cannot possibly be held that they were induced to believe that their tenure would be permanent; on the contrary I think that in a lease for clearing land the presumption is that it is not permanent. The lessee hopes to re imburse himself for his expenditure by the profits from the land and the rents from the agricultural tenants that he puts in. It would lead to chaos if every lease granted by a landed proprietor for the purpose of developing his land were to be presumed to be permanent. Moreover, in these cases the parties admit that rents were liable to be raised at the time of a new settlement. If, on the other hand, as alleged by the appellants, permanent works beyond those agreed upon at the time of the lease were constructed, then the law is that the new erection by the tenant of permanent structures upon the land let to him, in the knowledge of and without interference by the lessor, will not raise an equitable estoppel against ejectment, unless the landlord encouraged their erection in circumstances which would lead the lessees to believe that they were accepted as permarent tenants. On these cases we have the finding of the Divisional Judge that there is no evidence whatever to show that the lessees were encouraged to expect perpetual leases or were encouraged to spend money over and above what they were required to spend under the leases. These cases are clearly to be distinguished from *Yeshwadabai* v. *Ramchandra Tukaram* (4), where the circumstances raised a presumption of a grant under a certain well-known form of tenure. I have gone through all the rulings cited for the appellants, and I do not find any of them to be applicable to the circumstances of the cases before me.

As to compensation for improvements at Common Law, the landlord is *prima facie* entitled to the possession of everything in the nature of real property on the determination of the term. This general rule is controlled by the Transfer of Property Act, section 108 (*h*), by which the lessee may remove improvements during the continuance of the lease. The provisions of this section are not sought to be enforced here. Nor can section 51 of the Transfer of Property Act apply: "Such claim could not, in the case of a tenant, lie within the scope of section 51 of the Transfer of Property Act...because a tenant could not possibly believe in good faith that he was absolutely entitled to the land,' *vide Ismail Khan Mahomed* v. *Jaigun Bibi* (5). Even if the section is applicable to a tenant who believed in good faith he was a permanent tenant, I have already held that there was nothing to lead the appellants to believe that they were permanent tenants.

Finally I am asked to follow certain unpublished rulings of this Court. In Second Appeal No. 100 of 1883, Crosthwait, J. C., allowed compensation for improvements, in circumstances closely analogous to the present circumstances, but in that case there was a distinct finding that the lessee was led to believe that that he would not be turned out of the village until he had recovered his expenses. In First Appeal No. 17 of 1910 it was held by Skinner, A. J. C., that a lessee of a village, who makes a permanent improvement during the term of his lease, neither expressly permitted nor expressly forbidden by the landlord, is, if ejected at the end of the term, entitled to compensation for the unexhausted value of such improvements. With due respect I am unable to agree with this unpublished ruling, which might have the effect of a lessor being "improved" out of his property even when he has fixed the period of the lease.

The result is that the appeal fails and is dismissed with costs. This judgment covers appeals Nos. 322, 323, 324, 325, 327 and 328 of 1914, since no separate arguments were ultimately put forward in those appeals.

Appeal dismissed.

(4) 18 B. 66; 9 Ind. Dec. (N. S.) 553.

(5) 27 C. 570; 4 C. W. N. 210; 14 Ind. Dec. (N. S.) 374.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2650 OF 1915.

March 26, 1919.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

MAHARAJ BAHADUR SINGH
—PLAINTIFF—APPELLANT
versus
MAKHAN CHANDRA GHOSH
AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 155 (1) —Notice to restore land to original condition—Compensation, demand for, whether necessary—Formal defect, whether vitiates notice.

Where a notice under section 155 (1) of the Bengal Tenancy Act intimated to the tenants that they should, within one month from the date of service, restore the land to its original condition and that if they failed to do so a suit would be brought against them for ejectment and for recovery of damages:

Held, that the notice did not fulfil the requirements of section 155 (1), as there was no claim for compensation either in addition or as an alternative to a demand on the tenants to remedy the misuse or breach. [p. 385, col. 2.]

A notice does not become insufficient because it is open to criticism on a meticulous examination of some of the phrases employed. [p. 386, col. 2.]

Appeal against the decree of the District Judge, Birbhum, dated the 7th June 1915, affirming that of the Munsif, Rampurehat, dated the 4th April 1914.

Babus *Bipin Behary Ghose* and *Urukramdas Chuckerbutty* (for Babu *Chandra Sekhar Banerjee*), for the Appellant.

Babu *Karunamoy Basu*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for ejectment of the defendants from a tenancy on the ground that they have used the land in a manner which renders it unfit for the purposes of the tenancy. The Courts below have dismissed the suit on the ground that the notice alleged to have been served on the defendants did not fulfil the requirements of section 155 (1) of the Bengal Tenancy Act.

Section 155 provides that a suit for the ejectment of a tenant on the ground of misuse of land or breach of covenant shall not be entertained, unless the landlord has served, in the prescribed manner, a notice on the tenant, specifying the particular misuse or breach complained of and where the misuse or breach is capable of remedy, requiring the tenant to remedy the same, and, in any case, to pay reasonable compensation for the misuse or breach, and the tenant has failed to comply within a reasonable time with that request. In the case of *Pershad Singh* v. *Ram Pertob Roy* (1) it was ruled that the expression "in any case" means "in every case," and that a notice not containing a requisition to the tenant to pay compensation is insufficient to support a suit for ejectment brought under the section. In that suit, the notice given did not require the tenant to pay compensation nor did the plaint include a claim for compensation. In the case of *Boidya Nath Panday* v. *Ghisu Mandal* (2) it was ruled that the notice served was not vitiated, merely because the compensation was demanded in the alternative. It was observed that the section did not require that the notice must call upon the tenant, not only to pay compensation to the landlord for the misuse complained of, but also some additional compensation over and above the amount required to remedy the misuse of which the tenant had been guilty. As was pointed out by the learned Judges, a claim for damages in the alternative is in favour of the tenant, who is, as explained in *Harak Singh* v. *Kirat Narain Singh* (3), liable to be compelled to remedy the misuse where it is physically possible so to remedy it. In the present case, the notice intimates to the tenants that they should, within one month from date of service, restore the land to its original condition, and that if they failed to do so, a suit would be brought against them for ejectment and for recovery of Rs. 200 as damages. In our opinion, a notice so framed does not fulfil the requirements of section 155; there is no claim for compensation, either in addition or as an alternative to a demand on the tenant to remedy the misuse or breach. Reliance has been placed by the appellant upon decisions on section 14 of the Conveyancing and Law of Property Act, 1881, on which, as pointed out in *Pershad Singh* v. *Ram Pertab Roy* (1), section 155 of the Bengal Tenancy Act is substantially based. No useful purpose

(1) 22 C. 77; 11 Ind. Dec. (N. S.) 54.
(2) 30 C. 1063.
(3) 4 Ind. Cas. 734; 10 C. L. J. 595.

would, however, be served by an exhaustive review of these decisions, none of which really assists the contention of the appellant. The case of *North London Land Co.* v. *Jacques* (4) shows that when an *ex parte* order for ejectment has been obtained without service of a valid notice, the defendant is entitled to be relieved against forfeiture. But Bacon, V. C., appears to have maintained the view that the notice was bad because it did not claim compensation: *Jacques* v. *Harrison* (5), *Greenfield* v. *Hanson* (6). The case of *Lock* v. *Pearce* (7), which disapproved the dictum of Bacon, V. C., appears to be an authority for the proposition that a notice requiring the lessee to remedy a breach of covenant may, in certain circumstances, be good, even though it does not require payment of compensation in money. Lord Esher, M. R., interpreted the section to mean that the breach must be remedied if it can be and there must be compensation besides that, *if there is anything for which to compensate.* Lindley, L. J., said: "Supposing the lessor does not want compensation, is the notice to be held bad, because he does not ask for it? There is no sense in that." Kay, L. J., agreed in this opinion. A similar view had been adopted by Fry, L. J., in *Skinners' Co.* v. *Knight* (8) where, in giving the written judgment of himself and Lord Halsbury and Lord Esher, he interpreted the section as follows: "The section creates some difficulty, because it seems to contemplate compensation as payment in every case of a breach, and because it uses, not the familiar word 'damages' for a breach, but 'compensation.' But it is evident that many cases may occur in which, where the breach has been perfectly made good and no expense or loss incurred, there may be nothing for which to make compensation, and we are, therefore, of opinion that, notwithstanding the general terms of the notice required by the Statute, the lessee is bound to make compensation, not absolutely in every case, but only where there is something to compensate." See also *Pannell* v. *City of London Brewery Co.* (9), where it is pointed out that in *Lock* v. *Pearce* (7) the notice did include a claim for damages, though the demand was for payment of something which the lessee was not liable to pay. But whatever divergence of opinion may be traceable in these decisions, the case before us is reasonably free from difficulties. Here, compensation could have been demanded for the misuse and has been claimed in this suit though not mentioned in the notice. To stretch the language of the section so as to take this case out of its purview would plainly be to abrogate it altogether. No doubt, as observed by Lord Parmoor in *Fox* v. *Jolly* (10), a notice does not become insufficient, because it is open to criticism on a meticulous examination of some of the phrases employed. But here the objection to the validity of the notice goes to the root of the matter.

We hold accordingly that the decree of the District Judge must be confirmed and the appeal dismissed with costs.

Appeal dismissed.

(4) (1884) 32 W. R. 283; 49 L. T. 659; 48 J. P. 505.
(5) (1884) 12 Q. B. D. 136 on appeal (1884) 12 Q. B. D. 165; 53 L. J. Q. B. 137; 50 L. T. 246; 32 W. R. 471.
(6) (1886) 2 T. L. R. 876.
(7) (1893) 2 Ch. 271; 62 L. J. Ch. 582; 2 R. 403; 68 L. T. 569; 41 W. R. 369.
(8) (1891) 2 Q. B. 542 at p. 544; 60 L. J. Q. B. 629; 65 L. T. 240; 40 W. R. 57; 56 J. P. 36.
(9) (1900) 1 Ch. 496; 69 L. J. Ch. 244; 82 L. T. 53; 48 W. R. 264; 16 T. L. R. 152.
(10) (1916) 1 A. C. 1 at p. 22; 84 L. J. K. B. 1927 113 L. T. 1025; 59 S. J. 665; 31 T. L. R. 579.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 91 OF 1917.

July 23, 1918.

Present :—Mr. Justice Spencer and Mr. Justice Krishnan.

NATESA AIYAR—RESPONDENT No. 1 IN C. R. P. No. 238 OF 1916 ON THE FILE OF THE HIGH COURT—APPELLANT

versus

SATTAYA PILLAI AND ANOTHER—PETITIONER AND RESPONDENT No. 2 IN THE SAID C. R. P. No. 238 OF 1916—RESPONDENTS.

Negotiable Instruments Act (*XXVI of* 1881), *s.* 28—*Promissory note, execution of, by agent*—Nattukkotta Chetty *firms, practice of*—Vilasam *of firm prefixed by executant to his signature, effect of*—*Principal debited with amount in body of note*—*Liability of agent.*

NATESA AIYAR v. SATTAYA PILLAI.

Second defendant, who was the agent of a Nattukkcttai Chetty, executed a pro-note in favour of the plaintiff to which he put his signature prefixing his principal's *vilasam* thereto. The amount was expressly debited to the principal, the 1st defendant, in the body of the note:

Held, that section 28 of the Negotiable Instruments Act did not apply as the executant expressly excluded his personal liability, and that the 2nd defendant was not, therefore, liable. [p. 387, col. 2.]

Koneti Naicker v. *Gopala Ayyar*, 21 Ind. Cas. 417; 38 M. 482; 25 M. L. J. 425; 14 M. L. T. 414, distinguished.

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Bakewell, in Civil Revision Petition No. 238 of 1916, presented to the High Court against the decree of the Court of the Subordinate Judge, Negapatam, in Small Cause Suit No. 2181 of 1915.

FACTS.—The suit was for recovery of the balance due on a promissory note executed by the 2nd defendant in favour of the plaintiff, the plaintiff's case being that the 1st and 2nd defendants were partners and that the note was executed for a purpose binding on the partnership. The 2nd defendant pleaded non-liability on the ground that he was not a partner but was only an agent of the 1st defendant's firm, that he expressly debited the 1st defendant in the body of the note with the amount due thereunder, that he further prefixed the initials of the said firm to his signature at the foot of the note and that thereby he clearly intended to exclude his personal liability under the note. The material portion of the promissory note in question is as follows :—

" Credit Natesa Aiyar (Plaintiff).

Debit R. M. S. S. Seshachala Chettiar (1st defendant). For 85 bags of machine Samba paddy, received from your younger brother at Rs. 10-14-0 per bag, Rs. 924 6-0. I shall pay the sum of Rs. 924-6 0 with interest at one rupee per cent. (per mensem from this date.

(Sd) R. M. S. S. Sattaya Pillai,
(2nd defendant)."

The Subordinate Judge, without finding that the 2nd defendant was a partner of 1st defendant, held that the 2nd defendant was also liable inasmuch as he executed the note without describing himself as agent of 1st defendant and passed a decree against both the defendants.

A revision petition was thereupon presented to the High Court by the 2nd defendant which came on for disposal before his Lordship Mr. Justice Bakewell on 16th July 1917, whose judgment was as follows:—

"The usage is well established under which documents are executed on behalf of Nattukkottai firms by affixing their Vilasams, and the addition of the name of the person who does so only signifies that he acts as agent of the firm.

"The decree against the 2nd defendant is reversed and the suit is dismissed with costs as against him.

"The civil revision petition is allowed with costs."

Messrs. *A. V. Viswanatha Sastri* and *S. Vaidyanatha Aiyar*, for the Plaintiff-Appellant.—The 2nd defendant has not described himself as an agent in the body of the note. He is personally liable under section 28 of the Negotiable Instruments Act.

Mr. *M. Raghavachari* for Mr. *V. C. Seshachariar*, for Respondent No. 1.—Among Nattukkottai Chetty firms the agents generally sign prefixing their firm's Vilasam. That is generally taken as taking liability on the firm. That practice has been recognised in judicial decisions. Here the 2nd defendant has prefixed the 1st defendant's Vilasam to his signature. Not only that, he has expressly debited the amount against the firm. Section 28 of the Negotiable Instruments Act does not apply to this case and 2nd defendant is not liable.

JUDGMENT.—The ruling in *Koneti Naicker* v. *Gopala Aiyar* (1) is not applicable to the present case, as here the 2nd defendant has signed his name with the initials of the firm of the 1st defendant and has expressly stated in the note that the debit was to be against the firm. This is not a case of mere description of the executant as an agent in the body of the note. The words used here exclude the application of section 28 of the Negotiable Instruments Act (XVI of 1881), as there is sufficient indication in the note that 2nd defendant was excluding his personal liability. The principal, the 1st defendant, has accepted his liability under the note. The plaintiff's case that 2nd defendant was

(1) 21 Ind. Cas. 417; 38 M. 482; 25 M. L. J. 425; 14 M. L. T. 414.

a partner of the 1st defendant was not established, there being no evidence for it; we do not think the first Court meant to find any partnership.

The Letters Patent Appeal fails and is dismissed with costs of the 1st respondent.

M. C. P.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 181 OF 1918.

January 22, 1919.

Present:—Mr. Stuart, J. C.

DWARIKA PARSHAD—DEFENDANT—APPELLANT

versus

Musammat MAHADEI—PLAINTIFF—RESPONDENT.

Hindu Law—Widow, unchaste, returning to virtue—Maintenance, whether can be allowed.

An unchaste widow who returns to a life of virtue is, upon the general principles of Hindu Law, entitled to bare maintenance from her deceased husband's family.

Appeal from the decree of the District Judge, Rae Bareli, dated the 21st February 1918, modifying that of the Probationary Munsif, Rae Bareli, dated the 12th September 1917.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellant.

Mr. *Mohammad Wasim*, for the Respondent.

JUDGMENT.—The findings of fact are as follows:—Mahadei Kurmin is the widow of Ramjiawan. Ramjiawan died in 1912. In 1915 Mahadei became pregnant by her brother-in-law. She was clearly party to a plan by which her child when born should be made away with and in consequence of what she did was sent to prison for a year. Her child was born in prison. A few months after her release she sued her deceased husband's family for maintenance. She has been given what is known as a starving allowance, that is to say, a bare subsistence allowance by way of maintenance of Rs. 3 a month. I accept the learned District Judge's view of the facts. I do not look upon this woman Mahadei as an absolutely depraved woman. Her case appears to be one of those many unfortunate cases in which a young widow is too intimate with a member of her deceased husband's family. That she was unchaste with him there can be no doubt, but I have no reason to suppose that she committed any other lapses and I accept the learned District Judge's conclusion that she is now leading a perfectly respectable life.

The question remains whether a widow who has been unchaste but who has returned to respectability can under the Hindu Law claim a bare subsistence allowance by way of maintenance from her deceased husband's family. There are many decisions that a widow while leading an unchaste life is entitled to nothing and it may be taken as the prevailing view of law in all High Courts that a widow so long as she is unchaste is entitled to nothing by way of maintenance, not even the merest subsistence. But this case is different. This is the case of an unchaste widow who has returned to a life of virtue, and there is the authority of Chandavarkar, J., in *Parami* v. *Mahadevi* (1) and of Seshagiri Ayyar, J., in *Sathyabhama* v. *Kesavacharya* (2), that such a widow is entitled to bare maintenance. I cannot go so far as to say that there is any direct authority under the Mitakshara Law of the view taken by these two learned Judges, but it appears to me that, upon the general principles of Hindu Law common to the Mitakshara and the systems in force in Bombay and Madras, their view must be accepted, especially as it is entitled to considerable weight as the view of Judges learned in their own personal law. For the above reasons I accept the conclusion of the lower Appellate Court that Mahadei is entitled to maintenance. I do not consider the amount fixed excessive. At the present rates Rs 3 a month is literally a starving allowance. I dismiss this appeal with costs.

I note, of course, that in event of Mahadei relapsing from virtue the maintenance will be liable to be stopped.

Appeal dismissed.

(1) 5 Ind. Cas. 960; 34 B. 278 at p. 285; 12 Bom. L. R. 196.

(2) 29 Ind. Cas. 397; 39 M. 658; 18 M. L. T. 28; 29 M. L. J. 87.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 155 OF 1915.

March 26, 1919.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

RAMBISHEN DUTT—DEFENDANT No. 1—APPELLANT

versus

HARIPADA MUKERJEE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Merger—Superior and subordinate interests, union of, effect of—Proprietor, whether can become ryot

Under the law as it stood before the passing of the Transfer of Property Act and the Bengal Tenancy Act, the union of a superior and a subordinate interest did not, by operation of law, necessarily merge the subordinate in the superior interest It could be shown by the conduct of the party concerned that he did not intend to keep the two interests alive as mutually distinct rights. [p. 39), col. 2.]

A proprietor in occupation of land within his own estate cannot acquire the status of a *ryot*. [p. 390, col. 1.]

Appeal against the decree of the Subordinate Judge, Birbhum, dated the 28th July 1914, reversing that of the Munsif, Dubrajpur, dated the 23rd May 1913.

Dr. *Jadu Nath Kanjilal*, for the Appellant.

Babus *Mahendra Nath Ray* and *Kali Kinkar Chuckerbutty*, for the Respondents.

JUDGMENT.—This is an appeal by the 1st defendant in a suit for recovery of possession of land upon establishment of title. The disputed area lies in Lot Nimtikuri, which was held by a family of Datts in Zemindari and Patni interest in equal proportions. The appellant had a one-fourth share in this property, which he mortgaged to the father of the plaintiffs on the 31st May 1892; he subsequently granted to the plaintiffs a second mortgage of his Patni interest on the 13th November 1903 and of his Zemindari interest on the 11th November 1904. The plaintiffs enforced these securities, and, at execution sales, purchased the Zemindari interest on the 19th November 1901 and the Patni interest on the 3rd July 1911. The land in suit is in the actual occupation of the Domes (the second and third defendants) who hold as sub-tenants on payment of paddy rent. The case for the plaintiffs is that, notwithstanding their purchase of the Zemindari and Patni interests of the first defendant, they have not been able to collect rent from the Domes, because the first defendant has set up an unfounded right as intermediate Jotedar on the allegation that the land constituted a Jote of 16 *bighas* in the name of Kalliprosad Datta on an annual rental of Rs. 6 9 6. The plaintiffs denied the existence of the alleged Jote, and asserted in the alternative that if the Jote existed at any time, it must have merged in the superior Zemindari and Patni rights. The plaintiffs accordingly asked for declaration of their title to realise rent directly from the Dome defendants and for consequential relief. The first defendant resisted the claim on the ground that the Jote had existed from time unknown, was not extinguished by merger in the superior interest, and was still owned by him as it had not been included in the mortgages which were the root of the title of the plaintiffs. On these pleadings, three issues arose for consideration, namely, (1) did the disputed lands form a Jote in the name of Kaliprosad Datta; (2) did the Jote right merge in the superior right as Zemindar and Putnidar; (3) did the plaintiff's mortgage include the same? The trial Court answered the first issue in the affirmative, and the second and third issues in the negative, and consequently, dismissed the suit. Before the lower Appellate Court, the decision on the first issue was not challenged; but the Subordinate Judge held on the second issue that the Jote right was merged in the *maliki* right; in this view, the third issue did not arise, because if the Jote right was extinguished by merger, it could not have been included in the mortgages. The Subordinate Judge accordingly decreed the suit. On the present appeal, that decree has been assailed on the ground that the decision of the lower Appellate Court on the question of merger is erroneous in law.

The Subordinate Judge has relied on section 111, clause (*d*), of the Transfer of Property Act and section 22 of the Bengal Tenancy Act in support of his conclusion that "the *ryoti* right merged into the superior right as soon as the two rights—superior *maliki* right and inferior *ryoti* right—vested in the same person or persons." He has also fortified his opinion by reference to the decisions in *Reed* v.

Sreekishen (1) and *Bool Chand* v. *Luthoo Moodee* (2), which are authorities merely for the proposition that a proprietor in occupation of land within his own estate cannot acquire the status of a *ryot*. The Subordinate Judge has, however, overlooked that neither section 111, clause (*d*), of the Transfer of Property Act nor section 22 of the Bengal Tenancy Act is applicable, as in this case the union of the superior and subordinate rights took place before the date of these statutory enactments: *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry* (3). The foundation of the decision consequently disappears and we have to determine the question of merger, with reference to the law as it stood before 1882.

In the case of *Womesh Chunder Goopto* v. *Raj Narain Roy* (4), which was decided in 1868, Peacock, C. J., with the concurrence of Loch and Jackson, JJ., said: "My own impression is that the doctrine of merger does not apply to lands in the Mofussil in this country....I believe it is the practice in this country for Zemindars to purchase and keep on foot Patni Talooks without the necessity of adopting the practice, which is followed in England, of purchasing such Talooks in the name of a trustee to prevent the merger of them. If the doctrine of merger applies, a Zemindar could not purchase and hold a Putni tenure in *khas* possession." A similar view was expressed by Ainslie and Birch, JJ., in *Thomas Savi* v. *Punchanun Roy* (5) and by Pigot and Banerjee, JJ., in *Jibanti Nath Khan* v. *Gokool Chunder Chowdhry* (6). In the case last mentioned, the Court observed: "No authority has been shown us for holding that the doctrine of merger applies to such cases as this in India, that is, that a Putni interest must merge in the Zemindari interest, if they come into the same hands, and we do not think that we should for the first time, so far as we are aware, apply the doctrine to such a case." These decisions show that in cases unaffected by the provisions of the Transfer of Property Act and the Bengal Tenancy Act, the union of a superior and a subordinate interest did not, by operation of law, necessarily merge the subordinate in the superior interest, and this accords with the view expressed in *Rushton* v. *Atkinson* (7), *Lal Mahomed* v. *Jagir Sheikh* (8) and *Hirendra Nath Dutt* v. *Hari Mohan Ghose* (9). On the other hand, we have another class of decisions which support the proposition that although, in cases not touched by the Transfer of Property Act and the Bengal Tenancy Act, the union of the superior and subordinate interests may not automatically cause a merger of the latter in the former, the conduct of the party concerned may show that he did not intend to keep the two interests alive as mutually distinct rights; see *Prosunno Nath Roy* v. *Jogut Chunder Pundit* (10), *Suraj Narain Mandal* v. *Nanda Lal Sinha* (11), *Ulfat Hossain* v. *Gayani Dass* (12), *Promotha Nath Roy* v. *Kishore Lal Saha* (13). Some of these decisions were largely influenced by a dictum of the Judicial Committee in *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (14), in favour of the possibility of merger of resumable *birt* tenures in a superior interest, the holder whereof did not take steps to keep them alive as distinct sub-tenures for his own benefit. The substantial question for consideration in the present case thus arises, do the surrounding circumstances indicate that after the Jote right had vested in the holders of the Zemindari and Putni rights, the latter treated the two as distinct interests. The trial Court, upon a careful analysis of the evidence, answered this question in the affirmative and the lower Appellate Court has not expressed its dissent from this conclusion. The most important facts mentioned in the judgment of the primary Court are as follows: (*i*) the

(1) 15 W. R. 430.
(2) 23 W. R. 387.
(3) 28 C. 744.
(4) 10 W. R. 15.
(5) 25 W. R. 503.
(6) 19 C. 760; 9 Ind. Dec. (N. S.) 948.
(7) 11 W. R. 485.
(8) 2 Ind. Cas. 654; 13 C. W. N. 913.
(9) 22 Ind. Cas. 966; 18 C. W. N. 860.
(10) 3 C. L. R. 159.
(11) 33 C. 1212.
(12) 3 Ind. Cas. 994; 36 C. 802.
(13) 38 Ind. Cas. 547; 25 C. L. J. 133; 21 C. W. N. 304.
(14) 5 C. 198 (P. C.); 5 C. L. R. 213; 6 I. A. 145; 4 Sar. P. C. J. 17; 3 Suth. P. C. J. 637; Rafique and Jackson's P. C. No. 58; 8 Ind. Jur. 426; 3 Shome L. R. 1; 2 Ind. Dec. (N. S.) 737.

Zemindari papers recite the existence of the Jote in quite recent years; (*ii*) the co-sharers of the appellant as also the plaintiffs themselves have mentioned the Jote in their road-cess returns filed subsequent to the mortgages, (*iii*) in 1880, when a share of the Mehal was let out in Ijara, the farmer showed the Jote as in existence in his collection papers and in his road-cess returns. In our opinion the Court of first instance correctly held that the Jote did not, by operation of law, merge in the superior interest, and was all along treated as separate from the Mehal, was not included in the mortgages and never passed to the plaintiffs.

The result is that this appeal must be allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the lower Appellate Court.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1391 OF 1915.

July 8, 1918.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

KISHEN CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUNICIPAL COMMITTEE OF AMRITSAR—DEFENDANTS—RESPONDENTS.

Punjab Municipal Act (III of 1911), s. 47—Contract with Committee not duly signed—Suit, whether maintainable—Registration Act (XVI of 1908), s. 17—Document renouncing title—Registration, whether necessary.

A contract entered into with a Municipal Committee which is not signed by the President, nor by the Vice-President nor by any member of the Committee, as required by section 47 of the Punjab Municipal Act, is not binding on the Committee.

A document which contains a declaration by a person that he holds no title in immoveable property of Rs. 100 in value requires registration, and, if it is unregistered, it cannot be received as evidence of any transaction affecting such property.

Second appeal from the decree of the District Judge, Amritsar, dated the 9th April 1915.

The Hon'ble Pandit *Sheo Narain* and Mr. *Sohan Lal Kapur*, for the Appellants.

Mr. *Balwant Rai*, for the Respondents.

JUDGMENT.—In this second appeal the first matter for decision is, whether the agreement on which the plaintiffs rely is not binding on the respondent Committee, and the second whether, being unregistered, it is admissible at all.

Now the value of the contract, which involved the supply by the respondent from time to time of water sufficient to fill a large public bathing tank, clearly exceeded Rs. 100 and such a contract is not binding on the Municipal Committee unless signed by the President or Vice-President and one more member, or, in the event of delegation, by members to whom that function may have been delegated.

In this case the contract has been signed by neither the President nor by the Vice-President nor by any member

The point, though raised at a late stage, is a legal one, is patent on the face of the record and is fatal to the plaintiffs' action.

Again the agreement which the Committee deny as admissible contains as unmistakable disclaimer by both parties that either has any proprietary interest in the immoveable property referred to in the contract.

We find no force in the argument that section 17 of the Registration Act does not apply where it is doubtful whether any title existed in the declarants. The title in the tank was not free from dispute, and in these circumstances we hold that a declaration by a person that he holds no title in immoveable property of Rs. 100 in value requires registration and if it is unregistered, it cannot be received as evidence of any transaction affecting such property.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

BEJOY RATNA ROY *v.* BHABANI SUNDARI DASYA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2026 OF 1916.

February 20, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Panton.

BEJOY RATNA ROY AND ANOTHER —DEFENDANTS—APPELLANTS

versus

BHABANI SUNDARI DASYA —PLAINTIFF—RESPONDENT.

Appeal—Issue decided after contest—Finding, whether can be expunged on the ground that it was not necessary for decision of suit.

Where a Court is invited by the parties to decide a particular issue in a case and each side produces evidence and a definite finding is arrived at, it is not open to the party adversely affected thereby to ask in appeal that that finding be expunged from the judgment on the ground that it was not necessary for the decision of the case. [p. 393, col. 2.]

Appeal against the decree of the District Judge, Dacca, dated the 6th January 1916, affirming that of the Subordinate Judge, 1st Court of that District, dated the 6th July 1914.

FACTS appear from the judgment.

Babu *Dwarka Nath Chakravarty*, for the Appellants.—This is a suit for a declaration that the plaintiff is the heiress of her deceased father and is entitled to succeed to the property left by him. There is a prayer in the plaint that the defendant No. 1 should not be recognised as the legally adopted son of her deceased brother. The defendant No. 1 is a minor and is under the guardianship of his mother, defendant No. 2. Both the Courts below held that the adoption of defendant No. 1 was not proved and that the plaintiff Bhabani was entitled to succeed to her father's estate.

The learned District Judge ought not to have decided the question of the validity of the adoption, regard being had to the fact that the succession to the estate of Rakhal (the deceased father of the plaintiff) having already taken place, the validity of the subsequent adoption of defendant No. 1 could in no way affect the plaintiff's right. Moreover the unfortunate position of the defendant No. 1 who is a minor must be considered. The learned Judge's findings as to the question of adoption will prejudice his (the minor's) right in future. I submit that this issue, which is absolutely unnecessary in the present case, ought not to have been tried by the Court and the finding thereon should be expunged to safeguard the interest of the minor.

Babu *Jogesh Chandra Roy* (with him Babu *Akhoy Kumar Banerjee*), for the Respondent.—The question of adoption is a necessary issue in this case. In the plaint there is a prayer as to the invalidity of the adoption of defendant No. 1; in the written statement it is stated that permission was given to the widow to adopt a son. The issue arises from the pleadings of the parties. After the issue has been framed and the evidence gone into and even the question has been raised in one of the grounds of appeal in this Honorable Court, it does not lie in the mouth of the appellant to say now that the finding is to be expunged. It is now too late in second appeal to ask for the setting aside of that finding.

Then as to the question of the divesting of the estate by subsequent adoption, I beg to refer to the cases of *Musammat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (1), *Padmakumari Debi* v. *Court of Wards* (2) and *Sri Sri Sri Madana Mohana Ananga Bheema Deo* v. *Sri Sri Sri Purushothama Ananga Bheema Deo* (3).

Further the Court should consider what an enormous expenditure will be caused to the estate, if the finding is set aside. In that case after the death of this lady the point will again be taken up by the adopted son and litigation will follow. Hence I submit that this necessary issue, as found by the Courts below, should not be expunged.

Babu *Dwarka Nath Chakravarty*, in reply.—The plaintiff makes an absolutely unnecessary prayer in the plaint. Moreover the minor, defendant No. 1, was wrongly made a party to this suit. Simply because the minor was made a party, it cannot be justified that he should be prejudiced by a finding as a vengeance for his mother's action.

(1) 10 M. I. A. 279; 3 W. R. P. C. 15; 1 Suth. P. C. J. 574; 2 Sar. P. C. J. 111; 19 E. R. 978.

(2) 8 I. A. 229; 8 C. 302 (P. C.); 4 Sar. P. C. J. 285; 6 Ind Jur. 148; 4 Ind. Dec. (N. S.) 193.

(3) 46 Ind. Cas. 481; 23 C. W. N. 177; 35 M. L. J. 138; 5 P. L. W. 79; 8 L. W. 167; 16 A. L. J. 725 (1918) M. W. N. 621; 24 M. L. T. 231; 28 C. L. J. 403; 41 M. 855; 20 Bom. L. R. 1041; 45 I. A. 156 (P. C.).

JUDGMENT.—The plaintiff is the daughter of one Rakhal. She sued for declaration that the defendant No. 1, who is said to have been adopted by Nirmola (defendant No. 2), the widow of Bir Chandra, son of Rakhal who predeceased his father (Rakhal), had not been legally and validly adopted, and that the said defendant is not entitled to divest the plaintiff of her interest in the estate of her father, and for *khas* possession.

The defendant No. 2 Nirmola is the mother and certificated guardian of the adopted son.

The suit was contested by the defendant No. 2 for self and as guardian of her minor son, on the ground that the plaintiff was unchaste, that permission was given to the defendant No. 2 by her husband Bir Chandra to adopt defendant No. 1 and that he had been accordingly adopted.

Both the Courts below have concurred in finding that the plaintiff is not unchaste, that the estate left by her father had devolved upon her and that she could not be divested by the alleged adoption of defendant No. 1. They further held that the adoption had not been proved. The suit accordingly was decreed in favour of the plaintiff.

The defendants have appealed to this Court.

It is contended before us on behalf of the appellant that the plaintiff Bhabani was entitled to the estate left by her father when it was found that she was not unchaste, and that the question of the adoption of defendant No. 1 could not affect the interest of Bhabani as the estate of her father had already vested in her and that in the circumstances it was unnecessary to consider the question of the adoption of the defendant No. 1.

The learned Pleader for the appellant has drawn our attention to the passage in the judgment of the District Judge where he says: "Holding that if the plaintiff establishes that she was not disqualified she must succeed, the principal question for me to deal with is the question of her chastity. If she succeeds on that point, it becomes unnecessary to go into the question whether Bir Chandra gave his wife power to adopt." Then he proceeds to consider the question and after finding that the plaintiff was not unchaste, the learned Judge held that "on her father's death the property vested in the plaintiff. This, in my opinion, disposes of the whole case, my view being that the law is that even if the defendant No. 2 was empowered by her husband to adopt and did adopt a son to him, this would not affect the right of the plaintiff in Rakhal's property which had vested in her before the adoption. But as it may be held by another Court that this is a wrong view of the law and as the question of the authority to adopt has been argued out, I will give my findings on that point."

It is contended before us that the question of adoption ought not to have been gone into in the view that the learned Judge took of the right of the plaintiff and that the finding on the point should be expunged.

We do not think that this should be done. The defendants invited the decision of the Court on the question of adoption on the ground that by the adoption, the plaintiff was divested of the estate, and evidence on the point was gone into on both sides. The Court of first instance decided the question against the defendants, the defendants appealed and urged that the adoption was proved, and even in the grounds of appeal to this Court the same point is taken. It is true that the defendant No. 1 is a minor. But his guardian took the chance of a favourable decision, and after having been defeated in both the Courts she now asks us to expunge the finding in order that the defendant No. 1 may fight out the matter again when he comes of age.

The plaintiff has got a son who is a minor and who would succeed to the estate on her death if there were no adoption. However that may be, having regard to the circumstances, we do not think that the finding on the question of adoption should be expunged.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2127 OF 1917.

June 4, 1918.

Present:—Mr. Justice Shah Din.

SHIB RAM—DEFENDANT—APPELLANT

versus

MAQSUM ALI KHAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 15 (c) secondly—Rupar, *whether divided into sub-divisions.*

Rupar is divided into well-recognised *pattis* which are "sub-divisions" within the meaning of section 15 (c) *secondly* of the Punjab Pre-emption Act.

Second appeal from the decree of the District Judge, Ambala, dated the 7th May 1917.

Pandit *Nanak Chand*, for the Appellant.

JUDGMENT.—The facts of this case are very fully given in the judgment of the learned District Judge and it is unnecessary to repeat them here. The first question for decision is whether Rupar is divided into *pattis*, as alleged by the plaintiffs, and those *pattis* are "sub-divisions" within the meaning of section 15 (c) *secondly* of the Punjab Pre emption Act. A reference to the plaint will show that the plaintiffs based their suit expressly on the ground that Rupar was divided into *pattis*, that the land in suit was situate in one of these *pattis* called *Patti* Rajputan, that the vendee had no land in the said *patti* and that, therefore, the plaintiffs had a superior right of pre-emption in the land in suit. In his *jawab dawa* the vendee did not deny that Rupar was divided into *pattis*, but pleaded that he was landowner in *Patti* Rajputan as well as the plaintiffs and that therefore the plaintiffs' alleged right of pre-emption was not superior to his. He made the same admission as to the existence of *pattis* in Rupar in his statement in Court, though he added that the *pattis* had been fixed only for fiscal purposes. There he was quite wrong, as a reference to the statement of proprietors at the foot of the pedigree table of the Settlement of 1883 would show that although there were no *pattis* in Rupar before, in the course of the said Settlement it was divided into four *pattis*, namely, *Patti* Rajputan, *Patti* Araian, *Patti* Kalalan and Harchahar *Patti*. The very names of the *pattis* show that they were not fixed merely for fiscal purposes, but that they represented

homogeneity of descent of the proprietors included in one *patti*, whatever the case may be as to the areas of the *pattis* in question. In connection with this question, Counsel for the vendee has relied on *Waryam Singh* v. *Mahtab Singh* (1) but that decision, which relates to a newly founded Chak No. 224 in the Lyallpur Colony, has no bearing whatever on a case like the present.

In view, then, of the pleadings of the parties and of the statement of the proprietors in the Settlement of 1883, it must be held, as has been held by the District Judge, that Rupar is divided into well-recognised *pattis* which are "sub-divisions" within the meaning of section 15 (*c*) *secondly* of the Punjab Pre-emption Act. The District Judge has found as a fact that the vendee had no land in *Patti* Rajputan prior to the sale in dispute; and it follows that the plaintiffs' right of pre emption is superior to that of the vendee. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 26 Ind Cas. 433; 21 P. R. 1915; 31 P. L. R. 1916.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1776 OF 1915.

March 26, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

KANAILAL JALAN—PLAINTIFF—APPELLANT

versus

MANOO BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Receiver, appointment of, effect of—Possession of Receiver, whether can be disturbed without leave of Court—Execution of decree—Sale of property in custody of Receiver, validity of.

The rule that the possession of a Receiver may not be disturbed without leave of the Court appointing him does not apply so far as third persons are concerned, until the Receiver has been actually appointed and is in possession. It is not enough that an order has been made directing the appointment of a Receiver. Until the appointment

has been perfected and the Receiver is actually in possession, a creditor is not debarred from proceeding to execution against properties in respect of which the Receiver has been appointed. [p. 395, col. 2; p. 396, col. 1.]

When property is in the custody of a Receiver appointed by a Court, a sale of that property under an execution issued by another Court is not necessarily void but may be avoided by an appropriate process. [p. 396, col. 1.]

Appeal against the decree of the District Judge, Hooghly, dated the 3rd May 1914, reversing that of the Subordinate Judge, Hooghly, dated the 30th March 1914.

Dr. *Sarat Chunder Basak* and Babu *Jotish Chandra Bose*, for the Appellant.

Sir *Rash Behary Ghose*, Babus *Basant Coomar Bose*, *Bepin Behary Ghose* and *Biraj Mohan Mozumdar*, for the Respondents.

JUDGMENT.—The subject-matter of the litigation which has culminated in this appeal is an one fourth share of a garden which was owned at one time by Gopal Charan Ghose. He left four sons, Chandranath, Suryyakumar, Satyacharan and Kartikcharan. Chandranath died in or about the year 1892 and left a son Mohinimohan; the latter died before the commencement of this suit, which concerns the one fourth share of Chandranath. There are three rival claimants to this share, namely, the plaintiff, the Das defendant, and the Maharaja of Burdwan, who was added as a defendant by order of Court, dated 23rd April 1912. The Maharaja of Burdwan purchased the share in execution of a money decree obtained by him against Mohinimohan; the sale took place on the 15th February 1896 and was confirmed on the 18th March 1896. The 1st defendant obtained a lease of the entire garden from Mohinimohan and his three uncles on the 2nd July 1907. The plaintiff purchased the share at a sale held on the 2nd September 1907 by the Official Receiver of the High Court who had been appointed Receiver to the estate of Chandranath Ghose in a litigation on the Original Side of this Court. The title of the Maharaja thus accrued many years before that of the plaintiff or the 1st defendant, and the substantial question in controversy is, whether the plaintiff by his purchase at the sale held by the Receiver has acquired a title superior to that of the Maharaja. The primary Court answered his question in favour of the plaintiff; the District Judge has reversed that decision. The circumstances which led to the appointment of the Receiver and the sale held by him must accordingly be narrated here.

On the 10th April 1883, Chandranath Ghose executed a trust deed in respect of his share in the paternal properties in favour of Narendranath Sen, an attorney of this Court, to enable the latter to administer the estate and satisfy the debts due to his creditors. One of these creditors, Bhagaban Chandra Ray, on behalf of himself and the other creditors, instituted a suit on the Original Side of this Court on the 11th September 1886 against Chandranath Ghose and Narendranath Sen for the construction of the indenture of trust, for the execution of the trusts mentioned therein, for an account, for the appointment of a Receiver and for consequential reliefs. On the 30th May 1887, a preliminary decree was made and the Official Receiver was appointed Receiver in the suit. On the 14th March 1889, an order was made authorising the Receiver to sell the properties included in the trust and an amended order was made on the 3rd March 1890. Chandranath Ghose died in or about the year 1892 and no steps were taken to revive the suit against his son Mohinimohan till 1908. Meanwhile, the transactions under which the Maharaja of Burdwan and the 1st defendant acquired interests in the property had taken place in 1896 and 1907.

The District Judge has found that the Receiver never obtained possession of the property, though he was directed to take possession by the vesting order, dated 30th May 1887, and the Ghoses remained in possession independently of the Receiver. It is consequently plain that the Maharaja was entitled to proceed in execution against the property of his judgment debtor. The rule that the possession of a Receiver may not be disturbed without leave, does not apply, so far as third persons are concerned, until a Receiver has been actually appointed and is in possession. It is not enough that an order has been made directing the appointment of a Receiver. Until the appointment has been perfected and the Receiver is actually in possession, a creditor is not debarred from proceeding to execution. The order appointing a Receiver

is for the benefit of the parties to the action; it does not affect third persons until the appointment is complete and perfected: *Defries* v. *Creed* (1) and *Edwards* v. *Edwards* (2). It is further clear that the sale held at the instance of the Maharaja was, at the worst, only voidable. As pointed out in *Levenia Ashton* v. *Madhubmoni Dasi* (3), property in the hands of a Receiver is exempt from judicial process and the purchaser of such property at an execution sale buys at his peril for the sale may be cancelled upon an application to the execution Court; in other words, when property is in the custody of a Receiver appointed by a Court, a sale under an execution issued by another Court may be avoided by an appropriate process. In the case before us, however, no steps have ever been taken, either by the Receiver or by the beneficiares, for cancellation of the execution sale in which the Maharaja became the purchaser. In this view, it is not necessary to consider the effect of the attempt to revive the suit on the Original Side of this Court after it had remained dormant for 17 years and to hold a sale to the prejudice of rights already acquired by strangers who had no notice of the proceedings in the suit.

In our opinion, the plaintiff has not acquired a title enforceable against the Maharaja and his claim has been rightly negatived by the District Judge. The result is that the appeal is dismissed with costs.

Appeal dismissed.

(1) (1865) 34 L. J. Ch. 607; 11 Jur. (N. S.) 360; 12 L. T. 262; 13 W. R. 632.

(2) (1876) 2 Ch. D. 291; 45 L. J. Ch. 391; 34 L. T. 472; 24 W. R. 713.

(3) 5 Ind. Cas. 890; 11 C. L. J. 489; 14 C. W. N. 560.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 658 OF 1915.

July 17, 1918.

Present:—Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

NAND SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHHAJJU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal, second—Abandonment, whether question of law.

A finding on the question of abandonment is a finding of fact, and only matters of legal principles arising out of such finding can be taken up in second appeal. [p. 396, col. 2.]

Second appeal from the decree of the District Judge, Jullundur, dated the 4th December 1914.

Pandit *Rambhaj Datta Chowdhary*, for the Appellants.

Bakshi *Tek Chand*, for the Respondents.

JUDGMENT.—One Haria had three sons, of whom Ruldu left his land before the first Settlement. In 1865 he had died leaving two sons, Nihala and Budhu, of whom the former sued his relations for his and his brother's share in the land. He obtained a decree for one-fourth share. It is not clear whether this decree was ever executed or not, the next piece of information available being a revenue entry in 1878 showing him as again out of possession. He subsequently died sonless in *Sambat* 1960, leaving as his heirs the descendants of his brother Budhu who have now sued the descendants of Haria's other sons for their share in the property, which was joint and remained till 1905 recorded in the names of plaintiffs and defendants. The only questions before the Courts were whether Nihala and Budhu had abandoned their land and whether the present suit is within time. Both Courts have held that no abandonment took place and that the first denial of plaintiffs' title took place in 1905. Against the decision of the lower Appellate Court a second appeal has been preferred.

Strictly speaking the findings of the lower Courts on the question of abandonment are findings of fact [*Kirpa* v. *Jiwa* (1), *Atra* v. *Ram Kishen* (2) and *Kailas Chandra* v. *Romesh Chandra* (3)]. On second appeal, therefore, only matters of legal principles arising out of these facts can be taken up. In this appeal no matter of legal principle appears to be involved and in these circumstances it is unnecessary for us to discuss the evidence regarding the *factum* of abandonment. There is also no question of limitation involved, as the parties were co sharers in a joint holding and no overt denial of the plaintiffs' title took place till 1905 and

(1) 5 Ind. Cas. 840; 13 P. W. R. 1910; 48 P. L. R. 1910.

(2) 4 Ind Cas. 965; 102 P. L. R. 1909; 154 P. W. R. 1909.

(3) 32 Ind. Cas. 355.

the suit was instituted within 12 years of this denial.

We dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2155 OF 1916.

January 8, 1919.

Present :—Mr. Justice Beachcroft.

BASHIRAM NATH—PLAINTIFF—APPELLANT

versus

DINA NATH DEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 153—Rent suit of less than Rs. 100 in value—Decision on question of title—Appeal, whether lies—Landlord and tenant—Rent realised by third person, effect of.

In a suit for recovery of rent of a holding the value whereof was less than Rs 100, the defence was that the plaintiff was entitled only to a half share of the rent of the holding. The lower Appellate Court decreed the suit for rent of only half the holding. Plaintiff preferred a second appeal:

Held, that as there was a dispute as to the share of the plaintiff, there was a dispute as to the amount of rent annually payable by the defendant and that a decision having been given on that point, a second appeal was competent. [p. 398, col. 2.]

If one man realizes rent due to another, that fact cannot constitute the former the landlord in place of the latter. [p. 399, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, 3rd Court, Mymensingh, dated the 19th June 1916, modifying that of the Additional Munsif, Iswargunj, dated the 4th May 1915.

FACTS appear from the judgment.

Babu *Kalikinkar Chakravarty*, for the Respondents, raised a preliminary objection to the competency of the second appeal, on the ground that the value of the suit for rent was less than Rs. 100 and the case did not fall within any of the exceptions to section 153 of the Bengal Tenancy Act, because no question of title to landbetween parties having conflicting claims thereto or of the amount of rent annually payable by the defendant was decided in the case. He relied on *Prasanna Kumar Banerjee* v. *Srinath Dass* (1) and also the unreported decision in Second Appeals Nos. 699 and 1100 of 1903.

Babu *Annada Charan Karkoon* for Babu *Jotindro Mohan Chowdhury*, for the Appellant, contended that the Court below had decided what was the amount of rent payable by the defendant to the plaintiff, *i.e.*, whether the plaintiff was entitled to realize the whole of the rent for the holding or only half of the rent as alleged by the defendants. The case, therefore, fell within the exception to section 153 of the Bengal Tenancy Act and the second appeal, therefore, was competent *Srimutty Poresh Moni Dassya* v. *Nobo Kishore Lahiri* (2) was referred to. The case of *Prasanna Kumar Banerjee* v. *Srinath Dass* (1) was overruled by the Full Bench in the case of *Narain Mahton* v. *Manofi Pattuk* (3). See also *Nobin Chand Nuskar* v. *Bansenath Paramanick* (4) and *Sasi Bhusan Rudra* v. *Beni Madhab Samanta* (5).

On the merits it was urged that Dina Nath, the alleged foster-child of Ramjoy, had no rights to the rent sued for and the plaintiff, who as heir of Gopi had all along been recovering the rent for the whole holding, was entitled to a decree for the whole rent. The finding of the Court of Appeal below that the plaintiff, who succeeded to one half of the property left by Gopi and Dina Nath as heir, was entitled to the other half could not stand.

Babu *Kalikinkar Chakravarty*, for the Respondents.—The finding is that Dinanath realized rent for half of the holding at least for a considerable period of time as heir to Gopi. The learned Subordinate Judge finds that Dina was recognized as the adopted son of Gopi. Even if Dina was not an heir to Gopi, the fact remains that he got rent for half of the holding for more than 12 years and thus acquired the right of landlord by adverse possession.

Babu *Annada Charan Karkoon*, in reply, urged that even if Dina had realized rent due to the plaintiff, that would not make him a landlord. The plea of adverse posses-

(1) 15 C. 231; 7 Ind. Dec. (N. S.) 738.
(2) 8 C. W. N. 193.
(3) 17 C. 489 (F. B.): 8 Ind. Dec. (N. S.) 865.
(4) 21 C. 722; 10 Ind. Dec. (N. S.) 1112.
(5) 8 C. L. J. 519.

sion by Dina now raised here was not raised in the Courts below.

JUDGMENT.—This is an appeal in a suit for rent and the only question involved is whether the plaintiff is entitled to recover the whole of the rent for the holding or only the half of the rent.

The plaintiff is the heir of one Gopi, who shared with his two brothers, Ramjoy and Baidya, the original landlords' interest. Ramjoy and Baidya both died before Gopi and as neither of them left any children and the widows of both died before Gopi, Gopi would, in the ordinary course, be the heir of both. But the defence was that one Dina Nath was a foster-son of Ramjoy and as such entitled to a half share of the property. The learned Subordinate Judge gave effect to this contention and, therefore, decreed the suit for rent of only half the holding.

A preliminary objection is taken to the hearing of this appeal under section 153 of the Bengal Tenancy Act, the amount of rent involved being less than Rs. 100.

The appellant supports his right of appeal by referring to the case of *Srimutty Poresh Moni Dassya* v. *Nobo Kishore Lahiri* (2), where, as here, the defence was that the plaintiff was entitled only to a smaller share than was claimed. It is attempted to distinguish that case by the fact that the rent for the whole holding was in dispute. That no doubt is true but it is not a sufficient reason for distinguishing the case, for the decision was not based on the fact that there was a dispute as to the rent. The reason for overruling the objection was contained in this sentence of the learned Judges: "The question raised and determined was not merely the amount of rent payable to the co-sharer but whether he had a title to recover the 8-annas share as he alleged. This comes under the exception mentioned in the section and the objection, therefore, fails." That is, the decision was based not on the dispute as to the total rent but on the dispute as to plaintiff's title to recover a particular share. It is argued that the language may refer to the other exception contained in section 153, namely, the decision relating to title to land. That cannot be so, for there was no decision as between parties having conflicting claims thereto, the record showing that the other co-sharers were not parties to the suit. The view taken by the learned Judges evidently was that if there was a dispute as to the share of the plaintiff there was a dispute as to the amount of rent annually payable by the defendant, and there being a decision on that point, an appeal lay. That is, if I may say so, a perfectly logical line of reasoning and though a contrary view was taken in the case of *Prasanna Kumar Banerjee* v. *Srinath Dass* (1), that was overruled by the Full Bench in the case of *Narain Mahton* v. *Manoh Pattuk* (3).

My attention was called to a decision of Geidt, J., in an unreported case (Appeals from Appellate Decrees Nos. 699 and 1100 of 1903) in which the learned Judge drew a distinction between a decision as to the amount of rent receivable by the plaintiff and a decision as to the amount payable by the defendants. That case was decided before the case of *Srimutty Poresh Moni Dassya* v. *Nobo Kishore Lahiri* (2) and the learned Judge is evidently referring to the total rent payable by the defendants, a point which had also been in dispute in the 1st Court, but not in the lower Appellate Court. In any case whatever my own view, I should be bound by the decision in *Srimutty Poresh Moni Dassya* v. *Nobo Kishore Lahiri* (2). The preliminary objection must, therefore, be overruled.

As regards the merits the learned Subordinate Judge holds that Dina Nath was entitled to an 8 annas share as foster-son and heir of Ramjoy and, therefore, the plaintiff was entitled only to an 8 annas share.

As a foster-child Dina Nath would have no rights and respondent's Pleader says he does not base his case on Dina Nath being the heir, but on the fact that he realised rent for some time. He suggests he may have realised rent for more than 12 years. This brings in a plea of adverse possession by Dina Nath against plaintiff which was not raised in the issues, and not investigated by the first Court and would rightly not be investigated in the absence of Dina Nath. It cannot be entertained now. Then the learned Pleader argues that the Subordinate Judge finds that Dina Nath was the adopted son of Ramjoy. In fact he does not definitely find so, nor

could he well do so as adoption does not appear to have been asserted, nor was there any issue as to it. Finally it is argued that Dina Nath's relation as landlord was created by acceptance of rent. Stripped of verbiage the argument comes to this, that if one man accepts rent due to another that fact constitutes him the landlord of the tenant in place of the other. The argument has only to be stated to be rejected.

The appeal must, therefore, be allowed, the decree of the learned Subordinate Judge set aside and that of the Munsif restored with costs in all Courts.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 384 OF 1918.

November 11, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C.

SUNDAR LAL—PLAINTIFF—APPELLANT

versus

SITA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXVI, r. 9—Commission for local investigation, whether can be issued after evidence closed.

A commission for local investigation cannot be issued after the evidence is closed and the case is ready for judgment.

Appeal against the order of the Subordinate Judge, Unao, dated the 25th July 1918, upholding that of the Munsif, (South) Unao, dated the 18th March 1918.

Pandit *Harkaran Nath Misra*, for the Appellant.

JUDGMENT.—The dispute in this appeal relates to plot No. 1277, new *khasra*, which appertains to a *mahal* of which the plaintiff is the owner. His allegation was that it was tank land with some *babul* trees growing there which were self-grown and that the defendants wrongfully cut some of those trees and planted fresh trees in their places. He sued for possession of the said land with the trees existing there and damages. He further sued for the removal of the trees which the defendants had planted. The defence was that the land in dispute formed part of a bigger grove belonging to the defendants, which

has been standing on the land in suit, and a contiguous plot No. 1276, new *khasra*, appertaining to another *mahal*.

Both the Courts below found that the land in dispute formed part of a grove which was planted by the ancestor of the defendants and that the plaintiff had failed to prove his actual possession over the trees standing on the land.

The learned Counsel who appears for the plaintiff contends that beyond some *babul* trees no fruit bearing trees stand on the land in dispute and that the Court below ought to have allowed a commission to be issued to ascertain the actual condition of the land. He further says that the finding is opposed to the entry in the revenue records.

It appears that an application for the issue of a commission was made by the plaintiff after the evidence was closed and the case was ready for judgment. The Court below rightly refused to issue a commission at that stage. The entire evidence adduced, oral and documentary, was considered by the Court of first instance and discussed at length. The lower Appellate Court endorses the view taken by the Court of first instance and holds that the entire area, consisting of Nos. 1276 and 1277, new *khasra*, constituted one compact ancestral grove of the defendants and that it was immaterial whether there was a tank in some portion of it. There is no sufficient reason for interference with that finding in second appeal, which is accordingly rejected.

Appeal dismissed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 6 OF 1918.

February 17, 1919.

Present:—Mr. Maynard, F. C.

SALIH MOHAMMAD—APPLICANT

versus

MEHAR SINGH—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 79—

SALIH MOHAMMAD *v.* MEHAR SINGH.

Execution of decree by Collector—Collector, powers of—Collector, whether can propose temporary alienation of land.

The position of a Revenue Officer executing the decree of a Civil Court, by the attachment of land or by temporary alienation or otherwise, is that of a ministerial officer of the Civil Court taking his orders from such Court, and he has no power to order a temporary alienation of the land attached. [p. 40 , col. 1.]

Land belonging to a member of an agricultural tribe is liable after attachment to be dealt with under section 72 of the Civil Procedure Code, the object of that section being to avoid the evils of a sale of agricultural land in execution of decrees by providing an alternative process of a more equitable and less harsh description. A Collector, therefore, has jurisdiction to make a proposal to effect a temporary alienation of the land of an agriculturist judgment-debtor attached in execution of a decree. [p. 402, col. 1.]

Revision from the order of the Commissioner, Rawalpindi, dated the 28th March 1918.

Mr. *Raghunath Rai*, for the Applicant.

Mr. *Amar Nath Monga*, for the Respondent.

JUDGMENT.—I have heard Counsel for both parties in this case. Mehar Singh, respondent, obtained a decree from a Civil Court for Rs. 572 against Salih Mohammad, applicant, who was described as a Rajput Bhatti. The judgment-debtor's land in two villages was attached in execution. The Court executing the decree twice asked the Collector whether he would intervene with a proposal for temporary alienation under section 72 of the Civil Procedure Code. On the first occasion the Collector declined to do so, on the ground that the land was not more than sufficient for the maintenance of the judgment-debtor and his family. On the second occasion the Collector re-examined the figures, took into account the remittances made by the judgment-debtor's sons and ordered that the Civil Court should be informed that he was ready to arrange for a temporary alienation for twelve years of a part of the land, *viz.*, that situated in the village of Bohra. This land consists of 76 *kanals*, of which 8 are already mortgaged. The remaining land which under this proposal, would remain for the maintenance of the judgment-debtor, consists of 103 *kanals*, 50 cultivated and 53 waste, in the village of Mohra Shaikhan. The fact that the applicant is of an agricultural tribe is sufficiently proved.

No order of temporary alienation has been passed. The judgment-debtor lodged an appeal against the Collector's report to the Civil Court, expressing his willingness to arrange for a temporary alienation. The Commissioner rejected that appeal, remarking that the judgment debtor was merely endeavouring to avoid payment of his debts and that he was being left with ample means of subsistence.

The proposal of the Collector to effect a temporary alienation was recorded in the absence of the judgment-debtor, who was held to have been present outside the Court but to have deliberately evaded attendance. The grounds of revision before this Court are taken up mainly by the contentions that the judgment-debtor was not responsible for his absence, and that the proposal (thoughout described, and quite incorrectly described, as an order) of temporary alienation, made in his absence, was irregular. The other contentions are that the so-called order was improper because the Revenue Assistant had reported against it, that the Collector had already decided not to propose a temporary alienation, and that the subsistence left to the judgment-debtor is inadequate.

None of these contentions has any force as a ground of revision, and I find it unnecessary to discuss them. The case for the applicant has been put before me on quite other grounds, which require consideration. Briefly they are these; that the judgment-debtor is a member of a notified agricultural tribe, that a sale in execution of decree of land belonging to a member of an agricultural tribe is illegal under the provisions of section 16 (1) of the Punjab Alienation of Land Act, and that, as section 72 of the Code of Civil Procedure requires that the Collector's representation is to be made with reference to, and in view of, a proposal to sell attached land, no temporary alienation of such land can be made by the Collector under the section cited.

Ahmad Khan v. *Parmanand* (1) is in point. But in that case the Revenue Officer had himself ordered a temporary alienation by his appellate order. Such an order was clearly without any legal authority, and the claim of the judgment-debtor in that case must inevitably have failed for

(1) 43 Ind. Cas. 356; 8 P. R. 1917 Rev.; 7 P. W. R. 1917 Rev.

that reason. The position of a Revenue Officer executing the decree of a Civil Court, by the attachment of land or by temporary alienation or otherwise, is that of ministerial officer of the Civil Court, taking his orders from such Court, and he has no power to order a temporary alienation.

Having ruled in the case above cited that the whole procedure in the Assistant Collector and the Collector's Courts had been irregular and *ultra vires*, for reasons which I have summarised above, my learned colleague, the Hon'ble Mr. Fagan, proceeded in paragraph 6 of his judgment to consider what would have been the correct procedure for the Assistant Collector to adopt. He expressed his dissent from the dictum of the Hon'ble Judges of the Chief Court in *Badar Din* v. *Bura Mal* (2) that the land of a member of an agricultural tribe was liable after attachment to be dealt with under section 326 of the Civil Procedure Code, corresponding to section 72 of the present Code. Briefly his reason for this view is that a proposal for the sale of such land can only be made by mistake, that no representation by the Collector under section 72, Civil Procedure Code, is legally possible, and that, therefore, no temporary alienation of the land of a member of an agricultural tribe can be made by the Collector under the authority of that section. It is important to note that this conclusion was formulated after it had been made clear that the application for revision must be accepted for quite other reasons.

I have examined the history of section 72 of the present Civil Procedure Code. Something like it appeared in the Code of 1859 (section 244 of that Code) and the discussions in Council upon that Code and upon the later Code of 1870 (where it appears as section 325) make it plain that the object was to avoid the evils of the sale of agricultural land in execution of decree by providing an alternative process of a more equitable and less harsh description. In moving that the report of the Select Committee on the Bill of 1877 be taken into consideration, the Hon'ble Sir A. Hobhouse quoted his own words spoken on a former occasion, with reference to the provisions relating to execution sales as follows: —

"These provisions constitute the principal alteration which we propose in the Code and our object has been to alleviate the harshness and rigidity of the law, to diminish the number of forced sales, and to get for the owner of the land something like an adequate value for it: at the same time keeping in mind the important principle —one of the most important objects of all civilized society—that a man should perform his contracts and pay his debts to the best of his ability."

These may, then, be taken as the double objects of that portion of the Civil Procedure Code which deals with execution of decrees upon land, and in particular of section 72 which provides a procedure for recovery of the judgment-debt from land without sale. There is nothing, of which I am aware, in the discussion which preceded the framing of the Punjab Alienation of Land Act to indicate that its framers intended, when prohibiting the sale in execution of decree of land belonging to members of notified agricultural tribes, to prohibit also the alternative method of temporary alienation, which had been introduced into the law with the double object of diminishing the number of forced sales, and of securing as far as possible the payment of just debts from the produce of land. It is in the highest degree improbable that they would deliberately have made so far-reaching a change, without a definite statement of the specific intention to do so. If, then, the effect of section 72 of the Civil Procedure Code read with section 16 (1) of the Punjab Alienation of Land Act be to prevent a Civil Court from authorising a Collector to satisfy a decree by a temporary alienation, it is a purely accidental effect, due to oversight in the framing of the latter Act.

I do not think that there has been any such oversight or accident, or that section 72 has the meaning which has been attributed to it by my learned colleague. Notwithstanding the prohibition of the alienation of the land of a member of an agricultural tribe, there still remain instances in which a Collector might find it necessary to represent to a Court that a sale was objectionable. Obvious instances are those of a person whose status as a member of an agricultural tribe was in dispute, or whose status was discovered after an order of sale had been passed,

(2) 4 P. R. 1903.

GOPAL v. JHAU LAL.

It seems equally plain, moreover, that a representation by a Collector that an order of sale is illegal by reason of section 16 (1) of the Punjab Alienation of Land Act would fall within the language of the section, and that an order does not cease to be "objectionable" because it is contrary to law. The word "objectionable" would appear to be applicable to any process to which objection may legally be taken.

In the present case the Collector has never, in so many words, represented to the Civil Court that the sale of the land is objectionable; but I think I should be placing a strained interpretation upon the section if I were to argue that the absence of such a formal representation, made in a particular form of words, has the effect of rendering illegal the application of the important execution process for which the section provides. When a Collector proposes to satisfy a decree by a temporary alienation of land, it is plain that he holds a sale to be objectionable, and neither his proposal, nor the authorisation thereafter given to it by the Court would appear to be invalidated by the fact that he has not said that sale is objectionable. Following the interpretation of the law given by the Hon'ble Judges of the Chief Court in *Badar Din* v. *Bura Mal* (2), I hold that there is no reason for doubting that the land of a member of an agricultural tribe is liable after attachment to be dealt with under section 72 of the present Code; and that the proposal of the Collector to effect a temporary alienation of the land of the judgment debtor in this case was in no way irregular or contrary to law and was not made without jurisdiction. The application for revision is, therefore, rejected.

Revision rejected.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 244 OF 1918.

February 10, 1919.

Present:—Mr. Stuart, J. C.

GOPAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

JHAU LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Jurisdiction of Civil and Revenue Courts—Theka-dar, *person holding under*—Theka, *expiry of*—*Ejectment of tenant*—*Court, proper.*

A Civil Court has no jurisdiction to entertain a suit for the ejectment of a person holding under a *thekadar*, on the expiration of the period for which the *theka* was granted.

Appeal from the decree of the District Judge, Hardoi, dated the 9th March 1918, setting aside that of the Subordinate Judge, Hardoi, dated the 25th June 1917.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—The facts are as follows:—The appellants were cultivators of certain plots. The plaintiffs respondents, who were the owners of those plots, issued notices for their ejectment under the provisions of section 55 of the Oudh Rent Act. The appellants brought suits to contest those notices. One of the appellants acting on behalf of all then took a *theka* from the respondents of a certain area of land which was greater than and included the land which the appellants were cultivating. The appellant who had taken the *theka* as *thekadar* proceeded to give the other appellants a long lease of the land. The *theka* has now come to an end and the respondents wish to eject the appellants through a Civil Court from the holding. This they cannot do, for the Civil Court has no jurisdiction. The lease granted by one of the appellants to the other three appellants is on the face of it null and void as against the respondents, and the respondents may take proceedings in ejectment without taking that lease into account. But if they wish to eject the appellants, they must eject them through the Revenue Court for a Civil Court has no jurisdiction. I agree with the decision of the late Sir William Burkitt in the matter—*Sidhi* v. *Bhaiya Tirbhuwan Dat Ram* (1). The facts of this case are clearly covered by that decision. As a result the suit must fail.

I allow the appeal and direct that the suit be dismissed. The respondents will pay their own costs and those of the appellants in all Courts.

Appeal dismissed.

(1) S. C. No. 180.

ALIMUDDI BEPARI *v.* CHINTAHARAN MUKROPADHYAY.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1589 OF 1916.

August 26, 1918.

Present :— Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

ALIMUDDI BEPARI—DEFENDANT—APPELLANT

versus

CHINTAHARAN MUKHOPADHYAY—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 49, 85 (2)—Ejectment—Suit to eject under-raiyat by notice—Permanent lease set up by under-raiyat, validity of—Previous possession—Estoppel.

In a suit to eject an under-*raiyat* after service of a notice to quit under section 49 of the Bengal Tenancy Act, the defendant set up a permanent sub-lease granted by the plaintiff's vendor and pleaded that he could not be ejected and contended that on principle such a lease should be held to be binding on the lessor on the ground of estoppel:

Held, (1) that according to the provisions of clause (2) of section 85 of the Bengal Tenancy Act, the lease set up was invalid and the tenancy could be put an end to by a notice under section 49 of the Act and as the defendant had no subsisting tenancy, he could not rely upon his previous possession; [p. 404, col. 2.]

(2) that the general rule as regards the application of the principle of estoppel being that that principle cannot be invoked to defeat the plain provisions of a Statute, and as the application of that principle would clearly defeat the object of section 82 (2) of the Bengal Tenancy Act, the principle could not be applied to the case. [p. 405, col. 1.]

The fact that a lease contains a clause, inserted at the request of the lessee, that the interest of the lessor is that of a *raiyat* at fixed rates, cannot be availed of by the lessee to support a plea of estoppel. [p. 405, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Faridpur, dated the 6th May 1916, modifying that of the Munsif, 2nd Court at Chikandi, dated the 25th January 1915.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Prokash Chandra Mozumdar*), for the Appellant.—This appeal is on behalf of the defendant and it arises out of a suit for ejectment after service of notice to quit under section 49, Bengal Tenancy Act. My points are :—(1) section 85, clause (2), of the Bengal Tenancy Act does not apply to this case, because the plaintiff is a *raiyat* at fixed rent ; (2) although the lease was for more than 9 years, it is valid and operative; (3) the plaintiff is estopped from urging that the lease is invalid and inoperative.

It appears from the lease itself that the status of the plaintiff is that of a *raiyat* at fixed rent; therefore, the plaintiff cannot eject the defendant on the ground that the sub-lease, having been given in contravention of section 85 (2) of the Bengal Tenancy Act, is invalid because the restrictions to sub letting in section 85 have no application to a *raiyat* at fixed rent or rate of rent.

As regards the question whether the lease which was registered in contravention of section 85 is valid and binding between the parties, the decisions of this Court are conflicting. My submission is that such a lease should be treated as valid and binding as between the lessor and the lessee, and a lesee, who on the strength of a lease for more than 9 years granted by a *raiyat* enters into possession, is not liable to ejectment at the instance of the *raiyat* on the ground that the lease is invalid. Refers to *Manik Borai* v. *Bani Charan Mondal* (1), *Gonesh Mondol* v. *Thonda Namasundrani* (2), *Telam Pramanik* v. *Adu Shaikh* (3). A contrary view was, however, taken in several other cases. See *Chandi Charan Nath* v. *Somla Bibi* (4).

Lastly, my contention is that the landlord cannot now turn round and say that the sub lessee must go out because the term of the sub-lease was in excess of the term authorized by section 85. Refers to *Walsh* v. *Lonsdale* (5). The principle of estoppel is well applicable in this case, because the plaintiff represented in the lease that he was a *raiyat* at fixed rent.

Babu *Gunada Charan Sen* (with him Dr. *Sarat Chandra Basak* and Babu *Birendra Kumar De*), for the Respondent.—The plaintiff is an ordinary occupancy *raiyat* and not a *raiyat* at fixed rent, and so section 85 applies to this case. No doubt in the lease the interest of the plaintiff has been described as that of a *raiyat* at fixed rent, but the finding is that such a statement was made in the Pattah at the instance and request of the defendant, who knew very well that the plaintiff was an ordinary occupancy *raiyat*. The doctrine of estoppel cannot apply to a case like this. See *Mohendra*

(1) 10 Ind. Cas. 469; 13 C. L. J. 649.
(2) 38 Ind. Cas. 489; 24 C. L. J. 539.
(3) 18 Ind. Cas. 791; 17 C. W. N. 468.
(4) 44 Ind. Cas. 254; 22 C. W. N. 179; 28 C. L. J. 91.
(5) (1882) 21 Ch. D. 9; 46 L. T. 858; 31 W. R. 109; 52 L. J. Ch. 2.

Nath v. *Parbutty Charan Doss* (6). The defendant should not be allowed to take advantage of his own act, *viz*, the request by which he induced the plaintiff to say in the Pattah that he was a *raiyat* at fixed rent. The defendant was fully aware of the nature of the plaintiff's interests, and so there can be no estoppel.

Lastly, the lease in question is inoperative and invalid. The trend of modern decisions is to treat such leases as invalid. Refers to *Telam Pramanik* v. *Adu Shaikh* (3), *Chandi Charan Nath* v. *Somla Bibi* (4); and also the unreported Second Appeal No. 2078 of 1915 decided on 10th July 1917 [*Nazir Ali Shikdar* v. *Banshi Badan Patwari* (7)]. Therefore, the defendant's tenancy having been put an end to by a notice under section 49, Bengal Tenancy Act, he is now liable to ejectment.

Babu *Jogesh Chandra Roy*, in reply.

JUDGMENT.—This appeal arises out of a suit to eject the defendant, who is found to be an under-*raiyat*, after service of a notice to quit under section 49 of the Bengal Tenancy Act.

The defendant set up a permanent sub-lease granted by the plaintiff's vendor and pleaded that he could not be ejected. The Court of first instance held that the plaintiff was bound by the sub-lease granted by his vendor, and that it was not invalid by reasons of the provisions of section 85, clause (2), of the Bengal Tenancy Act, and accordingly disallowed the claim for ejectment. On appeal the learned Subordinate Judge upon a consideration of some decisions of this Court held that the lease was invalid and allowed ejectment. The defendant has appealed to this Court.

Section 85, clause (2), of the Bengal Tenancy Act expressly lays down that a sub-lease by a *raiyat* shall not be admitted to registration if it purports to create a term exceeding nine years.

The decisions of this Court, however, upon the questions whether a sub lease granted in contravention of the provisions of section 85 of the Bengal Tenancy Act is void not only against the superior landlord, but also against the *raiyat* himself, are not uniform. It has been held in a number of cases that a sub lease granted after the passing of the Bengal Tenancy Act by a *raiyat* for a term exceeding 9 years and registered in contravention of the provisions of section 85 is void, and that such a lease is not admissible in evidence to prove the tenancy. In some other cases it has been held that a lease granted in contravention of section 85 is operative as between the grantor and the grantee. It is unnecessary to refer to the numerous cases on the point. They will be found collected in the case of *Telam Pramanik* v. *Adu Shaikh* (3), by Carnduff, J., where he dissented from the decision in the case of *Abdul Karim* v. *Abdul Rahman* (8), to which he was a party; and in the recent case of *Chandi Charan Nath* v. *Somla Bibi* (4), one of the learned Judges, Beachcroft, J., reviewed the cases on the point.

The cases in which it has been held that the under-*raiyat* cannot be ejected under such a lease by his landlord (the *raiyat*) or that the under-*raiyat* can recover possession against his landlord, are cases in which the under-*raiyat* was defending his possession or seeking to recover possession under a subsisting tenancy. For instance, see *Manik Borai* v. *Bani Charan Mondal* (1) and *Gonesh Mondol* v. *Thanda Namasundrari* (2). There is another class of cases in which the lease was executed before the Bengal Tenancy Act, and, therefore, come under clause (3) of section 85, and to which different considerations apply, see *Gopal Mondal* v. *Eshan Chunder Banerjee* (9) and other cases mentioned in *Chandi Charan Nath* v. *Somla Bibi* (4).

In the present case the defendant was in possession and was defending his tenancy, but the tenancy was put an end to by a notice to quit under section 49 of the Bengal Tenancy Act.

The lease being invalid according to the provisions of clause (2) of section 85, the tenancy could be put an end to by a notice under section 49, and the defendant not having a subsisting tenancy, he could not rely upon his previous possession.

(6) 8 C. W. N. 136

(7) 42 Ind. Cas. 621; 23 C. W. N. 435; 29 C. L. J. 888.

(8) 13 Ind. Cas. 364; 16 C. W. N. 618; 15 C. L. J. 672.

(9) 29 C. 148.

In a recent case, Second Appeal No. 2078 of 1915, decided on the 10th July 1917 [*Nazir Ali Shikdar* v. *Banshi Badan Patwari* (unreported) (7)], where the under-*raiyat* was served with a notice under section 49 (*b*), it was held that he could not rely upon any subsisting tenancy though he was the defendant in possession, and that the plaintiff was entitled to *khas* possession. The present case is covered by that decision.

Apart from the cases on the point it has been contended that on principle such a lease should be held to be binding on the lessor on the ground of estoppel. There is divergence of judicial opinion on the point. The general rule is that the principle of estoppel cannot be invoked to defeat the plain provisions of a Statute, and if the contention were given effect to, the provisions of clause (2) of section 85, the object of which, as pointed out in *Mohendra Nath* v. *Parbutty Charan Dass* (6), was to protect the *raiyats* themselves against the effect of their own improvident acts, would be defeated in every case.

The learned Pleader for the appellant has relied upon the leases based on the principle laid down in *Walsh* v. *Lonsdale* (5), but those cases can have no application to a case like the present, because there cannot be specific performance of an agreement to grant a permanent sublease to an under *raiyat*, having regard to the provisions of clause (2) of section 85 of the Bengal Tenancy Act.

Lastly, it has been contended that there is a special ground of estoppel in the present case as the lessor represented in the lease that his interest was that of a *raiyat* holding at fixed rates. It is found, however, that the lessor had no such right, and it was at the request of the lessee that such a statement was made in the Pattah. The lessee having knowledge of the true nature of the lessor's title, there is no estoppel and he cannot take advantage of a statement made in the Pattah at his own request.

The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2101 OF 1915.

April 1, 1919.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

FORT GLOSTER JUTE MANUFACTURING CO.—DEFENDANT—APPELLANT

versus

CHANDRA KUMAR DAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 99, O. XX, rr. 1, 2, 3—Judgment written by one Judge pronounced by another, validity of—Irregularity—Waiver.

The provisions of the law relating to the delivery of judgments have been framed for the benefit of the parties litigant and their contravention is an irregularity curable by consent or waiver of parties. [p. 407, col. 2.]

After the conclusion of the hearing in a case the Judge reserved his judgment, which he afterwards wrote out, signed, dated and placed on the record. This judgment was delivered by another Judge, who was temporarily in charge of the Court:

Held, that although the judgment so delivered was pronounced, dated and signed in contravention of the specific provisions of the Civil Procedure Code, it was an irregularity which was waived by the parties not taking objection at the time of the delivery of the judgment. [p. 407, cols. 1 & 2.]

Non-compliance with every rule of procedure does not necessarily destroy the validity of the whole proceeding. The purpose of the rule violated must be examined. If the act of the Court is without jurisdiction or infringes a rule prescribed on grounds of public policy, the proceeding becomes a nullity; if it is, on the other hand, only an irregular exercise of jurisdiction, a contravention of rules framed by the Legislature with a view to afford protection to the individual litigant, the latter might waive the benefit thereof and is not entitled to obtain a reversal of the decree except on proof that the merits have been affected. The mere fact that the Court has acted in a manner contrary to that prescribed by the Code of Civil Procedure does not necessarily show that what has been done is a nullity; the effect depends upon the nature, scope and object of the particular provision which has been violated. [p 407, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Hooghly, dated the 29th May, 1915, reversing that of the Munsif, Howrah, dated the 16th January 1914.

Sir *Rash Behary Ghosh*, Dr. *Jadu Nath Kanjilal* and Babu *Sarat Kumar Mitra*, for the Appellant.

Babu *Mahendra Nath Ray*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for establishment of

title to land. The claim was dismissed by the trial Court, whereupon the plaintiffs preferred an appeal. This was heard on the 6th May 1915 by Mr. Asutosh Ghose, First Subordinate Judge of Hooghly, who reserved judgment. On the 29th May 1915 Mr. Ghose wrote, signed and dated his judgment. It appears that during a portion of every month the First Subordinate Judge had to discharge his judicial duties in another station in the district. While Mr. Ghose was thus absent from the headquarters, the judgment was delivered on the 31st May 1915 by Mr. U. B. Mookerjee, the Second Subordinate Judge, who was in charge of the first Court during the temporary absence of Mr. Ghose. The decree was drawn up in due course and was signed by Mr. Ghose on the 4th June 1915, but as required by Order XX, rule 7, of the Civil Procedure Code bore the date when the judgment was pronounced, that is, the 31st May 1915. As the suit was decreed by the Subordinate Judge, the defendants have appealed to this Court, and the only point pressed is that there is no legal judgment which can form the foundation for a valid decree.

The provisions of the Civil Procedure Code relevant for the determination of the question raised are as follows:

Order XX, rule 1. The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their Pleaders.

Order XX, rule 2. A Judge may pronounce a judgment written but not pronounced by his predecessor.

Order XX, rule 3. The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it, and, when once signed, shall not afterwards be altered or added to save as provided by section 152 or on review.

It is plain that in the case before us, the judgment was not pronounced, dated and signed in conformity with the requirement of the Code. Here it may be observed that the paper signed by Mr. Ghose and kept on the record could not be treated as a valid judgment till it had been pronounced in Court; this view is supported by decisions of unquestionable authority. In *Brand* v. *Hammersmith Ry. Co.* (1) Erle, C. J., was one of the Judges who heard the case; he prepared a judgment, which could not be delivered as the other members of the Court were not then ready to give judgment. The Chief Justice resigned before the case could be set down for delivery of judgment and the opinion recorded by him was not treated as a judgment. This was followed by Peacock, C. J., in *Mahomed Akil* v. *Assadunnissa Bibee* (2). That case was heard by a Full Bench of nine Judges, judgment was reserved after conclusion of the hearing, and the Judges, from time to time, lodged with the Registrar copies of the judgments which they respectively intended to deliver. Two of these Judges retired from the Court, and one died, before the case was set down for delivery of judgment. It was unanimously held by the other six Judges (who were themselves equally divided in their opinion on the merits) that the opinions recorded by their late colleagues were only minutes or memorandums and could not be treated as operative judgments. The result was that under the Letters Patent the opinion of the Chief Justice prevailed, whereas the decision would have been to the contrary effect, if the rejected opinions had been taken into account. A still more remarkable instance of the principle applicable to cases of this character will be found in *Lachman Prasad* v. *Ram Kishen* (3). There a Subordinate Judge heard an appeal recorded in the order sheet that judgment would be pronounced on a date mentioned, wrote out what took the form of a judgment in the case, and placed it on the record. But before the appointed day arrived, he ceased to be Subordinate Judge of the place. His successor-in-office did not pronounce the judgment written by him, examined the record, took a totally different view of the case, and delivered a judgment contrary to what, it would appear, the Judge who had heard the appeal had intended to deliver. The Allahabad High Court held that though the new Judge might have pronounced the judgment prepared by his predecessor, he was not bound to do so. He had an option in the matter, so that it was competent to him to treat the case as still undisposed

(1) (1867) 2 Q. B. 223 at pp. 235, 246.
(2) 9 W. R. 1; B. L. R. Sup. Vol. 774.
(3) 3 Ind. Cas. 1096; 33 A. 236; 7 A. L. J. 1189.

of and to deliver his own judgment. There is thus no escape from the conclusion that, in the case before us, the judgment required to be delivered was pronounced dated and signed in contravention of the specific provisions of the Code, and the question inevitably arises, whether this constitutes an irregularity which could be waived or an illegality which nullified the proceedings.

The determination of this point must depend upon the nature of the rules which have been infringed; if the act of the Court was without jurisdiction or infringed a rule prescribed on grounds of public policy, the proceeding became a nullity; if it was, on the other hand, only an irregular exercise of jurisdiction, a contravention of rules framed by the Legislature with a view to afford protection to the individual litigant, he might clearly waive the benefit thereof and could not be entitled to obtain a reversal of the decree except on proof that the merits had been affected (section 99, Civil Procedure Code). The mere fact that the Court had acted in a manner contrary to that prescribed by the Code does not necessarily show that what was done was a nullity: *Ashutosh Sikdar* v. *Behari Lal Kirtania* (4); the effect depends upon the nature, scope and object of the particular provision which has been violated. As pointed out in Macnamara on Nullities and Irregularties, though no hard and fast line of demarcation can be drawn, an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of validation. See the observation of Coleridge, J., in *Holmes* v. *Russell* (5) and of Taunton, J., in *Garrat* v. *Cooper* (6). If we test the case before us in the light of these principles, what is the position? As explained in *Sukh Lal Sheikh* v. *Tara Chand Ta* (7), jurisdiction, which is the power of a Court to hear and determine a cause, to adjudicate or exercise judicial power in relation thereto, divides itself under three heads; with reference to (*a*) the subject-matter, (*b*) the parties and (*c*) the particular question which calls for decision. The substance of the matter then is that here the Court had jurisdiction to try the controversy between the parties, but acted, in the exercise of its undoubted jurisdiction, in a mode contrary to that prescribed by Statute. Non-compliance with every rule of procedure does not, however, necessarily destroy the validity of the whole proceeding. We must accordingly examine the purpose of the rules which have been infringed. The object of the Legislature seems to have been two-fold, namely, (*a*) that the contending parties should be speedily and publicly apprised of the decision of the Court, and (*b*) that the Court should have an opportunity for immediate reconsideration on the representation of the parties, which, after the judgment has been signed, can be done only on a formal application for review (section 114) or for amendment (section 152). The provisions of the law relating to the delivery of judgments may consequently be deemed to have been framed for the benefit of the parties litigant, and their contravention is an irregularity curable by consent or waiver. This is clearly not a case of lack of inherent jurisdiction, where the maxim applies that consent cannot give jurisdiction, *Golab Sao* v *Chowdhury Madho Lal* (8), *Gurdeo Singh* v. *Chandrika Singh* (9). Nor is this a case of a mandatory provision of law, the infringement whereof nullifies the entire proceedings: *Ashutosh Sikdar* v. *Behari Lal Kirtania* (4), *Liverpool Borough Bank* v. *Turner* (10). In the case before us, when the judgment prepared by Mr Ghose was about to be pronounced by Mr. Mookerjee, no objection appears to have been taken by either party; if objection had been taken, the delivery of the judgment might and would in all probability have been postponed till Mr. Ghose could return to headquarters. Finally, there is no suggestion that the appellant has been prejudiced in any manner by the failure of the Court to pronounce judgment in conformity with the rules.

(4) 35 C. 61 at p. 74; 11 C. W. N. 1011 (F. B.); 6 C L. J. 320.
(5) (1841) 9 Dowl. 487.
(6) (1831) 1 Dowl. 28.
(7) 33 C. 68 at p. 71; 2 C. L. J. 241; 9 C. W. N 1043; 2 Cr. L. J. 618.
(8) 2 C. L J. 384; 9 C. W. N. 956.
(9) 1 Ind. Cas. 913; 5 C. L. J. 611; 36 C. 193.
(10) (1860) 2 De G. F. & J. 502; 45 E. R 715; 119 R. R. 172.

We hold accordingly that the infringement of the procedure prescribed in Order XX, rules 1, 2, 3, constituted an irregularity which was waived by the parties, did not affect the merits of the case, and thus affords no ground for reversal of the decree based on the judgment irregularly pronounced. The appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1635 OF 1914.

July 1, 1918.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

BHAGWANA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BALIK RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Occupancy rights, creation of, whether amounts to alienation.

The creation of an occupancy tenancy amounts to a permanent alienation of the land, inasmuch as the rights created derogate from the full title of the landlord.

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated the 26th March 1914.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *Sundar Das*, for the Respondents.

JUDGMENT.—This was a suit by some of the heirs of one Tungal for possession of land which he had in one case mortgaged, and in two other cases encumbered with, occupancy tenant rights.

With regard to the area mortgaged, the learned Divisional Judge decreed possession to plaintiffs of their shares subject to payment of their proportionate share of Rs. 270, which sum representing an earlier encumbrance on the land had been paid off by the mortgagees-defendants. For the appellants-plaintiffs Mr. Tek Chand argued at length, with reference to Order XLI rule 27, and *Kessowji Issur* v. *Great Indian Peninsula Railway Co.* (1) and *Marimuthu Pillai* v. *Velu Pillai* (2), that no evidence on this point was led by the respondents in the trial Court and, therefore, the Divisional Judge should not have admitted evidence in his Court.

His argument, however, reposed on an imaginary foundation, for evidence, that of Lal Chand, on the point was taken in the first Court and the Divisional Judge merely allowed that evidence to be supplemented and confirmed and gave appellants full opportunity of rebuttal.

That payment by the respondents placed them in the shoes of the prior mortgagees and *prima facie* the payment was for necessity. On this point the appeal fails.

With regard to the creation of occupancy tenancies, the Courts below have contented themselves with a finding that the creation of occupancy tenancies is not a permanent alienation and have not considered whether their creation in the case was an act of good management.

In our opinion, the creation of an occupancy tenancy amounts to a permanent alienation, inasmuch as the created rights derogate from the full title of the landlord. And in the cases before us, the creator of the right appears to have been actuated not by a desire to improve his estate, but to secure cash with the slightest inconvenience to himself and the greatest loss to his successors. A mortgage of the land would have been his proper course. That the consideration for the creation of the tenancies was needed by Tungal, we see no reason to doubt; indeed after all these years necessity may be presumed. On this view we accept the appeal and decree to plaintiffs possession of their share (23/60) of the occupancy areas on their paying 23/60 of Rs. 240 to defendants Nos. 4 and 5 and 23/60 of Rs. 121 to defendants Nos. 6 to 10.

Regarding the shares of the plaintiffs' co-heirs, who have not sued, no argument has been addressed to us.

Parties shall bear their own costs in this Court.

Appeal accepted.

(1) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P. C.).

(2) 32 Ind. Cas. 908.

SRIRAM CHANDRA NAIK *v.* HRIDOY NATH GUPTA.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 109 OF 1915.

March 13, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

SRIRAM CHANDRA NAIK AND OTHERS—DEFENDANTS—APPELLANTS

versus

HRIDOY NATH GUPTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal against joint decree—Failure to join one respondent, effect of—Dismissal of appeal against one respondent—Appeal, whether can proceed.

A joint decree having been passed in favour of certain plaintiffs for recovery of possession of certain property, the defendant preferred an appeal but did not take steps for the representation of one of the plaintiffs-respondents who was a minor and the result was that the appeal as against the infant respondent was dismissed:

Held, that the appeal as against the other respondents could not proceed inasmuch as even if the appeal succeeded, the decree in favour of the infant must remain untouched, so that he would be in a position to execute the decree.

Appeal against the decision of Mr. Justice Newbould, dated the 4th June 1915, in Appeal from Appellate Decree No. 2599 of 1912, against the decree of the Subordinate Judge, 2nd Court, Burdwan, dated the 4th July 1912, reversing that of the Munsif, 3rd Court, Burdwan, dated the 11th May 1911.

Babu *Rishindranath Sarkar*, for the Appellants.

Babu *Bankim Chandra Mookerjee*, for the Respondents.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Newbould. A preliminary objection has been taken that the appeal should not be heard on the merits, as no decree of dismissal of the suit can be made by this Court in the appeal as at present constituted. We are of opinion that this objection must prevail.

Eight persons as plaintiffs instituted this suit for declaration that the subject-matter of the litigation was *debutter* property dedicated to an idol Sri Sri Issur Raghunath Jiu Bishnu Thakur and that there had been dealings with the property by the *shebaits* in a manner not justified by its character as *debutter* property. The plaintiffs accordingly prayed for a declaration of the true character of the property and for a decree for recovery of possession from the first defendant who had acquired no valid title to the property and was in unlawful possession. The Court of first instance dismissed the suit. On appeal, a joint decree was made in favour of all the plaintiffs. A second appeal was next preferred to this Court. One of the plaintiffs died during the pendency of the appeal, and his legal representatives were brought on the record; one of these was a minor and an officer of this Court was appointed his guardian *ad litem*. The appeal was heard on the merits and dismissed. An appeal was then preferred under clause 15 of the Letters Patent, but steps were not taken for the representation of the infant respondent. The result was that on the 5th February last, this Court dismissed the appeal as against the infant. The defendant-appellant now seeks to proceed against the other respondents on the record. They contend that the appeal should not be heard on the merits, because even if the appeal succeeds, the decree in favour of the infant plaintiff must remain untouched, so that he will be in a position to execute the decree and evict the appellant. In our opinion, the appeal as at present constituted should not be heard for the reasons assigned. This view accords with the decision in *Basir* v. *Fazle Karim* (1). This Court cannot be called upon to make two contradictory decrees in the appeal. The effect of the order of the 5th February 1917 is to confirm the decision of Mr. Justice Newbould in favour of the infant plaintiff; he has got a declaration of the true character of the property and is entitled to take possession of the property from the hands of the first defendant by execution of his decree. We cannot now hear the appeal against the other plaintiffs and hold that although they stand in the same relation to the property in suit as the infant, they are not entitled to the same relief.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

(1) 28 Ind. Cas. 703; 19 C. W. N. 290.

BHANA *v.* BELA SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1150 OF 1916.

May 31, 1918.

Present:—Sir Henry Rattigan, KT., Chief Judge.

BHANA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BELA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Minor, contract of exchange of land by—Ratification after attaining majority, effect of.

A contract of exchange of land made by a minor is void and as such cannot possibly be ratified in law. [p. 410, col. 2.]

Second appeal from the decree of the District Judge, Jullundur, dated the 4th February 1916.

Mr. *Badr-ud-Din Kureshi*, for the Appellants.

Mr. *Brij Lal*, for the Respondents.

JUDGMENT.—It appears that on the 6th December 1913 and 10th December 1913 Bhana, plaintiff No. 1, who was then himself a minor, aged 17, acting on behalf of himself and purporting to act as the guardian of his minor brothers, effected certain exchanges of lands with the defendants. Mutations followed and it is stated that at the mutation, which took place on the 26th of June 1914, when Bhana had attained the age of majority, *Musammat* Rami, the mother of the plaintiffs, was also present and that both she and Bhana ratified the transactions that had already taken place. Plaintiffs, who are Bhana himself and his two minor brothers, have now sued for possession of the land originally belonging to them, and ask to have the parties restored to the *status quo*. The first Court held that the transactions effected by Bhana were void, that the exchanges were not beneficial to the minors and that the defendants, who had built on the land in defiance of an injunction from the Court, were not entitled to any compensation for their buildings. He accordingly granted plaintiffs the decree for which they prayed. On appeal the District Judge reversed the decree and dismissed the plaintiffs' suit with costs throughout. The grounds upon which the learned District Judge based his judgment were that Bhana at the time of the transactions was "quite old enough to know what was to his advantage and to that of his younger brothers," and that the latter were represented at the second mutation by their mother, and further that the exchanges had been beneficial to the plaintiffs who had received *chahi* land in lieu of *baniar qadim*.

Plaintiffs have preferred a further appeal to this Court and in my opinion their appeal must succeed. The contract of exchange made by Bhana, a minor, was void, and as such could not possibly be ratified in law (see Pollock and Mulla's Contract Act, 3rd Edition, pages 56 and 58). The authority relied on by the District Judge, namely, *Roy* v. *Thakur Ram Jiwan Singh* (1) is not in point. In that case it was held that a person who at the time of contracting was under a disability under the provisions of the Chota Nagpore Encumbered Estates Act, VI of 1876, but was at the point of emerging from that disability, could ratify his contract after the disability had ceased. That case was thus decided with reference to its own particular facts and to the provisions of the Act referred to. The disability was one under the terms of that Act, and not a disability due to minority. On the other hand we have now the authority of their Lordships of the Privy Council for the proposition that a contract by a minor is not merely voidable, but is wholly void [see *Mohori Bibee* v *Dharmodas Ghose* (2)]. Such being the case, it was not competent either to Bhana or to *Musammat* Rami to ratify an act which from its very inception had no legal force.

I accordingly accept the appeal and setting aside the order of the District Judge I remand the appeal to the Court below for determination of the question whether any compensation is due to defendants for the building erected by them. This question was put in issue (6th issue) and decided against defendants by the first Court, but it was raised before the lower Appellate Court in the defendants' 7th ground of appeal and upon the view I take of plaintiffs' right to have the exchanges set aside, it must be considered and decided by the District Judge. I accordingly direct that the record be returned to the Court

(1) 33 C. 363; 10 C. W. N. 149.

(2) 30 C. 539 (P. C.); 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374.

of the District Judge for final determination of defendants' appeal in accordance with law and subject to the foregoing remarks. I leave it to the District Judge to deal with the question of costs.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 813 OF 1917.

April 16, 1918.

Present:—Mr. Justice Seshagiri Aiyar.

SOMU PATHAR AND ANOTHER—DEFENDANTS NOS. 2 AND 4—RESPONDENTS NOS. 1 AND 3—PETITIONERS

versus

RENGASAWMI REDDIAR AND ANOTHER—ATTACHING CREDITOR AND DEFENDANT NO. 3—PETITIONER AND RESPONDENT NO. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, rr. 2, 3—Attachment by decree-holder of decree held by judgment-debtor—Satisfaction of decree attached, application for entering of—Application opposed as collusive and fraudulent—Burden of proof—Application, withdrawal of—Duty of Court—Permission, grant of, for withdrawal—Revision by High Court.

Where a decree-holder attaches a decree held by his judgment-debtor and an application by the latter for entering up satisfaction of such decree is opposed by the attaching creditor on the ground that it is collusive and fraudulent, the onus lies on him to prove the fraud and not on the judgment-debtor to prove the *bona fides* of the certificate. [p. 411, col. 2.]

When once a Court is seized of an application to enter up satisfaction of a decree, it is bound to make an enquiry and see whether the decree has been satisfied and it will not be justified in allowing the application to be withdrawn. [p. 412, col. 1.]

The permission to withdraw in such a case is a grave irregularity warranting the interference of the High Court in revision. [p. 412, col. 1.]

Where injustice is done in the exercise of jurisdiction, the High Court should interfere. [p. 412, col. 1.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court, Tanjore, in Appeal Suit No. 423, preferred against the decree of the Court of the District Munsif, Mayavaram, dated the 1st April 1916, in E. P. No. 2 in E. R. No. 171 of 1916, (in Original Suit No. 333 of 1912 on the file of the Court of the District Munsif, Shiyali).

Mr. *R. Seturama Sastri*, for the Petitioners.

Mr. *S. Muthiah Mudaliar*, for the Respondents.

JUDGMENT.—Although the point argued is not free from difficulty and I have a doubt whether section 115, Civil Procedure Code, is applicable to the case, I shall express my opinion fully so that, if the matter be taken in appeal, it can be properly dealt with then.

The petitioners in this case are the judgment-debtors in Original Suit No. 333 of 1912. One Rengsawmi Reddi obtained in a Small Cause Suit a decree against the decree-holder in Original Suit No. 333 of 1912 and attached the decree in the latter suit. That was in August 1914. In December 1915 the decree-holder in Original Suit No. 333 of 1912 applied to the District Munsif's Court to enter up satisfaction of his decree. At this time, the attachment at the instance of the decree-holder in the Small Cause suit had been effected. This application for satisfaction being entered up was opposed by the attaching decree-holder. In consequence of the opposition by the attaching creditor, the decree-holder in Original Suit No. 333 of 1912 withdrew the application. The attachment proceedings were allowed to continue.

I find from the papers that notice was served upon the 1st defendant in Original Suit No. 333 of 1912, the father of the petitioners, and that he stated in person that the decree was satisfied. In these circumstances, it was the duty of the attaching decree-holder to have adduced evidence to show that the decree was not satisfied. I cannot accede to the contention of Mr. Muthia Mudaliar that the burden of proving the *bona fides* of the certificate is upon the judgment-debtor who said that he had paid the money and the decree-holder who said that he had received the money; and in these circumstances it is upon persons, who allege that the certificate was collusive and was intended to defraud them, to adduce evidence to establish the facts.

The District Munsif and, in appeal, the District Judge have come to the conclusion that, as the application for satisfaction was withdrawn, it is not open to the petitioners to plead that the decree in Original Suit No. 333 of 1912 was satisfied. The learned

Vakil for the petitioners drew my attention to Order XXI, rule 2, clauses 1 and 3.

The first clause makes it the duty of the decree-holder to certify the payment, and when that application is before the Court, the Court is directed to record satisfaction. Clause 3 says that a payment or adjustment which has not been certified or recorded shall not be recognised by the executing Court, thereby implying that if there is either a certificate by the decree-holder or the recording of satisfaction by the Court, the executing Court is bound to take notice of the fact. The decision in *Tarak Nath Sarkar* v. *Natabar Mondal* (1), which I respectfully follow, holds that a mere certificate is enough to enable the judgment-debtor to plead that the decree has been satisfied. As myself and Kumaraswami Sastri, J., held in *Lodd Govinda Doss* v. *Rajah of Karvetnagar* (2), when once a Court is seized of an application to enter up satisfaction, it is bound to make an enquiry and see whether the decree has been satisfied. I do not think that the Court will be justified under the circumstances in allowing the application to be withdrawn.

It seems to me that in this case, the Courts below ought to have made an enquiry whether the application to enter up satisfaction was made *bona fide* and whether the payment alleged to have been made by the judgment-debtor to the decree-holder in Original Suit No. 333 of 1912 was actually made. In my opinion, this is an irregularity which will warrant the interference of this Court under section 115, Civil Procedure Code. What the Courts below have done is practically to refuse to exercise the powers given to them under Order XXI, rule 2. That would amount to a refusal to exercise the jurisdiction vested in them. I am free to confess that section 115 can be invoked in this case. Some Judges may hold that this is straining the language of section 115. I have always held that wherever there is injustice done in the exercise of jurisdiction, the High Court should interfere. Therefore, I incline to the view that section 115 is applicable to this case. I would reverse the orders of the Courts below and send the case back to the District Munsif for proper enquiry regarding the question whether the payment was really made by the judgment-debtor to the decree holder in Original Suit No. 333 of 1912, and if so, whether there was any subsisting interest capable of being attached by the attaching decree-holder. Costs will abide the result.

Order reversed;
Case remanded.

M. C. P.

(1) 30 Ind. Cas. 45; 21 C. L. J. 632.
(2) 60 Ind. Cas. 357; 29 M. L. J. 319.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 250 OF 1918.

June 10, 1918.

Present:—Mr Justice Scott-Smith.

DEVI DAYAL—DEFENDANT—APPELLANT

versus

BAINI RAM—PLAINTIFF—RESPONDENT.

Contract—Performance becoming impossible owing to act of executive authorities—Damages, suit for, maintainability of—Principle applicable—Contract Act (IX of 1372), s. 65.

A contract which at the outset is not void, but performance of which becomes impossible owing to an act of the executive authorities which could not have been foreseen at the time the contract was entered into, is governed by the principle "that the loss must lie where it has fallen," section 65 of the Contract Act being inapplicable, and money advanced under the contract before the date of the interruption cannot be recovered. [p. 414, col. 2.]

Second appeal from the decree of the District Judge, Ludhiana, dated the 12th November 1917.

Bakhshi *Tek Chand*, for the Appellant.

The Hon'ble Mr. *Fazl-i-Husain* and Mr. *Badr-ud-Din Kureshi*, for the Respondent.

JUDGMENT.—Pandit Devi Dayal, defendant appellant, is the publisher of a vernacular almanac or *jantri* called *Mufid-i-alam*. It was his custom to receive advertisements from various advertisers. In accordance therewith on the 25th of May 1915 there was an agreement between him and Baini Ram, plaintiff, that the defendant would print certain advertisements in 60,000 copies of the Urdu *jantri* for the year 1916 and in 45,000 copies of the Nagri *patra* for *Sambat* 1973. Plaintiff alleged an advance of Rs. 660. It was said that his advertisements had not been printed in the Nagri *patra* at all, that they had been printed in

the Urdu *jantri* but that the copies of it had been forfeited by Government and that therefore there had been no publication. He sued for recovery of Rs. 660. The allegations in regard to the Nagri *patra* were found by the Courts below to be false and there is no dispute now in regard to this. As regards the Urdu *jantri*, the first Court found that 60,000 copies were actually printed, that some 56,500 copies were sold and that the defendant was not responsible for the act of the executive authorities in confiscating the publication and therefore dismissed the suit. The lower Appellate Court came to no finding as to how many copies were actually printed but says: "the defendant has been able to account for the sale of 23,000 copies in all and assuming that each copy was incorporated with plaintiff's advertisements, it may, therefore, be concluded that he published only 23,000 advertisements of the plaintiff. In the absence of proof to the contrary, it can safely be presumed that the defendant failed to publish the rest either by reason of the confiscation of his *jantri* by Government or owing to the fact that he did not actually print more than 23,000 or 25,000 copies of it." It held further that it was due to the defendant's carelessness and negligence in publishing certain objectionable matter in the *jantri* that the latter was confiscated and, therefore, he was liable to re-imburse the plaintiff a sum proportionate to the number of copies which were not actually sold to the public. It gave the plaintiff a decree for Rs. 254 5-4 with proportionate costs. From this order the defendant appeals and plaintiff has filed a cross-appeal in which he asks for a further decree for Rs. 145-10-8.

In another similar suit one Salig Ram sued the same defendant for Rs. 440 and obtained a decree for Rs. 271-5-4. In a third suit one Gulam Ahmed sued the defendant for Rs. 168 and obtained a decree for Rs. 103-10-0. In each of these two suits cross applications for revision have been filed (Nos. 70, 131, 71 and 194 of 1918).

As the lower Appellate Court has not come to any finding as to the number of copies actually printed, it will be well to clear the ground by arriving at a finding on this point. The first Court came to a clear finding that 60,000 copies of the *jantri* were actually printed. The lower Appellate Court has not dissented from this finding. The evidence on which the first Court based its decision is referred to by it and I have heard it. I fully agree that it is proved that the full number of 60,000 copies were printed. In my opinion the lower Appellate Court should have come to a decision on this point as it would probably have influenced its decision on the second point, namely, as to the number of copies actually sold to the public.

Now, taking into consideration the fact that 60,000 copies were actually printed, it appears reasonable to hold that they were all placed on the market for the purpose of sale and that most were sold. Only some 3,500 copies were recovered by the Police from the defendant himself and a few were recovered from other sources. The defendant did his best by advertising and otherwise to recover the sold copies which he handed over to the authorities. If he had had a stock of unsold copies in his possession, it is reasonable to presume that he would have handed them over also. The publication (almanac), a copy of which is on the record, shows on its title page that it is obtainable from a large number of booksellers and it appears probable that the copies were distributed to these persons for sale. The defendant has stated that his register of sales was taken away from him by the Police and has not been restored to him. This has not been denied and it appears to be highly probable. It appears further *prima facie* probable that all the 60,000 copies of the *jantri* were sold except those—some 5,000 odd in number—which were made over to the authorities. All that the defendant undertook to do was to print the advertisements in his almanac and to put the latter on the market. This it is held he has done. The confiscation of the almanac has, undoubtedly, caused loss to the defendant and presumably to the various advertisers who have brought suits against him. The question is whether under the circumstances the defendant is liable to compensate the plaintiffs. In order to decide this the further question arises whether the confiscation of the almanac was due to the defendant's care-

lessness or negligence in inserting in it objectionable matter or matter which he knew or had reason to believe would render its confiscation probable. There is no proof on the record as to what the objectionable matter in the almanac was which led to its confiscation by the authorities. All we know is that it was confiscated in accordance with the provisions of the Defence of India Act or the rules framed thereunder. It is not alleged that the defendant had committed any criminal offence or had inserted in the almanac anything that would have been considered objectionable in times of peace. What is alleged is that he inserted in it objectionable predictions as to coming events. The almanac has been regularly published for several years past and presumably these predictions are a feature of it and the plaintiffs must have known this. They gave their advertisements to the defendant with their eyes open. Under these circumstances it is difficult to see how he can be held liable to refund any of the money which he received for work which he agreed to do and did do so far as possible. The almanac was printed in September 1915 and was not confiscated by Government until three months later. After the date of the confiscation the continuance of the sale of the almanac was rendered impossible by causes over which the defendant had no control. It appears to me equitable that the loss in such a case should lie where it has fallen. No authority on all fours with the present case has been cited on either side. Counsel for Devi Dayal has referred me to a book entitled "The Law of War and Contract" by Campbell, in which on pages 151 *et seq.* what are known as the Coronation Cases are discussed. These are cases which arose out of the postponement of the date of the Coronation of King Edward VII. The principle that in such cases the loss must lie where it has fallen was generally applied. In the Indian Contract Act by Cunningham in the commentary on section 65, page 259, the following passage occurs:—

"In cases of this sort where the contract is not void at the outset, but in consequence of an accident further performance is excused, no remedy is according to the English authorities open to either party in respect of money advanced or work done under the contract before the date of the interruption. It is considered that *restitutio in integrum* is impossible and therefore in the absence of any express provision each party is left in the position which he occupied when the interruption took place."

The present case is not on all fours with the Coronation Cases, but at the same time I do not think it can be said to be governed by section 65 of the Contract Act because the defendant carried out his part of the agreement by printing and placing on the market 60,000 copies of his almanac. *Boggiano & Co.* v. *Arab Steamers Ltd.* (1), which has been relied on by the lower Appellate Court, is distinguishable from the present case, because there the shipping Company which had received a payment in advance on account of freight had not done anything towards earning the money. The ship on which the goods were loaded did not leave the harbour and the voyage was abandoned, because the import of the goods into the country to which they were being sent was prohibited by orders of Government. That case was held to be governed by section 65 of the Indian Contract Act which, in my opinion, does not apply to the present case. The fact that a certain number of the 60,000 copies of the almanac were never sold to the public or having been sold were recalled and destroyed, has been found to be not due to any fault or carelessness on the part of the defendant but to an act of the executive authorities which could hardly have been foreseen. Under these circumstances I hold that the principle that the loss must lie where it has fallen should be followed. I, therefore, accept the defendant's appeal and, setting aside the order of the lower Appellate Court, dismiss plaintiff's suit. His appeal is also dismissed. Under all the circumstances of the case, I think it equitable that the parties should bear their own costs throughout and I order accordingly.

Appeal accepted.

(1) 33 Ind. Cas. 536; 18 Bom. L. R. 126; 40 B. 529.

SHAMSOONESSA BIBI *v.* SATYA SEBAK GHOSAL.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1777 OF 1917.

March 7, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

SHAMSOONESSA BIBI—DEFENDANT—APPELLANT

versus

SATYA SEBAK GHOSAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Kabuliyat, *construction of*—*Rent, annual*—*Presumption*—*Tenant holding over*—*Ejectment*—*Notice to quit, period of*—*Transfer of Property Act* (*IV of* 1882), *ss.* 106, 116.

A *kabuliyat* executed in September 1866 and reserving a yearly rent payable by monthly instalments contained the following clause: "On the expiry of the term of my *pattah* I shall be liable to pay the rent of which assessment notice will be served by you, and I shall pay the same. If I do not pay the said rent, you may settle with somebody else":

Held, (1) that the landlord was entitled to settle the land with others if the tenant refused to pay the rent which he might be called upon to pay on the expiration of the term of one year, but that the clause did not take away the right of the landlord to eject the tenant after service of notice to quit according to law, even if the landlord did not choose to exercise the right to call upon the tenant to pay additional rent and settle the land with others in the event of the tenant refusing to pay such rent; [p. 416, col. 1.]

(2) that the rent reserved in the *kabuliyat* being a yearly rent, the tenancy could be presumed to be a yearly tenancy; [p. 416, col. 2.]

(3) that the *kabuliyat* having been executed prior to the coming into force of the Transfer of Property Act, it was not governed by the provisions of the Act and that the question of the period of notice must be decided with reference to the circumstances of the case. [p. 417, cols. 1 & 2.]

In cases not governed by the Transfer of Property Act there is no fixed period of notice, and the question has to be decided according to the rules of justice, equity and good conscience having regard to all the circumstances. [p. 417, col. 2.]

Appeal against the decree of the 2nd Additional District Judge, 24-Pergannahs, dated the 7th May 1917, affirming that of the Special Munsif, Alipur, dated the 21st December 1915.

Babu *Dwarka Nath Chuckerbutty*, Moulvi *A. K. Fazlul Huque* and Babu *Gagan Chand Sarkar*, for the Appellant.

Babus *Gunada Charan Sen* and *Jyotish Chandra Sarkar*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for ejectment of the defendant after service of a notice to quit, on the allegation that he was a tenant-at-will. The defendant No. 1, the tenant, had transferred the greater portion of the land to the defendant No. 2. The defence was that the defendant No. 1 had a permanent tenure in the land, having held the same from the time of his ancestors at a rent which had not been varied, that the notice to quit was not sufficient, and that the defendants were not liable to be ejected.

The Courts below concurred in decreeing the suit. The defendant has appealed to this Court.

There is no doubt that the land has been held by the defendant No. 1 from the time of his ancestors, but the Courts below have found that the rent receipts produced by the defendants are not trustworthy. The learned District Judge says: "their appearance is suspicious, their custody has not been properly proved and in any event they do not show that rent has been paid at a uniform rate for any considerable time." He further found that there were no substantial structures on the land, and came to the conclusion that the defendant was merely a tenant-at-will. Having regard to the facts found, we are unable to hold that the Court below was wrong in finding that the tenure was not a permanent one.

The plaintiffs alleged that the defendant's grandfather took a settlement of the land for a term of one year by executing a Kabuliyat in 1273, and that on the expiry of the term was holding over as a monthly tenant. The genuineness of the Kabuliyat was challenged by the defendants but the Courts below have accepted the document as genuine. It is contended on behalf of the appellant that the case has not been properly tried. The learned Munsif was of opinion that as the defendants failed to show the tenancy to be permanent, the proof of the Kabuliyat was not essential for the plaintiffs. He, however, observed: "It is over 30 years old, so proof of custody is all that is necessary with regard to it. The evidence given as to custody is not entirely satisfactory but it may, on the whole, I think, be regarded as adequate." The learned District Judge considered the matter and accepted the document as genuine, and we do not think the finding of the Court below on the point can be interfered with.

SHAMSOONESSA BIBI v. SATYA SEBAK GHOSAL.

It is contended, however, that even upon the Kabuliyat the plaintiffs cannot succeed.

The Kabuliyat provides: "on the expiry of the term of my Pattah I shall be liable to pay the rent of which assessment notice will be served by you, and I shall pay the same. If I do not pay the said rent you may settle with somebody else." It is contended that the plaintiffs cannot maintain the suit unless it is shown that the plaintiffs served the defendants with notice of assessment of rent, and the defendants refused to pay the same. But the clause appears to refer to the assessment of rent at the time when the lease would expire, *i. e.*, in the year 1274. Under that clause the landlord was entitled to settle the land with others, if the tenant refused to pay the rent which he might be called upon to pay on the expiration of the term of one year; and this the landlord was entitled to do under the contract and without the service of a notice to quit. But it did not take away the right of the landlord to eject the tenant after service of notice to quit according to law, even if the landlord did not choose to exercise the right to call upon the tenant to pay additional rent and settle the land with others in the event of the tenant refusing to pay such rent. It is to be observed that this question was not raised in the Court below. This contention also must, therefore, be overruled.

The last contention relates to the sufficiency of the notice to quit. The notice was dated the 8th of Sravan and the tenant was required to leave by the end of the month. The learned District Judge refers to the case of *Hari Das Tanti* v. *Upendra Narain Shaha* (1), in which it was held that in the case of a tenancy not governed by the Transfer of Property Act, six months' notice is sufficient to terminate it. He then says: "As regards the question whether the time allowed for removal was reasonable, it was held in the case of *Troilokya Nath Roy* v. *Sarat Chandra Banerjee* (2) that where a property was leased for a term of years, and not for agricultural or manufacturing purposes, and was held over by the lessee after the expiration of the term then in the absence of an agreement to the contrary the lessee must be deemed to be a tenant from month to month and entitled to only 15 days' notice to quit expiring at the end of the month of the tenancy. The land in the present case was admittedly leased for dwelling purposes only, and as has been said above, the defendant is a tenant-at-will so that the three weeks' time allowed in the notice must, I think, be reasonable".

Now, in the case of *Troilokya Nath Roy* v. *Sarat Chandra Banerjee* (2), cited above, the tenancy came into existence after the Transfer of Property Act and the case admittedly fell within the Transfer of Property Act. The lease was for a term of 3 years and the tenant was holding over after the expiry of the term. Section 116 of that Act lays down if a lessee remains in possession after the determination of the lease and the lessor accepts rent from the lessee, the lease is, in the absence of an agreement to the contrary, renewed from year to year or from month to month according to the purpose for which the property is leased as specified in section 106. Under section 106, in the absence of an agreement to the contrary, a lease for a purpose other than agricultural or manufacturing purposes must be deemed to be a lease from month to month terminable by a 15 days' notice. In the present case the lease was dated the 9th Assin 1273 (September 1866) and is, therefore, not governed by the Transfer of Property Act, section 2 of which provides that nothing in the Act shall affect any right or liability arising out of a legal relation constituted before the Act came into force or any relief in respect of such right or liability. The lease reserved a yearly rent. It is true the rent was payable according to monthly instalments, but even in the case of permanent tenures such as Patni or Mokarari tenures where a yearly rent is reserved, the rent is payable in many cases according to monthly instalments, and that fact does not show that the rent is a monthly rent. The rent reserved in the lease being a yearly rent, the tenancy can be presumed to be a yearly tenancy; see *Sheikh Aklu* v. *Sheikh Emaman* (3) and there is nothing to rebut the presumption. The tenant was, therefore, hold-

(1) 16 Ind. Cas. 937; 16 C. L. J. 74.
(2) 32 C. 123; 8 C. W. N. 901.
(3) 33 Ind. Cas. 899; 20 C. W. N. 1005; 44 C. 403.

ing over as a yearly tenant on the expiry of the term. Section 116 of the Transfer of Property Act, as stated above, lays down that where a lessee holds over, the lease is in the absence of an agreement to the contrary renewed from year to year or from month to month according to the purpose for which the property is leased as specified in section 106, and that is the ground upon which the decision in *Troilokya Nath Roy's case* (2) proceeded. But, apart from the fact that the tenancy in the present case is not governed by the Transfer of Property Act, it is to be observed that the provisions of both the sections 106 and 116 of that Act are subject to an agreement to the contrary. In the present case the tenancy being a yearly tenancy there was an implied agreement to the contrary. In cases governed by the Transfer of Property Act it has no doubt been held that a contract of yearly tenancy cannot be implied from the mention of an annual rent (so as to constitute an agreement to the contrary within the meaning of section 106 or 116), because the contract must be a valid contract, and a tenancy from year to year or reserving a yearly rent can be made only by a registered instrument as laid down by section 107 of the Act [see *Debendra Nath Bhowmik* v. *Syama Prosanna Bhowmik* (4) and *Sheikh Aklu* v. *Sheikh Emaman* (3)].

In the present case the lease came into existence not only long before the Transfer of Property Act, but also before the Registration Act, VIII of 1871, which for the first time laid down that a lease of immoveable property from year to year or reserving a yearly rent required registration. At the time when the lease in the present case was granted, Act VI of 1866 was in force, and under that Act only leases for any term exceeding one year required registration, and there was no provision in that Act that a lease from year to year or reserving a yearly rent was to be registered. That being so, the agreement of a yearly tenancy, which is implied from a yearly rent, having been reserved by the lease was a valid agreement. The reasons, therefore, upon which *Troilokya Nath Roy's case* (2) was decided do not apply to the present case. In cases not governed by the Transfer of Property Act there is no fixed period of notice, and the question has to be decided according to the rules of justice, equity and good conscience having regard to all the circumstances. In the present case the learned Judge has held that a 22 days' notice is reasonable, but he has done so with reference to the decision in *Troilokya Nath Roy's case* (2) which, as we have shown, has no application to the present case.

The tenancy has been in existence from 1866, and the question what is a reasonable notice in such a case should not be considered with reference to cases decided under the Transfer of Property Act.

The case should, therefore, go back to the lower Appellate Court in order that that Court may come to a finding on the question whether the notice was a reasonable one and decide the case accordingly. Costs will abide the result.

Appeal allowed;
Case remanded.

(4) 11 C. W. N. 1124.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1485 OF 1915.
July 20, 1918.
Present:—Mr. Justice Shadi Lal and
Mr. Justice Wilberforce.
PARTAP SINGH—PLAINTIFF—APPELLANT
versus
Musammat JAI KAUR—DEFENDANT—RESPONDENT.

Custom—Succession—Mother and step-brother—Hindu Jats of Ludhiana District.

Among Hindu Jats of the Ludhiana District a widowed mother is entitled to succeed to the estate of her childless son in the presence of a step-brother. [p. 419, col. 1.]

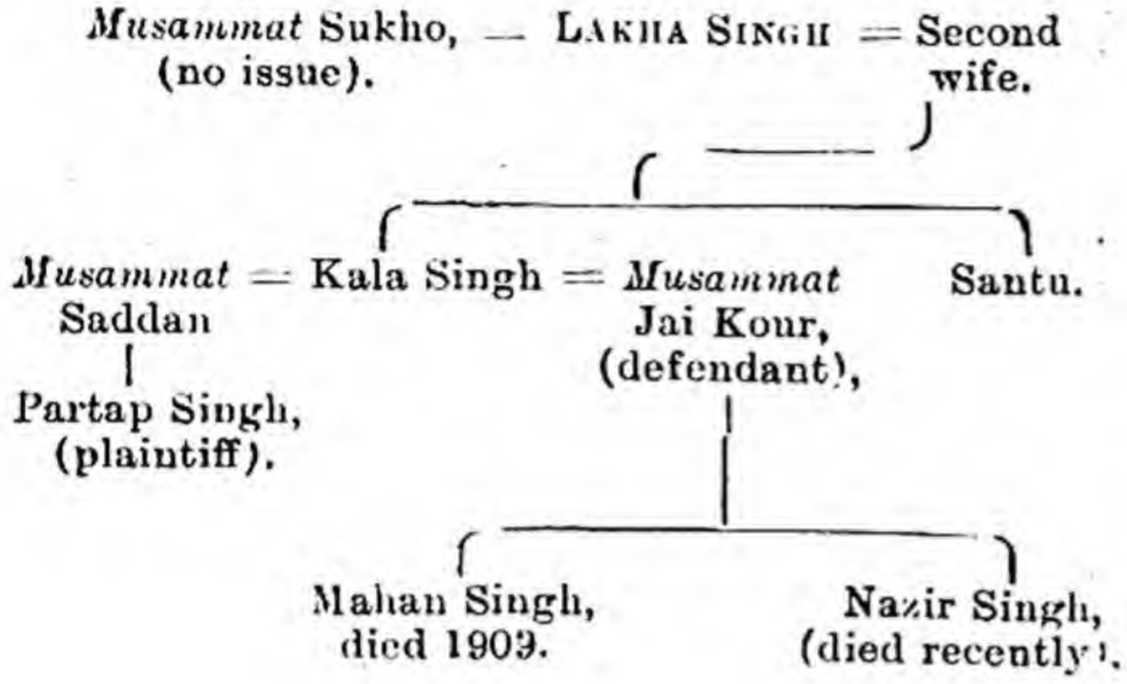
Second appeal from the decree of the District Judge, Ludhiana, dated the 18th February 1915.

Mr. *Nand Lal*, for the Appellant.

Mr. *Ganpat Rai*, for the Respondent.

PARTAB SINGH *v.* JAI KAUR.

JUDGMENT.—The pedigree-table of the parties is as follows:—



The parties are Jat Sikhs of the Ludhiana District. The dispute before us is regarding the succession to the property of Nazir Singh, the last surviving son of Kala Singh, and the defendant *Musammat* Jai Kaur. The property on the death of Kala Singh was mutated in the names of his sons and on the death of Nazir Singh his share has been mutated in the name of his mother. The lower Appellate Court has held that both by general custom and the custom of the District *Musammat* Jai Kaur, mother of Nazir Singh, is entitled to a life tenure of the property. A certificate as to the question of custom involved has been obtained.

The lower Appellate Court has based its decision especially on the *riwaj i ams* of Mr. Gordon-Walker and Mr. Dunnett. It has also held that paragraph 22 of Rattigan's Digest is in favour of the mother. It has also referred to a case which occurred in the family on the death of Lakha Singh who was succeeded in equal shares by a childless widow, *Musammat* Sukho, and the sons by his other wife. Further, it has referred to certain authorities that on the death of Nazir Singh, the succession must be considered as re-opened and that *Musammat* Jai Kaur was then entitled to succeed as the widow of Kala Singh.

On appeal before us, it was argued that paragraph 22 of Rattigan's Digest gives a misleading summary of the authorities on which it purports to be based. It is pointed out by Counsel that these authorities refer to the rights of a mother as against collaterals or a sister and not as against a son of a co-wife. This criticism appears to be justified, and the only Chief Court judgment on the rights of a widowed mother as against a son of a co-wife is contained in an unreported authority No. 341 of 1880 referred to in Rattigan's Digest and also by the lower Appellate Court. This authority, however, being of Moghuls of the Rawalpindi District, does not help us in the present case. Fortunately, however, it is not necessary for us to base our decision on any general custom of the Punjab, as the *riwaj-i ams* of the district deal with the matter at length. Both Mr. Gordon-Walker and Mr. Dunnett deal clearly with the question. There can be no doubt as to the meaning of the answers recorded by them, as in both cases the rights of a mother as against a brother are specially dealt with. It is true that these *riwaj-i-ams* contain no specific instances of the custom alleged; but answers to other questions on the matter of succession leave no doubt that these entries contain a correct exposition of the custom. The rights of a widowed mother rank very high in the district, as is shown by the answers to questions 32 and 39, which are both supported by many instances. In answer to question 32 it is stated that a sonless widow in the presence of sons by another wife takes a share equal to that of each of the sons. In answer to question 39 it is stated that a widowed wife and widowed mother succeed in equal shares. Thus, a widowed mother is given a very favourable position, being equal to that of a widowed wife.

No actual instances were proved before the lower Courts, except two which have occurred in the family of the parties. To the succession of Lakha Singh by a childless widow and his sons we have already referred. The other instance which is relied upon by the appellant is that on the death of Mahan Singh, the brother of Nazir Singh, his property was divided equally between his own brother, Nazir Singh, and his half brother, Partab Singh. At the time, however, in the presence of her son *Musam-*

mat Jai Kaur had no right of succession and she is in no way adversely affected by this instance.

To sum up, therefore, we find that among Hindu Jats of the Ludhiana District a widowed mother is entitled to succeed to the estate of her childless son in the presence of a son by another wife. We dismiss the appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 134 OF 1916.

February 17, 1919.

Present:—Pandit Kanhaiya Lal, A. J. C., and Mr. Daniels, A. J. C.

RAWAT SHEO BAHADUR SINGH—PLAINTIFF—APPELLANT

versus

BENI BAHADUR SINGH, MINOR SON OF SHEAMBAR SINGH, UNDER THE GUARDIANSHIP OF MUNSHI AVADH BEHARI LAL, CERTIFICATED GUARDIAN—DEFENDANT—RESPONDENT.

Will, execution of, proof of—Evidence, value of—Appellate Court, power and discretion of—Medical books, statements in, value of—Expert evidence.

The object of an appeal is to obtain a pronouncement from the Appellate Court both on law and facts, and the discretion of the Appellate Court is unrestricted. In many instances a trial Judge is in a better position to appraise the value of the oral evidence before him, and where the issue is simple and straightforward, the findings of fact arrived at by him are entitled to weight. But where the evidence on a particular issue, as *e. g.*, the execution of a Will, consists of the statements of persons whose evidence is tainted, and there are circumstances showing that the signature and handwriting of the alleged testator on the Will are not genuine, and the trial Judge has omitted to note the patent points of dissimilarity and to attach due value to the evidence adduced in disproof of the signature borne by the Will, the Appellate Court would be justified in looking into the evidence as a whole and coming to such conclusion as the materials placed before it and the circumstances proved might justify. [p. 427, cols. 1 & 2.]

Where the general condition and state of the health of a person is in issue, and it is sought to prove that owing to a particular disease from which he was suffering he was unable to write, isolated extracts from medical works ought not to be preferred to the evidence of a medical man who should be examined with reference to the symptoms deposed to by the witnesses, and to whom the extracts might be put. [p. 428, col. 1.]

Appeal from the decree of the Officiating Subordinate Judge, Rae Bareli, dated the 12th September 1916.

The Hon'ble Pandit *Gokaran Nath Misra* and Babu *Rajeshwari Prasad*, for the Appellant.

The Hon'ble Syed *Wazir Hasan*, Babus *Bisheshwar Nath Srivastava*, *Chhail Behari Lal* and *Amrit Rai*, for the Respondent.

JUDGMENT.

KANHAIYA LAL, A. J. C.—The dispute in this case relates to certain property which belonged to Rawat Jageshwar Bakhsh Singh, who died on the 3rd December 1907 leaving a widow, *Musammat* Sukhraj Kuar, but no issue. On the death of Rawat Jageshwar Bakhsh Singh mutation of names was effected in respect of his estate in favour of *Musammat* Sukhraj Kuar.

On the 26th June 1913 *Musammat* Sukhraj Kuar adopted the defendant-respondent. She died on the 13th July 1914. The plaintiff-appellant is one of the reversionary heirs of Rawat Jageshwar Bakhsh Singh. The other reversionary heir is Kanhaiya Bakhsh Singh, who is not a party to the suit. The defendant asserts that *Musammat* Sukhraj Kuar was given the power to make an adoption by virtue of an unregistered Will purporting to have been executed by her husband on the 15th July 1907. The plaintiff denies the genuineness of that Will and the power of *Musammat* Sukhraj Kuar to make an adoption and claims possession of half the estate with mesne profits. The Court below found in favour of the defendant and dismissed the claim.

The fact of adoption is not disputed, and the only point for consideration is whether the Will in question was executed by Rawat Jageshwar Bakhsh Singh and is genuine. The Will purports to have been written and signed by Rawat Jageshwar Bakhsh Singh with his own hand. It bears on its face three attestations, but they are in an ink different from that with which the body of the document and the signature of the alleged executant were written,

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The body of the document and the alleged signature of the testator with the Hindi letter "*ga*" (indicating *gawahi*) before the attestations of Bans Bahadur and Lalta Prasad appear to have been written at one and the same time. The two attestations were possibly made later. The letter "*ga*" before the third attestation is in a different ink from the letter "*ga*" preceding the other two attestations and omits the long vowel "*a*" appended to the latter, thus showing that it was written by some other hand.

Before proceeding to consider the evidence adduced in support of the Will, it is necessary to refer to the evidence produced as to the condition in which Rawat Jageshwar Bakhsh Singh was when he is said to have written this long Will. It is admitted that he had been suffering from diabetes from 5 or 7 years and that he had an attack of paralysis in February 1907, which had affected the right side of his body, including his right arm and right leg. If the attack of paralysis was of a mild type, it is possible that his right arm and fingers might have resumed their normal condition in some time, but his condition, as pictured by the witnesses for the plaintiff and admitted to some extent by the witnesses for the defendant, renders it doubtful whether he had sufficiently recovered in the month of July 1907 to be able to write a long Will, consisting of 27 lines of large sized paper, without showing any traces of a paralytic hand. The Will is written and signed in a firm hand from the beginning to the end and contains no such traces. "The course of the disease," says Osler, referring to hemiplegia, "depends upon the situation and extent of the lesion. If slight, the hemiplegia may disappear completely within a few days or a few weeks. In severe cases the rule is that the leg gradually recovers before the arm, and the muscles of the shoulder, girdle and upper arm before those of the forearm and hand. The face may recover quickly. Except in the very slight lesions, in which the hemiplegia is transient, changes take place which may be grouped as secondary symptoms. These correspond to the chronic stage. In a case in which little or no improvement takes place within 8 or 10 weeks, it will be found that the paralysed limbs undergo certain changes. The leg, as a rule, recovers enough power to enable the patient to get about, although the foot is dragged. Occasionally, a recurrence of severe symptoms is seen even without a new hæmorrhage having taken place. In both arm and leg the condition of secondary contraction or late rigidity comes on and is always marked in the upper extremity. The arm becomes permanently flexed at the elbow and resists all attempts at extension. The wrist is flexed upon the forearm and the fingers upon the hand. The position of the arm and hand is very characteristic." (Osler's Principles and Practice of Medicine, 8th Edition, page 995.) "In fact", he continues, "if persistent at the end of a month, some grade of permanent palsy is certain to remain, and gradually the late rigidity supervenes." (*Ibid.*, page 998).

Every case of paralysis is not, however, severe and may not become chronic and it is material, therefore, to consider on the evidence adduced whether the attack, Rawat Jageshwar Bakhsh Singh had, was mild or not. The witnesses adduced by the plaintiff state that the right arm and the right leg of Rawat Jageshwar Bakhsh Singh were affected by paralysis; he was not able to speak or articulate distinctly; month after month his condition became worse, and he was unable to rise from his bed. The witnesses produced by the defendant gave a somewhat different account. They, too, however, make certain admissions which throw some light on his general condition. The only person who is said to have treated him is Jag Prasad (D. W. No. 9), whose version is that Rawat Jageshwar Bakhsh Singh got a stroke of paralysis of a mild type *affecting the whole of his body other than his brain and tongue* about nine months before his death and that he recovered therefrom in two months. But Jag Prasad is a quack and his statement that his whole body was affected by paralysis conflicts with the other testimony. Sheopal Singh (D. W. No. 10) says that he saw Rawat Jageshwar Bakhsh Singh two or three days after the Holi, that is, some time in March 1907, and found his right arm and right leg affected but his tongue and the other parts of his body were all right. He adds that when he went to see him next day, Sheo

Ratan Singh, Raghuraj Singh and the present plaintiff came to see him in his presence and that Rawat Jageshwar Bakhsh Singh told them that "he was very ill and helpless (*bahut bimar hain aur lachar hain*)" and uncertain as to his life and that he was empowering his widow to make an adoption from the family of either Rawats or Thakurs. Janki Tewari (D. W. No. 14) deposes that he saw Rawat Jageshwar Bakhsh Singh in the month of Jeth and again in Katik previous to his death and that he "lay very ill at Jamoh for about a year." Nageshwar Bakhsh Singh (D. W. No. 19) deposes that in the month of Magh or Phagun preceding his death, Rawat Jageshwar Bakhsh Singh had stopped at his house on his way back from Sultanpur and had told him that he was much in distress on account of illness and was suffering from diabetes and had an attack of paralysis, and that when he came again in Sawan or Bhadon, two or three months before his death, he was "very ill" and had come in a palanquin and was helped to walk by a servant. Ramdat (D. W. No. 26), who professes to have seen Rawat Jageshwar Bakhsh Singh signing the Will and two of the witnesses attesting it, admits that as a result of the attack of paralysis on the right side, Rawat Jageshwar Bakhsh was weak and that he could not hold his pen with the same firm grip as before or write or sign in the manner in which he did before he got the attack. It is true that he says that he did not see him writing or signing any paper other than the Will after the attack; but an impression formed either from an observation of his fingers or from his general condition is not without some value. If what the witnesses for the plaintiff have stated is correct, namely, that Rawat Jageshwar Bakhsh Singh was getting worse every month and was unable to rise from his bed, or even if what the witnesses for the defendant have admitted be true, namely, that till Sawan or Bhadon Rawat Jageshwar Bakhsh Singh was very ill and had to be helped to walk by a servant and that he could not hold his pen with the same firm grip or write or sign in the manner he did before, the possibility of his having written out this long document himself without showing any traces of a paralytic hand may well be questioned.

The direct evidence adduced in support of the Will consists of three witnesses, two of whom, Lalta Prasad Dube (D. W. No. 24) and Bans Bahadur (D. W. No. 25), profess to have attested the Will. Both of them admit that the Will was not written in their presence, but assert that Rawat Jageshwar Bakhsh Singh signed it in their presence and that they attested it then and there. The signature of Rawat Jageshwar Bakhsh Singh and the attestations are not, however, in the same ink. Lalta Prasad is employed with the defendant on Rs. 12 per mensem. Bans Bahadur was till some time back in the service of the Jamoh estate on Rs. 10 per mensem. Neither of these is independent or worthy of credit. Bans Bahadur states that Ramdat came to show Jageshwar Bakhsh Singh some paper when the latter was signing the Will and that the paper in question was a *chaudbanda* relating to his estate, but Ramdat denies that he had taken any paper or *chaudbanda* with him to Jageshwar Bakhsh Singh, though he subsequently qualifies that statement by adding that he did not remember whether he had any paper in his hands. Ramdat (D. W. No. 26) says that he went to Jageshwar Bakhsh Singh to ask his permission to allow a person named Datta to break up some fallow land, but from what Bans Bahadur states, it would appear that he had gone in connection with some *chaudbanda* or account which was to be shown to Jageshwar Bakhsh Singh. Ramdat is employed with the defendant on a salary of Rs. 7 per mensem and his statement too is not entitled to any weight.

The Will also purports to bear the attestation of Mujib Haidar Khan, the Taluqdar of Babna. His son, Thakur Amir Haidar, and Onkar Nath, a former servant of Mujib Haidar Khan, against whom the defendant has recently obtained a decree, have given evidence in proof of the alleged attestation of Mujib Haidar Khan. But the signature of Mujib Haidar Khan, as contained in a plaint filed by him on the 5th August 1911 (Exhibit 42), materially differs from the alleged signature of Mujib Haidar Khan on the Will in question. Mujib Haidar Khan was a Thakur, whose ancestors had been converted to Islam. He used, however, to sign his name as Syed

Mujib Haidar without the word "Khan" affixed to it. In the attestation on the Will in question the prefix "Syed" does not appear and the word "Khan" is supperadded. The signature on the plaint shows that his fingers were suffering from some sort of palsy or chorea, and that he was unable to write a firm hand, his signature betraying considerable shakiness. His alleged signature on the Will does not, however, betray any such shakiness. It shows a firm hand and unless we suppose that the nervous debility from which his fingers were suffering came into existence long after 1907, it is difficult to say how the signature on the plaint and that on the alleged Will could have been made by one and the same person. The attestation of Mujib Haidar is said to have been obtained at Babna by Jageshwar Bakhsh Singh personally, who is said to have gone on an elephant to the house of Mujib Haidar for the purpose. Onkar Nath (D. W. No. 427), who professes to have been present when the attestation was made, says that Jageshwar Bakhsh Singh looked healthy and strong when he went to get the attestation made; but the other evidence adduced in the case shows that even in Sawan or Bhadon, Jageshwar Bakhsh Singh was not quite well. Bans Bahadur (D. W No. 25) says that when Jageshwar Bakhsh Singh went to Jamoh in the beginning of Sawan, he complained of the attack of paralysis he had and Nageshwar Bakhsh Singh (D. W. No. 19) deposes that Jageshwar Bakhsh Singh was "very ill" when he came to him in Sawan or Bhadon. If Jageshwar Bakhsh Singh was so far well as to be able to ride on the bare back of an elephant with nothing but a mattress to cover it and to go a distance of many miles to obtain an attestation, there is no reason why he should not have taken the better precaution of getting the Will registered at the nearest office of the Sub-Registrar or at his own house. Thakur Amir Haidar (D. W. No. 21), the son of Mujib Haidar, takes care not to commit himself further than is consistent with his own safety. He says that he was present at the time of the adoption of the defendant by Thakurain Sukhraj Kuar and that he attested the deed of adoption executed by her and kept the unstamped Will which the Thakurain had sent him that day for safe custody. He professes to have been conversant with the signature of his father, having seen him sign hundreds of papers relating to the estate, but when he was asked about the attestation of the Will, he took care to say that, though the alleged attestation of Mujib Haidar on the Will resembled the signature of his father, he could not swear that that signature was his father's. He added that he could not swear because he did not see his father signing the Will. But the explanation given only betrays the uncertainty he had in his mind. If Mujib Haidar used to sign in the way in which he is represented to have signed his attestation on the Will, numerous papers would, undoubtedly, have been forthcoming of about the time when the alleged Will was written, to show that Mujib Haidar was not always very particular about writing "Syed" before his name, or that he used to write "Khan" after it, or that he was not suffering from palsy or nervous weakness of the fingers when the alleged attestation was made, particularly when the plaintiff had filed a plaint bearing a signature showing a different tendency. Amir Haidar admits that his father was indebted to the extent of Rs. 10,000, to Jageshwar Bakhsh Singh and it is remarkable that though, according to him, the limitation for a suit had expired, he, on being consulted by the general agent of the defendant before the institution of a suit for the recovery of the money, agreed to a suit being brought against him and allowed a collusive decree to be passed in favour of the defendant with a view to obviate an imputation of the influence of the defendant over him by reason of his indebtedness.

The relations of Amir Haidar or his father towards Sheo Ratan Singh, the father of one of the reversioners in this case, were by no means friendly. Sheo Ratan Singh had purchased the claim of Ashraf Khan and sued the father of Amir Haidar for possession of the whole of the Babna estate. The litigation lasted for some time and eventually ended unfavourably to Sheo Ratan Singh, but it cost the father of Amir Haidar a considerable amount and involved him in debt to the extent of Rs. 65,000 Amir Haidar would naturally

be a person whom the supporters of Thakúrain Sukhraj Kuar would look up to for help in setting up a Will, if its existence would have the effect of depriving the heirs or relations of Sheo Ratan Singh of the property to which they would otherwise have been entitled.

The story of the alleged Will having been left in the custody of Amir Haidar is equally suspicious. Amir Haidar (D. W. No. 21) states that on the day he attended the ceremony connected with the adoption of the defendant, he attested a deed of adoption and Thukurain Sukhraj Kuar sent him an unstamped Will from inside to be kept for safe custody until she wanted it. The adoption and the execution of the deed of adoption admittedly did not take place on the same day. There was an interval of 20 days between the two and the witness is obviously mistaken in his statement. Assuming, however, that the witness went from his village to the place where the deed of adoption was executed to attest it, it seems surprising that the lady should have kept with her the deed of adoption and all other valuable papers but made over the Will to him. The Will was an important document bearing both on her right to adopt and her proprietary right to the estate left by her husband; and if she could safely keep the deed of adoption and other papers belonging to her husband, why could she not safely keep the Will in her own custody? After the death of Thakurain Sukhraj Kuar, the Court of Wards temporarily took charge of her property and a list prepared by the Court of Wards of the documents found in her possession (Exhibit 32) shows that she held possession of not less than 122 deeds, including promissory notes bonds, mortgage deeds, sale deeds, agreements and the like, all of which were made over after the release of the estate from the custody of the Court of Wards to the guardian of the defendant on the 15th May 1915. It was not, in all human probability, likely that Amir Haidar would take greater care of the Will than the lady would take care of it herself. The Will had remained in her possession from 1907 right up to 1913 when the deed of adoption was executed, and if there was no danger of the Will or of the other documents of the lady being lost between 1907 and 1913, it is difficult to believe that the suggested danger of its being lost afterwards could have been anything but imaginary. If the Will was forged in order to invest the lady with an absolute title and to give her the power of adoption and thereby to deprive the plaintiff and the son of Sheo Ratan Singh of their reversionary interest, it is easy to understand why the lady was nervous about the custody of the said Will and anxious to leave it in the custody of some person who might be in a better position to defend himself, if the forgery leaked out. In any event, there was no sufficient reason for the Will to have been made over to Amir Haidar for custody and there is a vein of improbability underlying his entire statement.

In the mutation proceeding which took place subsequent to the death of Thakurain Sukhraj Kuar the Will was produced by Amir Haidar, but it is strange that when the adoption of the defendant took place and the Court of Wards in charge of the estate of Kanhaiya Bakhsh Singh, one of the reversionary heirs of Rawat Jageshwar Bakhsh Singh, wanted to see the Will and asked the lady to produce it, it was never stated that it had been offered to Amir Haidar for custody.

Three days before the date on which the adoption of the defendant was to have taken place, *Musammat* Sahebdei, the mother of Kanhaiya Bakhsh Singh wrote to the Special Manager of the Court of Wards and to the Deputy Commissioner of Rae Bareli, stating that she had heard that Thakurain Sukhraj Kuar was making preparations for the adoption of a child belonging to another village on the 16th June 1913; that Kanhaiya Bakhsh Singh was entitled to the estate on her death, and that the Court of Wards as his guardian should take steps to protect his interests. The Deputy Commissioner of Rae Bareli directed the Special Manager to make inquiries; but before any definite action could be taken, the adoption was completed. Thakurain Sukhraj Kuar was asked to produce the Will but she did not send it. On the 24th November 1913 the Deputy Commissioner of Rae Bareli had an interview with Thakurain Sukhraj Kuar. He told her to bring the Will and

she promised to send it on Thursday the 27th November 1913. On the 30th November 1913 the Deputy Commissioner wrote to the Special Manager that the lady had not sent the Will to him at Jagatpur on Thursday last, as she had promised, and that he had already written to the Tahsildar about it. On the 19th December 1913, a notice was sent to her, calling upon her to produce proof of her having been given permission by her husband to make an adoption, but she took no action and did not send a copy of the Will or express her readiness to show the original. Neither at the interview she had with Mr. Faunthorpe, the Deputy Commissioner of Rae Bareli, nor at any subsequent period she ever said that the Will had been made over to Amir Haidar for custody. If there was a genuine Will of Jageshwar Bakhsh Singh in existence, there was no reason why the lady should have kept it back or refused to show it or send a copy of it either to the Special Manager of the Court of Wards or to the Deputy Commissioner, for her doing so, in case she satisfied the Court of Wards, would have strengthened her hands and closed the possibility of future litigation. Was there anything in the appearance of the document itself or in the alleged signature and writing of Jageshwar Bakhsh Singh, as borne on the Will, which could have betrayed that the Will was not genuine, is a question which naturally arises. If there was nothing suspicions about the document and no apprehension of the betrayal or exposure of the forgery by an early disclosure, the anxiety to make it appear that the document was left in the custody of one, who, being neither its scribe nor its attesting witness, could not in any case be made personally responsible for it, and to hold it back from the Court of Wards, though the Court of Wards repeatedly asked for it, is not without any meaning.

Numerous documents bearing the signature or handwriting of Jageshwar Bakhsh Singh, must be in existence; but none of them has been produced on behalf of the defendant-respondent. Even the papers of the Jamoh estate, which in the ordinary course of business he must have written or signed when he was in charge of the management of the estate, have not been produced; and beyond the statement of two servants, who are still in the employ of the defendant, and a person who was in the service of the Jamoh estate on a very low salary, no independent or reliable evidence of a direct character is forthcoming to prove the execution of the alleged Will or the signature and handwriting it purports to bear. The statement of Amir Haidar, who professes to find some similitude between the signature of his father and the alleged attestation of his father which the Will purports to bear, is clearly insufficient. Apart from the point of dissimilarity above noted, the old grudge which Amir Haidar bears to the family of which the present plaintiff and Kanhaiya Bakhsh Singh are the sole surviving male members, and the suspicious extent to which he has mixed himself up with the story about the custody of the Will in question, read with his studied anxiety to appear impartial even to the extent of allowing a collusive decree for what he called a barred debt being passed against him, go materially to discredit his testimony.

Amir Haidar states that he had sent a copy of the Will to the Court of Wards, but the papers produced from the file of the Court of Wards leave no room for doubt that his statement on the point is incorrect. In fact the Court of Wards was not even told that the Will was in the custody of Amir Haidar or that a copy could be obtained from him.

Raja Indra Bikram Singh, the Taluqdar of Itaunja, deposes that after the death of Jageshwar Bakhsh Singh, Thakurain Sukhraj Kuar came to his house after she had adopted the defendant and stayed with him for ten or fifteen days. He states that she told him that she had adopted a boy in pursuance of a written authority given by her husband which was at her house and that she sent for it and showed it to him. He adds that the writing then shown to him had two or three signatures and that though to his belief one of the three, purporting to be that of Jageshwar Bakhsh Singh, was his, he could not positively say whether that was so. The Raja noticed at that time an attestation in Hindi by Lalta and another in Urdu by Bans Bahadur Lal. The alleged attestation of Mujib Haidar did not probably then exist, for he says that he noticed

only two or three signatures, that is, of the persons named by him, and that out of the two Urdu signatures, which the Will now bears, he noticed the one second from the top, namely, that of Bans Bahadur Lal.

Thakur Mahabir Singh (P. W. No. 1), the Tahsildar of Maharajganj, deposes that when the Deputy Commissioner of Rae Bareli directed him on the 6th October 1913 to get the Will from Thakurain Sukhraj Kuar, he asked her general agent to produce it and was told that the Thakurain had gone to Itaunja and that the Will could not be had until her return. He goes on to say that he told the general agent to go to Itaunja and get the Will, but he did not turn up and when questioned on two subsequent occasions made some excuse or another and did not produce it. If the Will was shown to Raja Indra Bikram Singh some time in October 1913, or thereafter, the story of Amir Haidar that the original Will had been made over to him for safe custody on the day he attested the deed of adoption, that is, on the 4th July 1913 falls to the ground.

The plaintiff has produced Raja Chandra Chur Singh, the Taluqdar of Chandrapur, to identify the handwriting and signature of Jageshwar Bakhsh Singh, who was related to him. The Raja says that Jageshwar Bakhsh Singh could read and write Hindi and used to write letters to him and that the signature and handwriting, purporting to be that of Jageshwar Bakhsh Singh on the alleged Will, did not resemble his signature and handwriting. Looking at the signature as borne by certain plaints filed by Jageshwar Bakhsh Singh on behalf of *Musammat* Ganesh Kuar, the proprietor of the Jamoh estate, in 1881 (Exhibits 38, 39, 40 and 41), he stated that the signatures borne by those plaints appeared to have been made by Jageshwar Bakhsh Singh. The signatures on those plaints do not, however, bear any similarity to the alleged signature and handwriting of Jageshwar Bakhsh Singh on the Will. The letters "*ba*", "*ja*" and "*sa*" in the signatures of Jageshwar Bakhsh Singh in the plaint of 1881 bear a marked dissimilarity to those letters as appearing in his alleged signature on the Will. The Will shows that it had been written by a bold and firm hand, but neither the physical condition of Jageshwar Bakhsh Singh after he had suffered from paralysis, nor the signatures made by him on the plaints of 1881 justify the belief that he was capable of or accustomed to writing in that manner.

The learned Subordinate Judge, referring to the evidence of Raja Chandra Chur Singh, states that the Raja pointed out various letters in the alleged signature of Jageshwar Bakhsh Singh on the Will to show the points of dissimilarity between that signature and the signatures borne by the plaints, and observes that he attempted to follow what the Raja said but "on comparing the signatures as closely as possible", he could not find "the least dissimilarity in the style and formation of the letters between the signatures the Raja said were really his and that on the Will." The dissimilarities are, however, so patent and obvious to the naked eye, even without the aid of a magnifying glass or a photographic enlargement, that it seems surprising that the learned Subordinate Judge was not able to discover them in spite of what he calls his "close" examination. The Raja no doubt confessed that he was not infallible, but a confession of infallibility does not necessarily amount to an admission that he was wrong. It is true that since 1881 changes might have taken place in the style of the handwriting and signature of Jageshwar Bakhsh Singh, but it was open to the defendant-respondent to have produced documents or papers, bearing the signatures or handwriting of Jageshwar Bakhsh Singh of a date nearing 1907, and more particularly such papers, documents or accounts as he might have written or signed in connection with his own estate or the Jamoh estate, of which he was the manager, between the date on which he got an attack of paralysis and the date of his death. The latter, if produced, would have been of material assistance in determining how far Jageshwar Bakhsh Singh had recovered, if he did, after his attack of paralysis in February 1907 to be able to shake off completely the weakness of his right hand or fingers and write the long Will now attributed to

him and sign it without showing any traces of a paralytic hand.

The explanation offered for the non-production of any such papers, on behalf of the defendant-respondent, is that the question of the physical capacity of Jageshwar Bakhsh Singh to write or sign the Will was not brought home to him till a late stage of the case. He somehow chose to keep back his witnesses relating to the execution of the Will, till the fag-end of the trial, but produced his evidence as to the physical capacity of Jageshwar Bakhsh Singh much earlier. The genuineness of the Will having been denied, he had little excuse for not producing papers or documents containing the signatures or handwriting of Jageshwar Bakhsh Singh and bearing on his physical capacity, if he had any.

In order to satisfy myself and clear up matters involved in doubt, I was inclined to allow the defendant-respondent an opportunity to produce such documents or papers of a period nearing the date of the alleged Will and to give him an opportunity of proving them, but my learned colleague was not agreeable to that course for the reasons stated in his order of the 27th January 1919. I do not refer to it in any spirit of cavil, for the views of my learned colleague are entitled to every consideration and respect. I only mention it, because the decision has *ex necessitate rei* to be confined to the materials available, and on those materials, I regret it is not possible for me to come to any other conclusion than that at which I have arrived.

There is, moreover, internal evidence to suggest that the Will was not in all probability written in the lifetime of Jageshwar Bakhsh Singh. The Will purports to confer on Thakurain Sukhraj Kuar an absolute estate with power to adopt a boy out of the family of Rawats and Thakurs and to make him her heir after her death. It further empowers the lady to dedicate some property for the expenses of a temple and authorizes her to transfer four Mahals in Tahsil Patkapur, district Fyzabad, to her own brother, Thakur Saltanat Bahadur Singh, in lieu of his services to the testator. The Will recites that the testator had already given those Mahals to Saltanat Bahadur Singh in lieu of his services to him, that it was his intention to execute a deed in evidence thereof, and that if for any reason he might not get an opportunity to do so, that Thakurain or anybody who inherits his estate should transfer the said property to him. If Jageshwar Bakhsh Singh was after his attack of paralysis sufficiently able to write out the Will and go to Babna to get it attested by Mujib Haidar, there is no reason why he should not have in his lifetime formally executed documents setting apart some specific property for the expenses of the temple and giving the four Mahals in question to Saltanat Bahadur Singh, or made an immediate bequest for those purposes in the Will in question.

On the death of Jageshwar Bakhsh Singh, applications for mutation of names were made on behalf of Thakurain Sukhraj Kuar in respect of the properties left by Jageshwar Bakhsh Singh. In those applications, the lady was described as claiming the property by right of inheritance (Exhibit 1 to 25). Some of those applications were signed by Chhuttan Lal, her general agent, who professes to have been ignorant of the Will at the time when those applications were made. But it is significant that the applications in regard to the villages in the Fyzabad district were signed by Saltanat Bahadur Singh himself as the general agent of the lady (Exhibits 15 to 20). If there was a Will in existence when Jageshwar Bakhsh Singh died, it is difficult to believe that Saltanat Bahadur Singh could have been unaware of it, for he was the person to whom the lady must naturally have turned for support and guidance and for information as to what her husband had bequeathed, when she deputed him to go to Fyzabad and get mutation of names effected in respect of the villages situated in that district in her favour. He lived with Jageshwar Bakhsh Singh in his lifetime and if it is true, as Hardwar Singh and several other witnesses suggest, that Jageshwar Bakhsh Singh was telling the visitors who came to see him during his illness or shortly before his death that he had made a disposition in favour of his wife, is not likely that Saltanat Bahadur Singh could have been unaware of it or omitted to see the Will or ask for his rights under it when he went to apply for the entry of

her name? The idea of bringing such a Will into existence was apparently formed after the mutation of names had already been effected in favour of the lady; and an immediate or direct bequest in favour of the temple or Saltanat Bahadur Singh in the body of the Will would, therefore, have been out of place. The reference to the Will in the application for a succession certificate subsequently filed is of little value.

The learned Subordinate Judge argues that no adequate motive had been shown for Saltanat Bahadur Singh and the other persons concerned to have helped the lady in concocting a Will; but the desire to adopt where no permission has been given by the husband, is in itself a sufficient motive for concocting a document giving such an authority. In any event, the genuineness of the signature and handwriting of Jageshwar Bakhsh Singh and his physical capacity to write the Will in the manner suggested seem to me, in the circumstances above set forth, to be open to doubt; and the subsequent conduct of the lady in withholding the Will from the Court of Wards in spite of repeated demands for its production, and the subterfuge adopted to get the Will produced in the mutation proceeding by the hand of a third person who was not directly concerned with it, confirms the suspicion.

The learned Counsel for the defendant-respondent has strenuously urged that the opinion of the trial Court on the question of the value to be attached to the evidence recorded should not be lightly set aside, but, as their Lordships of the Privy Council have observed in *Bombay Cotton Manufacturing Company* v. *Motilal Shivlal* (1), the object of an appeal is to obtain a pronouncement from the Appellate Court both on law and facts and the discretion of the Appellate Court in the consideration of evidence is by no means restricted. A trial Judge is unquestionably in many instances in a better position to appraise the value of the oral evidence tendered before him; and where the issue is simple and straightforward, the findings of fact arrived at by him, are entitled to some weight. But where, as in this case, the direct evidence bearing on the execution of the Will, consists of the statements of persons whose evidence is tainted, and there are circumstances showing that the signature and handwriting of the alleged testator on the Will are not genuine and the trial Judge has omitted to note the patent points of dissimilarity and to attach due value to the evidence adduced in disproof of the signature borne by the Will, it is difficult to say that the Appellate Court would not be justified in looking into the evidence as a whole and coming to such conclusion as the materials placed before it and the circumstances proved might justify.

The learned Subordinate Judge has found that the oral Will or authority to adopt set up by the defendant has not been established. The reasons given by him for holding that view have not been seriously controverted. If there was no authority to adopt, written or oral, the defendant-respondent has no title.

The appeal should, in my opinion, be therefore allowed and the claim of the plaintiff-appellant decreed for possession of the property in dispute so far as its existence is admitted in the lists appended to the written statement filed by the defendant-respondent, with mesne profits appertaining thereto, the amount whereof can, if necessary, be determined by the Court below hereafter in the manner provided by Order XX, rule 12, of the Code of Civil Procedure. The plaintiff-appellant should get his costs from the defendant-respondent throughout

DANIELS, A. J. C.—I regret that I am unable to concur in the conclusion at which my learned colleague has arrived.

The sole question in dispute between the parties is one of fact:—Is the Will propounded by the defendant the genuine Will of Thakur Jageshwar Bakhsh Singh?

The Will purports to be a holograph Will written and signed by the testator with his own hand. The plaintiff-appellant adduced evidence to show that the testator, at the time when the Will purports to have been executed, was in such a state of physical helplessness that he was incapable of writing and even incapable of clear speech. That evidence having been found to be false, as it undoubtedly is, he relies in the alternative in this Court on the

(1) 29 Ind. Cas. 229; 39 B. 386 at p. 397; 28 M. L. J. 593; 17 M. L. T. 408; (1915) M. W. N. 788; 2 L. W. 521; 17 Bom. L. R. 455; 21 C. L. J. 528; 19 C. W. N. 617; 42 I. A. 110 (P. C.).

plea that even on the evidence adduced by the defendant the testator's condition was such as to render the execution of the Will by him almost a physical impossibility. It is suggested that the document was forged at the instance of the deceased's widow with the assistance of her brother Saltanat Bahadur and with the connivance of one of the defendant's witnesses, Amir Haidar.

The facts of the case are simple. The date of the Will is 15th July 1907. In February of that year the testator had a slight attack of paralysis from which, according to the respondent's evidence, he had completely recovered. He died in December of the same year from an injury supervening on diabetes from which he had long been suffering. By the Will in dispute he made his widow *Musammat* Sukhraj Kuar owner of his property, with power to adopt a son who should be heir after her death. He also made a small gift to Saltanat Bahadur. In pursuance of this Will *Musammat* Sukhraj Kuar in June 1913 adopted the defendant-respondent Rawat Beni Bahadur *alias* Dwijdeo Bakhsh Singh. *Musammat* Sukhraj Kuar died in July 1914. The defendant obtained mutation of names as owner of her estate in December 1914. The plaintiff filed the present suit on 6th April 1915. The validity of the defendant's adoption and, therefore, his title to the estate rests on the authority to adopt given to *Musammat* Sukhraj Kuar by the Will. In the absence of such authority the estate would descend in equal shares on *Musammat* Sukhraj Kuar's death to two persons, the plaintiff-appellant Rawat Sheo Bahadur and one Kanhaiya Bakhsh who has not joined in the litigation.

In the first place, the Will in dispute is a perfectly natural Will. It is just such a Will as the testator might have been expected to make. In its opening words the testator states that he has attained the age of fifty-five years without having any issue and he has now no hope of having any and he, therefore, makes his wife Thakurain Sukhraj Kuar his heir and gives her the right to take possession of his entire estate as owner after his death and to adopt a boy out of her family and to make him her heir. "He," that is, the adopted son, "will after the death of Thakurain get the entire estate like a natural son." Then follows a direction to the testator's wife to dedicate some portion of the property for the support of a temple of Shivaji. Lastly, the testator states his intention of executing a deed conferring four *mahals* in the Fyzabad district on his wife's brother Thakur Saltanat Bahadur and in case he should fail to do so, directs his widow or any person who might inherit the estate to transfer the said property to the intended donee. It appears that Saltanat Bahadur had been living in the house of the deceased and assisting him, and it is not suggested that there is anything improbable in the bequest made in his favour. It has been urged that the testator would have been more likely to make a direct bequest instead of putting it into the form of an executory devise, but the reason why it was put in this form is apparent on the face of the deed. The testator intended to execute a deed of gift *inter vivos* which would take effect earlier than the Will. In case he should die, as actually happened, before carrying out his intention, he leaves a direction to his successor to carry it out.

The Will is proved by the evidence of two attesting witnesses, Lalta Prasad and Bans Bahadur, one of whom was in the service of the deceased while the other was in the service of the Jamoh estate, of which the deceased was manager. Both these witnesses have been believed by the learned Subordinate Judge. Their evidence is fully discussed in his judgment and, so far as their evidence alone is concerned, no reason has been shown why we should reject witnesses whom the Judge who heard their evidence has believed. They are supported by a third witness Ramdat, who was also in the service of the deceased and who, though not an attesting witness, deposes to having been present at the execution of the Will and its attestation by Lalta Prasad and Bans Bahadur.

The Will also purports to bear the signature of a third attesting witness Mujib Haidar Khan. This man was a Talukdar and a friend of the deceased. His family originally belonged to the same clan of Thakurs but had been converted to Muhammadanism. It appears from the evidence of Onkar

(D. W. No. 27), a *ziladar* in the service of Mujib Haidar at the time, that the deceased went over to Mujib Haidar's place on an elephant bringing the Will with him and asked Mujib Haider to attest it and the latter did so in the witness's presence. The witness verifies Mujib Haidar's signature. Mujib Haidar is dead. His son Thakur Amir Haidar, the present Taluqdar, was called by the defendant and states that the signature appears to be that of his father. In the mutation proceedings he was more positive and said that the signature was his father's. In re-examination he gave as his reason for the more cautious statement he made in this Court that not having actually seen his father sign he could not definitely swear that the signature was his. The plaintiff attempted to show that the signature was a forgery. He produced a witness named Sheo Darshan Lal, who was also in Mujib Haidar's service, and who deposed that after the testator's death Saltanat Bahadur and the attesting witness Lalta Prasad came to his master with the Will and asked him to attest it. The Will at that time did not bear the signature of any attesting witness at all. Mujib Haidar excused himself from attesting the Will on the ground that he was ill and that it would be inconvenient for him to have to attend the Court to verify his attestation. Neither the witness nor Mujib Haidar made any objection on the ground that the latter was being asked to commit a crime. The falsehood of the story is apparent on the face of it. Sheo Darshan Lal admits that his master was an honest and self-respecting Taluqdar. Is it likely that the brother-in-law of the deceased would have ventured to approach him openly in the presence of the servant with a suggestion that he should commit forgery? Is it likely that the man of a character which Mujib Haidar is reported to have borne would have shown no surprise at the suggestion but merely excused himself on the ground of illness? The witness by his own account never mentioned the incident to Mujib Haidar's son until the latter had verified his father's signature in the mutation proceedings 6 years later. He did not even mention it at the time of the adoption, though the validity of the adoption depended entirely on the Will and though both he and Amir Haidar were present on that occasion. He never mentioned it at all to the reversioners whose interests were affected.

In addition to the evidence discussed above there are some witnesses, in particular Jageshwar Pande and Nageshwar Bakhsh, who depose to the testator shortly before his death having admitted to them that he had made a Will in favour of his wife. Nageshwar Bakhsh Singh is an important witness. He was on visiting terms with the deceased and is a member of the District Board and a *darbari*. He visited him on two occasions, once shortly after the attack of paralysis and again in August or September 1917. On the former occasion he mentioned to the witness his intention of settling all his property on his wife. On the second occasion he told him that he had done what he proposed, namely, had executed a Will in his wife's favour. The only suggestion made with reference to this witness is based on the fact that he is acquainted with Munshi Oudh Bihari Lal the guardian of the defendant. On this slender foundation it is suggested that the defendant had suborned him to give false evidence. The suggestion is absurd. Munshi Oudh Bihari Lal is not a relative of the defendant or an interested party. He is a retired Tahsildar who undertook the office of guardian at the request of the District Judge.

The theory propounded by the plaintiff is this. The existence of the Will and its date, were mentioned in *Musammat* Sukhraj Kuar's application for a succession certificate to realise the debts due to her husband which was presented to the Court on the 10th August 1908. It has, therefore, to be admitted that the Will, except for Mujib Haidar's signature which is disputed, must have been in existence on that date. Inasmuch, however, as the Will had not been mentioned in *Musammat* Sukhraj Kuar's application for mutation of names, it is suggested that *Musammat* Sukhraj Kuar and Saltanat Bahadur (both of whom are now dead and cannot, therefore, come forward to rebut the suggestion) conspired to have the Will forged between June and August 1908 and, thinking that it would strengthen their case to have it attested by a person of position, subsequently got

Thakur Amir Haidar to forge his father's signature as an additional attesting witness. This, according to the theory put forward, must have been after Mujib Haidar's death, which occurred in 1912.

No doubt, as the appellant has urged, it is not necessary for him to show how the forgery, if there was a forgery, was committed. It is sufficient if he can induce the Court to hold that the execution of the Will is not proved. At the same time, where there is definite evidence, probable in itself and accepted by the trial Judge, which directly proves the execution of the Will, an Appellate Court ought not to reject that evidence unless it finds strong ground for suspecting that a forgery has in fact been committed.

The obvious objection to this theory is the absence of motive as well as the absence of substantial foundation for these serious allegations against persons of the social standing of the Thakurain and her brother and of Amir Haidar. What motive had Thakuran Sukhraj Kuar? She was entitled to succeed to her husband's estate under Hindu Law. The Will gave her very little more. It has been suggested that the Will gave her an absolute estate and the well-known rulings which hold that the word "*malik*" is ordinarily to be construed as conferring such an estate have been referred to. Whether that is so or not, the terms of the Will leave no doubt of the testator's intention that if she adopted a son, as she was desired to do, that son was to inherit absolutely on her death. Certainly, the difference, if there is any, between the estate which she took under the Will and the estate which she would have taken otherwise, cannot with any reasonable probability be put forward as a ground for her to connive at forgery. The other motive suggested is that she wanted to have power to adopt a son and to keep the estate from going to the reversioners after her death. This is a possible motive, but the desire for an adopted son who should continue the family and who could confer spiritual benefit on the testator is much more natural as an explanation of the making of the Will by Thakur Jageshwar Bakhsh than as a reason why his widow should have forged it after his death. If she was so anxious to adopt a son that she forged a Will in order to do so, it seems strange that she should have waited for another five years before putting her desire into practice. It is not suggested that up to the time the Will is supposed to have been forged there was any enmity between *Musammat* Sukhraj Kuar and the reversioners or any reason why she should stoop to crime in order to injure them.

As regards Saltanat Bahadur, even the plaintiff found some difficulty in arguing that the gift to him was of sufficient value to furnish an adequate motive for the conduct imputed to him. The appellant's argument as to the manner in which the gift was made has already been discussed; apart from this, it had to be conceded that the gift was in itself one which the testator might naturally have made. As regards the part attributed to Amir Haidar, he or his father undoubtedly had litigation, not, it is true, with the present plaintiff, but with Sheo Ratan Singh, the father of Kanhaiya Bakhsh, the other possible reversioner. It is, however, a large order to assume that on this account a man of his position would be willing to run the risk of forging his father's signature to a Will purporting to have been made five or six years earlier. The only tangible grounds for the suggestion are that the plaintiff has produced one document in which Mujib Haidar signed as Syed Mujib Haidar instead of, as in the Will, Mujib Haidar Khan and a statement of the Raja of Itaunja and his *kurinda* Bansi Dhar. As regards the signature, Amir Haidar has deposed that his father sometimes used the word "Syed" and sometimes not. There is nothing improbable in this. Many people do not always sign their name in precisely the same way. Certainly if Amir Haidar, as suggested, had anything to do with forging his father's name he would not be likely to have adopted a form of signature which his father himself might not have used. It is also said that the signature on the paper produced by the plaintiff is not quite so firmly written as that on the Will but no importance can be attached to this as the former signature was made some four years after the date of the Will. The evidence of the Raja of Itaunja examined on commission goes so far little

that it is almost superfluous to notice it. He says that after Jageshwar Bakhsh's death Thakurain Sukhraj Kuar came to see him with Dwijdeo Bakhsh Singh, whom she said she had adopted. He asked to see the Will and she sent for it and showed it to him. The witness was shown the Will and deposed that to the best of his belief the signature purporting to be that of the testator, whom he calls his *mamun* (maternal uncle), was genuine. He then said that there were two or three other signatures, *i.e.*, signatures of witnesses, on the Will, and that *as far as he remembered* there were only three signatures and not a fourth. The witnesses' evidence is in favour of the genuineness of the Will and his recollection as to the number of signatures of attesting witnesses is much too indefinite for any weight to be attached to it. The Raja is very vague as to time. He thinks that the testator died in 1911 or 1912, whereas in fact he died in 1907. He states in one place that the Rani came to see him within a year of her husband's death and in another that she came about three years ago. It is, therefore, impossible to be certain which of these inconsistent dates is correct. He speaks, it is true, of an adoption having been already made, but the Thakurain might have made use of the expression of this sort although the actual adoption ceremony had not been performed. The story told by Bansi Dhar is far more definite but it is unfortunately absolutely devoid of truth. This man is a servant of the Raja. He deposes that after Thakurain Sukhraj Kuar made over the Will to his master the latter sent it to him for custody and that he retained it for two or three days and then returned it to the Raja to be given back to the Thakurain just as she was about to leave. He admits that he cannot read a single word of the character in which the Will is written and that he did not have the names of the witnesses read out to him, yet he would have us believe that he noticed the Will so carefully as to be able to swear positively that the signature of Mujib Haidar was not upon it. His statement that the Will remained in his possession for two or three days is directly contradicted by the Raja himself, who says that after looking at the Will he handed it back direct to the servant of Thakurain Sukhraj Kuar.

Amir Haidar has deposed that the Thakurain made the Will over to him for safe custody after the adoption. An attack has been made on this evidence on the ground that if it were in his possession, the Thakurain could not have shown it to the Raja. As we have seen, the Raja's memory as to when the visit took place is extremely hazy, but even if it was after the adoption was completed there is nothing improbable in her having got the Will from him temporarily. The Will certainly was made over to Amir Haidar as it was he who filed it in the mutation proceedings. Amir Haidar was not cross-examined on the subject, as he should have been if it was intended to make a point of this discrepancy. Amir Haidar had recently some litigation with the defendant resulting in a decree being passed against him, and it was suggested before us that this has produced somewhat strained relations between the two. Amir Haidar in his evidence volunteered the statement that this litigation was collusive and that though he really owed the money sued for, he might have pleaded limitation but that the defendant filed the suit lest it should be alleged that the defendant had remitted the debt from improper motives. However the matter may really stand, the witness would never have dared to make this admission if he had really been a party with the defendant to conspire to forge his father's signature to the Will. He would have been desperately anxious to deny any sort of collusion between them.

The only substantial ground of attack on the Will is that based on medical grounds. As the learned Subordinate Judge remarks, no skilled medical evidence was called at the trial at all. The defendant called Jag Prasad, the Vaid who ordinarily attended on the deceased. The plaintiff called a man named Aulia Bakhsh, who professed to have attended on the deceased as a Vaid, of whom the Subordinate Judge remarks that he was either an impostor set up by the plaintiff to pose as a physician or a quack of a most dangerous type. Personally, after reading his evidence, I have no hesitation

in adopting the former alternative and this seems to be the view of the learned Subordinate Judge himself, for he adds, "I cannot for a moment believe that he attended on Jageshwar Bakhsh during his last illness."

The appellant's Counsel has placed in the forefront of his argument extracts from certain medical books, such as Osler's Principles and Practice of Medicine, to the effect that in an attack of paralysis in which one side of the body is affected, as is said to have been the case here, the hand is the last member to recover, his object being to show that in view of the admitted fact that the deceased had a slight attack of paralysis affecting the right side of his body, it was impossible that he should have been able to write the Will with his own hand. If this case was to be put forward, it would have been far more satisfactory to have a medical man in the witness-box to whom these extracts could have been put and who might have been examined with reference to the symptoms deposed to by the witnesses. I strongly deprecate the decision of a case on isolated extracts from technical books, and in this view I am fortified bythe observations of their Lordships of the Privy Council in *Sajid Ali* v. *Ibad Ali* (2). At page 14 their Lordships say: "That speculative theory, for it is nothing else, illustrates the danger of deriving inferences of fact from medical books and judicial *dicta*, instead of depending on the facts established by the evidence in the case."

Here the evidence in the case proves that the attack was a slight attack and that the deceased completely recovered from it within two months and was able to do all his ordinary work. That such complete recovery is possible even in a case of hemiplegia is attested even by the text book relied on by the plaintiff. Seeing that the deceased was manager of a large estate, ability to do all his ordinary work necessarily implies ability to write. Much stress has been laid on two isolated observations made one by Nageshwar Bakhsh Singh (D. W No. 19) and the other by Ramdat (D. W. No. 23). The latter says that after his illness the deceased could not hold his pen with the same firm grip as before. This, however, is a witness who deposes to actually seeing the Will executed in his presence and as this was the only time when he saw the deceased write between the attack and his death, the remark can hardly be treated as inconsistent with the defendant's case. The other statement relied on is that of Nageswar Bakhsh Singh that on the last occasion when he saw the deceased the latter was assisted by a servant to walk. This might be due to many causes and the witness has stated specifically that he did not notice anything in the limbs of the deceased from which the effect of paralysis could be inferred.

After the defendant's case was closed, the plaintiff produced evidence (printed from page 27 of his paper-book), the general effect of which is that the deceased was in a perfectly helpless condition, unable to move, hardly able to speak and requiring to be spoken to more than once before he could understand what was said to him. According to Baldeo Singh at the time when the Will is said to have been executed he was incapable of lifting his arm or his leg. Aulia Bakhsh is still more definite and says that he could neither move his arm or leg nor hold a pen. The learned Subordinate Judge has called attention to the fact that this case was not foreshadowed by the plaintiff till a very late stage of the trial. This portion of the judgment has been very severely attacked, but there is at least some ground for the learned Subordinate Judge's criticism. The learned Subordinate Judge never intended to suggest that the burden of proof on this issue was on the appellant. He has clearly stated that it was for the defendant to show that the Will was voluntarily executed by the testator who was of sound disposing mind. All that the Subordinate Judge points out is that it was incumbent on the defendant definitely to allege in his replication any fact on which he intended to rely which would make the execution of the Will propounded a physical impossibility. This requirement is laid down in Order VII, rule 2, Civil Procedure Code. Suppose, for instance, his case was that the testator was dead on the date on which the Will is said to have been executed, no one would contend that it was not necessary for him to allege this fact in his plaint or in his replication. In this case all that the plead-

(2) 23 C. 1 (P. C.); 22 I. A. 171; 6 Sar. P. C. J. 627; 12 Ind. Dec. (N. s.) 1.

ings contain was a general denial of execution which would merely require the defendant to establish a *prima facie* case. Even when the earlier witnesses of the respondent were examined, there was no cross examination as to the physical condition of the deceased, though these witnesses included Jag Prasad Vaid (D. W. No. 9), the regular medical attendant of the deceased. At this point there was an interval of three months in the hearing of the case owing possibly to the Subordinate Judge's transfer and it was not until July 1916 that any serious intention to challenge the testator's physical capacity to execute the Will was disclosed. The appellant replies to this that he had not seen the Will and did not know that it purported to be in the testator's own hand. The Will had been filed in the mutation proceedings consequent on Sukhraj Kuar's death, the adverse order in which was the immediate occasion for the present suit, and though it is true that neither the appellant nor his Pleader was in Court on the date on which the Will was filed, it seems highly unlikely that he should have launched a suit of this importance without having taken some opportunity of seeing it or ascertaining its nature and contents. Moreover, some of the evidence which the plaintiff put forward in rebuttal was inconsistent not only with the testator having been capable of writing the Will but even with his capacity to execute it. The question is, however, not of primary importance, as whenever it first occurred to the plaintiff to put forward this evidence the evidence itself is almost certainly false. The learned Subordinate Judge has given reasons for refusing to accept this evidence and it is sufficient for me to say that I am satisfied that practically the whole of it is false. One of the witnesses, as the learned Subordinate Judge has pointed out, is a man who had never previously in his life been to Panhauna until the occasion on which he so conveniently went, so that he might be able to assist the plaintiff with his evidence in this case.

On the evidence, the testator's capacity to write and execute the Will is fully established. The plaintiff has put forward three plaints signed by the testator as agent of some one else in the year 1881 and though it is admitted that there is a general resemblance between these signatures and those on the Will, it is suggested that there are differences sufficient to throw doubt on the latter. The differences are not, in my opinion, sufficient to support the argument, and considering the interval of time between two signatures which are to be compared it would, in my opinion, be highly dangerous for this Court to take on itself to throw doubts on the genuineness of the Will on such flimsy grounds.

The other points which have been dwelt on at great length by the learned Counsel for the appellant may be very briefly disposed of. It is suggested that if the testator took the trouble to obtain Mujib Haidar's signature on the Will he would also have taken the trouble to get it registered.

This sort of argument leads nowhere. It would be highly desirable that all testators should register their Wills, but as a matter of practice we know that a large number of them omit this desirable precaution even though they may in many cases have taken other precautions to prevent the Will being disputed. Then it is said that it ought to have been mentioned in the mutation proceedings. Why? The Thakurain was able to obtain mutation of names on her title as widow; however much she might have put forward the Will, she could have got nothing more. The entry in the *khewat* was made on the basis of "inheritance" as opposed to "transfer;" the entry would be the same whether she took under the Will or *ab intestato*. In her application for succession certificate she did mention the Will, possibly under the advice of the Pleader whom she employed. The argument is now changed to "why did she not produce it." The answer is obvious. There was no necessity for her to do so. The application was unopposed and the Court did not require the production of the Will before issuing the certificate. The terms in which her title to make the application are expressed are worth quoting:

"Petitioner is the deceased's widow and according to Hindu Law she is the legal heir of the deceased, who executed a Will in her favour on 15th July 1907, corresponding to Asarh Sudi 5th, 1314, Fasli."

VARCADOS *v.* MCLEOD.

As in the case of the mutation proceedings she evidently regarded her title as widow of a separated Hindu as sufficient to enable her to get the certificate, but by way of making the matter complete she mentions that there is also a Will in her favour. When Thakurain Sukhraj Kuar contemplated adopting a son under the power conferred by the Will, the estate of Kanhaiya Bakhsh, one of the reversioners, was under the superintendence of the Court of Wards and Kanhaiya Bakhsh's mother moved the Court of Wards to try to get hold of the Will to see whether the adoption was authorised. The Deputy Commissioner made several attempts to get Thakurain Sukhraj Kuar to produce the Will but she put him off with excuses and did not do so. This is put forward as a further ground of suspicion, though it is difficult to see what force there can be in it when, according to the appellant's own case, the Will had been in existence for some six years. *Musammat* Sukhraj Kuar's conduct is easily understandable. Rustics, even of the social status of the Thakurain, are proverbially suspicious and knowing that the Deputy Commissioner's action had been prompted by a party interested in disputing the adoption, it was not unnatural that she should stick closely to the Will and refuse to be drawn into letting the other side get possession of it or even present them with a copy of it until she was obliged to do so.

For the reasons given above, I would dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2580 OF 1915.

July 23, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

C. G. VARCADOS—PLAINTIFF—APPELLANT

versus

D. C. McLEOD AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (*I of* 1877), *s.* 56 (h)—*Limitation Act* (*IX of* 1908), *Sch. I, Art.* 47—*Trade-mark, infringement of—Injunction, suit for—Delay, effect of—Damages, suit for—Limitation.*

The period of limitation applicable to a suit for damages for infringing a trade-name or a trade-mark—a trade-name or mark being an exclusive privilege—is contained in Article 40 of Schedule I to the Limitation Act. [p. 435, col. 1.]

In a suit for an injunction to restrain the defendant from using a trade-name and from infringing the plaintiff's trade-mark, it appeared that the plaintiff had taken no action beyond sending a notice to the defendant and that he had stood by for five years before coming forward with a suit:

Held, that, in the circumstances, the plaintiff was not entitled to the injunction, *vide* section 53 (*h*) of the Specific Relief Act. [p. 435, col. 1.]

Appeal from the order of the District Judge, Lahore, dated the 12th June 1915.

Mr. *Obedulla*, for the Appellant.

Dr. *Gokal Chand Narang* and Mr. *Madan Gopal*, for the Respondents.

JUDGMENT.—The plaintiff founded a business of cigarette makers at Aden in 1901. His brother G. G. Varcados (defendant No. 2) joined him as a partner in 1906, but left the partnership in 1908, and in 1909 started a business in Lahore under the name of G. G. Varcados and Co. or Varcados and Co. He carried this on at first in partnership with D. A. Braganza, and from 1911 in partnership with defendant No. 1.

The plaintiff sues (*a*) for an injunction to restrain defendants from using the name G. G. Varcados and Co. or Varcados and Co., which he alleges to be his own trade-name, and from infringing his trade-mark, (*b*) for an order for the deliverly to him of the cigarettes, labels, etc., in the defendants' possession, and (*c*) for damages or an account of the profits.

The first Court dismissed the suit, holding that the claim for damages or an account of the profits was barred under Article 40 of the 1st Schedule to the Limitation Act, and that under section 56 (*h*) of the Specific Relief Act the plaintiff was not entitled to an injunction as he had acquiesced in the defendants carrying on the business in Lahore.

On appeal the District Judge agreed with the finding of the first Court in regard to the claim for an injunction, but with regard to the claim for damages held that though Article 40 applied, the claim was within time, as a fresh cause of action arose *de die in diem* so long as the infringement of the trade-mark continued. He,

therefore, remanded the case under Order XLI, rule 23, Civil Procedure Code.

The plaintiff has preferred a second appeal to this Court.

It is argued on his behalf that the claim for damages is governed by Article 115 or Article 120; and that, therefore, the period for which damages can be claimed is six years. We do not agree with the contention. The right to a trade-name or a trade mark is an exclusive privilege, and a suit for damages for infringing the privilege clearly falls under Article 40.

The only other question involved in the appeal is whether there has been acquiescence on the plaintiff's part disentitling him to an injunction under section 56 (*h*) of the Specific Relief Act.

It has been shown that he has known since 1909 of the existence of the defendants' business in Lahore. He took no action in the matter beyond sending a notice (Exhibit D-1) to defendant No. 2 on the 24th March 1909 and issuing a caution to customers (D. W. No. 1). He has stood by and allowed defendant No. 1 to invest considerable sums of money in the business, and it was only in June 1914, when the business had begun to show signs of prosperity, that he came forward with the present suit. The lower Courts are clearly right in holding that the plaintiff is, in such circumstances, not entitled to an injunction.

The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2235 OF 1916.

January 30, 1919.

Present:—Mr. Justice Beachcroft.

NARAIN PROSAD MAITY—PLAINTIFF—APPELLANT

versus

RAMESWAR ADYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 29 (c)—Suit for recovery of money put into partnership business together with approximate profits, whether cognizable by Small Cause Court—Appeal, second, whether lies—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint, when can be allowed.

The plaintiff brought a suit for the recovery of Rs. 40 advanced by him for the purposes of a partnership business which had since ceased to exist and also for Rs. 9 as appoximate profits arising out of the dealings with the money put into the business. The lower Appellate Court dismissed the suit, holding that it was not maintainable. The plaintiff then preferred a second appeal to the High Court:

Held (1) that no second appeal lay, as the value of the suit was under Rs. 500 and the suit, not being one for the balance of partnership accounts, did not come within the description of suits given in clause (*c*) of Article 29 of Schedule II of the Provincial Small Cause Courts Act; [p. 436, col. 2.]

(2) that leave to amend the plaint, to the effect that the plaintiff might be given a decree for such sum as might be found due to him after taking accounts, could not be given, as such amendment would involve the alteration of the entire nature of the suit. [p. 436, col. 2.]

Appeal against the decree of the Sub-Judge, Midnapur, dated the 23rd May 1916, reversing that of the Munsif, Contai, dated the 17th December 1914.

FACTS appear from the judgment.

Babu *Jyotish Chandra Hazra*, for the Respondents, raised a preliminary objection that under section 102 of the Code of Civil Procedure the appeal was incompetent, because the suit as framed was of the nature cognizable by a Court of Small Causes and the value of the suit was less than Rs. 500.

Babu *Saroda Charan Maity*, for the Appellant, contended that the suit was not for recovery of money but for recovery of a balance of partnership accounts which had not been struck by the parties to the suit or their agents. It was, therefore, a suit which would fall within the description of suits given in clause (*c*) of Article 29 of the Second Schedule of the Provincial Small Cause Courts Act, and, therefore, section 102 of the Civil Procedure Code would not apply and hence the second appeal was competent.

The learned Subordinate Judge was wrong in holding that the suit was barred by the provisions of section 265 of the Contract Act and that the proper form of the suit should be one for accounts, because the partnership business came to an end before the institution of the suit, and also the amount claimed in the suit was

settled by a *panchait* and admitted by the defendant to be due to the plaintiff.

If it be held that the suit was not maintainable in its present form, then the plaintiff might be allowed to amend the plaint to the effect that a decree might be passed in his favour for such amount as would be found due to him after taking account.

Babu *Jyotish Chandra Hazra*, for the Respondents.— Once partnership is admitted, no suit for refund of money is maintainable. The plaintiff's only remedy was to bring a suit for accounts. The amendment prayed for should not be allowed because it would introduce a new case and the application for amendment has been made at a very late stage of the case.

JUDGMENT.—This appeal is by the plaintiff. His case was that he carried on a partnership business with the two defendants and that in the course of that partnership business he advanced Rs. 40 for the purposes of the business. The business subsequently came to an end. When the plaintiff demanded his money from the defendants they refused to give it. Then a *panchait* was held, accounts were gone into, and the defendants admitted their liability, though the plaint does not state to what sum the liability was admitted. The plaint, however, stated that there must have been some profits arising out of the dealing in the money put into the business but that the plaintiff did not know what profits exactly there were and that roughly speaking they would come to Rs. 9. The Munsif decreed the suit. When the matter went on appeal before the Subordinate Judge, the learned Judge held that the suit was not maintainable, referring to section 265 of the Contract Act, and also on the ground that as there might have been either loss or gain in the course of partnership business the proper form of the suit was one for accounts. It is now argued that section 265 of the Contract Act has no application because the allegation in the plaint was that the business had already ceased to exist and that the suit simply was to recover something which was due after the accounts had been settled at the *panchait*. Then the learned Pleader is met with this difficulty that if the suit is one for a sum of money, then by reason of the provisions of section 102 of the Code of Civil Procedure there will be no second appeal because the suit is one of the nature cognizable by Courts of Small Causes and the amount is under Rs. 500. There would only be a second appeal if the suit came within the description of suits given in Article 29 of the Second Schedule of the Provincial Small Cause Courts Act, 1887. It is argued on behalf of the appellant that the suit comes within the description given in clause (*c*) of that Article for a balance of partnership account and as no balance has been struck by the parties or their agents, the exception in clause (*c*) will not apply and, therefore, the suit will be one excluded from the cognizance of Small Cause Courts. Here it is not alleged in the plaint that any definite sum was due, also the claim in respect of the profits was an approximate sum. Now, looking at the plaint it cannot, in my opinion, be said to be one for the balance of the partnership accounts. That can be seen if one looks at the date given of the cause of action. The dates given are those of the advance of money and of the closing of the business. So it comes to this that the suit is not one which is included in the provisions of Article 29 and, therefore, *prima facie*, there will be no second appeal. Faced with this difficulty, the learned Pleader for the appellant now asks that he should be allowed to amend the plaint in such a form as to be a suit for accounts. He asks that he may be allowed to amend the plaint to this effect that accounts may be taken and if any amount is found due to the plaintiff, he may be given a decree for that amount. It seems to me that it is now too late to allow that in this suit. It will be altering the nature of the suit entirely and in a suit for such a petty sum as this, I do not think that any exception should be made to the general principle that amendment should not be allowed where it involves the entire alteration of the nature of the suit.

The appeal is dismissed with costs.

Appeal dismissed.

RAM DIYAL v. MOHAMMAD RAJU SHAH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1225 OF 1915.

July 22, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

RAM DIYAL—DEFENDANT—APPELLANT

versus

MOHAMMAD RAJU SHAH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 8—Representative suit—Permission obtained in trial Court—Appeal—Permission from Appellate Court, whether necessary.

Once the permission of the Court is obtained to the bringing of a suit in a representative capacity under Order I, rule 8 of the Civil Procedure Code, there is no necessity to get any further permission in the Court of Appeal. [p. 438, col. 2.]

Second appeal from the decree of the District Judge, Multan, dated the 15th March 1915.

Messrs. *Hargopal* and *Jagan Nath*, for the Appellant.

Mr. *Sleem*, for the Respondents.

ORDER.

SCOTT-SMITH, J.—(*April 23rd*, 1918).—The case out of which this appeal arises was decided by Mirza Zafar Ali, Additional District Judge, on 20th January 1912 and the appeal from his order was decided by Sheikh Amir Ali, District Judge, on 15th March 1915. A second appeal by the defendant was admitted for hearing before a Single Judge apparently on the ground of jurisdiction.

The value of the suit is Rs. 3,500 and in ordinary course the appeal should have been admitted to a Division Bench, but Counsel for the parties do not object to my disposing of it, if it is disposed of merely on the ground that the lower Appellate Court had no jurisdiction to hear the appeal from Mirza Zafar Ali's order.

The question whether Sheikh Amir Ali had jurisdiction to hear the appeal is not quite free from difficulty. *Nirinjan Das* v. *Kirori Mal* (1) is not quite in point, because Mirza Zafar Ali was not gazetted as a Subordinate Judge at all. He was District Judge of Multan, and on 15th November 1911 was relieved of the office by Mr. A. H. Parker, who was appointed in his place, Mirza Zafar Ali on the same date being gazetted as Additional District Judge, see Punjab Government Notifications Nos. 1293 B. and 1293 C. of that date. If it be decided that Sheikh Amir Ali had jurisdiction to hear the appeal, then the second appeal should be decided by a Division Bench. See *Musammat Nekhan* v. *Muhammad Khan* (2), as to the powers of an Additional District Judge under section 75 of the old Courts Act.

There is also another question which should, in my opinion, be decided by a Division Bench, *viz.*, whether the appeal to this Court has abated by reason of the deaths of Muzaffar Ali Shah and Zulfikar Shah, and the failure of appellant to apply for their legal representatives to be brought on the record within the prescribed period of six months.

The suit was brought by Makhdum Shah Muhammad, plaintiff, as representing all those entitled to sue under Order I, rule 8, Civil Procedure Code, and the question is whether, when any of those for whom he is suing dies, it is necessary to make an application under Order XXII, rule 4, Civil Procedure Code. No ruling applicable to the case is cited, but *Ponniathakathoot Parameswarem Munpu* v. *Moothedath Mallseri Illath Narayanan Namboodri* (3) may be referred to.

The appeal is accordingly transferred to the Division Bench. A *very early* date should be fixed as it has been pending for nearly three years already. Appellant should, if so advised, take steps to get those respondents served who have not yet been served.

JUDGMENT OF THE DIVISION BENCH.

SCOTT SMITH, J.—(*July 22nd*, 1918).—This appeal has been referred to the Division Bench for the decision of two points as set forth in the referring order of the 23rd April 1918. The first question is whether Sheikh Amir Ali, District Judge, Multan, had jurisdiction to hear the appeal from the order of Mirza Zafar Ali, Additional District Judge, dated the 20th January 1912. The appeal was, no doubt, duly filed in the Court of the Divisional Judge, Multan, who at that time had jurisdiction to hear appeals from orders of the Dis-

(1) 41 Ind Cas. 42; 38 P. R. 1917; 108 P. W. R. 1917.

(2) 46 P. R. 1898.

(3) 34 Ind. Cas. 384; 40 M. 110; 3 L. W. 305; (1916) 1 M. W. N. 402; 31 M. L. J. 279.

trict Judge and the Additional District Judge, but under the new scheme which came into force on the 1st of August 1914, the Court of the Divisional Judge ceased to exist and its place was taken by that of the District Judge. Now it is admitted that had Mirza Zafar Ali been the District Judge when he decided the suit, the appeal from his order could not have been heard by Sheikh Amir Ali, District Judge. But Counsel for the respondent relies upon *Niranjan Das* v. *Kirori Mal* (1), in which it was held that where a Subordinate Judge who has been appointed Additional Judge hears and decides a case which has not been assigned to him by the District Judge under section 21 (2) of the Punjab Courts Act, the appeal from his decision lies to the District Judge if the value of the suit does not exceed Rs. 5,000, and not to the Chief Court. This authority is not on all fours with the present case, because here the suit was not decided by a Subordinate Judge who had been appointed Additional Judge or Additional District Judge under the former Courts Act. Mirza Zafar Ali was District Judge, Multan, and on the 16th November 1911 was relieved by Mr. A. H. Parker who was appointed in his place. On the same date Mirza Zafar Ali was gazetted as Additional District Judge. As pointed out in the referring order, he was never at any time gazetted as a Subordinate Judge of Multan. In the case reported as *Shib Nath* v. *Alliance Bank of Simla Ltd.* (4), it was held that the transfer of a case by the District Judge to the Additional District Judge was an assignment of the case by the former to the latter. In any case, as Mirza Zafar Ali did not combine in himself the functions both of a Subordinate Judge and Additional District Judge, but was only an Additional District Judge, we must hold that the suit was decided by him as Additional District Judge and, therefore, the appeal clearly did not lie to the District Judge but to the Chief Court. We, therefore, hold that the District Judge's order appealed from was passed without jurisdiction and must be set aside.

The second question referred is whether the appeal to this Court has abated by reason of the deaths of Muzaffar Ali Shah and Zulfiqar Shah and the failure of the appellant to apply within the statutory period to have their legal representatives brought on to the record. The suit was brought by Sheikh Mohammad Raju for himself and 29 others under Order I, rule 8, Civil Procedure Code. These 29 included Muzaffar Ali Shah and Zulfiqar Shah, but they never applied to the Court to be made parties to the suit under Order I, rule 8, sub-clause (2), Civil Procedure Code. They, therefore, were never parties to the suit and there was no necessity for them to be made respondents in the appeal to this Court. It is contended by Mr. Sleem on behalf of the respondent that though permission of the Court was obtained in the trial Court under Order I, rule 8, it was necessary to again obtain the permission of the Court for the appeal. He cites no authority in support of this contention and it has, in our opinion, no force. Once the permission of the Court has been obtained to the bringing of a suit in a representative capacity under Order I, rule 8, there is no necessity to get any further permission in the Court of Appeal. We, therefore, hold that the appeal has not abated by reason of the fact that legal representatives of the two persons named were not brought on to the record within the statutory period.

We accept the appeal and set aside the order of Sheikh Amir Ali as passed without jurisdiction and restore the order of the first Court. By this order plaintiff's suit is dismissed. The memorandum of appeal will be returned to him and if so advised, he can file it again in this Court. We further direct that the plaintiff respondent shall pay defendant's costs throughout, provided that if he files his appeal again in this Court and it is admitted to a hearing, the costs of this Court will then follow the event.

Appeal accepted.

(4) 25 Ind. Cas. 480; 110 P. W. R. 1914; 3 P. R. 1915; 215 P. L. R. 1914.

KALIANARAMA AIYAR *v.* SIVARAMA CHETTIAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 6 8 OF 1917.

November 14, 1918.

Present:—Mr. Justice Phillips and Mr. Justice Napier.

KALIANARAMA AIYAR—PLAINTIFF—APPELLANT

versus

SIVARAMA CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Compromise decree—Decree wrongly passed, whether nullity—Jurisdiction of Court—Party consenting to decree, right of, to impeach decree—Estoppel—Evidence Act (I of 1872), s. 115.

A consent decree wrongly passed owing to some legal or technical defects is not a nullity *ab initio*. The Court has jurisdiction to pass a right as well as a wrong decree and if it decides wrongly, the wronged party can only take the course prescribed by law for setting matters right. [p. 441, col. 1.]

Thuljaram Row v. *Gopala Aiyan*, 40 Ind. Cas. 611; 32 M. L J. 434; (1917) M. W. N. 234; 21 M. L. T. 229, followed.

A party to a consent decree which the Court had jurisdiction to pass or any one deriving title under him is estopped from going behind the terms to which he has voluntarily submitted on the ground that the decree was wrongly passed. [p. 441, col. 1.]

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 131 of 1915, preferred against the decree of the Court of the Temporary Sub-Judge, Tanjore, in Original Suit No. 23 of 1914.

FACTS.—Plaintiff is the alienee from 1st defendant of certain properties which had been dedicated to charity by the 1st defendant's family. At the time of dedication 1st defendant was a minor. These properties were the joint family properties and the other members consented. Subsequent to this there was a partition suit and these properties were not included. In that suit the 1st defendant objected that these properties were also divisible. But the suit was compromised between the plaintiff in that suit and the 1st defendant and as against the 2nd defendant (a minor) the suit was withdrawn. The plaintiff-appellant in this appeal brought a suit for recovery of possession on the strength of a sale-deed which was executed to him by 1st defendant.

The Hon'ble Mr. *T. Rangachariar* (with him Messrs. *T. V. Gopalasami Mudaliar*, *R. Gopalaswami Ayyangar* and *A. Ganesa Aiyar*), for the Appellant.—The compromise decree in the partition suit is not binding on the 1st defendant, as one of the parties to the suit was a minor and hence the decree is a nullity. There can be no valid dedication to charity as the 1st defendant was a minor at the time.

Mr. *T. V. Muthukrishna Aiyar*, for the Respondents.—The 1st defendant was a party to the compromise. He pleaded that the charity properties should be partitioned and eventually consented to the compromise. It is not open to the 1st defendant's alienee to attack the compromise decree in this suit. It is binding on the parties. If so advised, the 1st defendant may file a suit to set it aside or the minor 2nd defendant may do so. A Court can decide wrongly as well as rightly. It is not a case of want of jurisdiction.

JUDGMENT.—The 3rd defendant's husband, one Ramaswami Chetti, brought a suit in 1907 against defendants Nos. 1 and 2, who were the sons of his nephew, for partition. The 2nd defendant was then a minor. Eventually, Ramaswami Chetti was allowed to withdraw the suit as against the 2nd defendant with liberty to bring another suit and the suit was compromised between him and the 1st defendant, and a decree was passed in terms of the compromise. Under this compromise, the 1st defendant took a certain share of the family property and separated himself from the family. This was on 17th November 1908. In 1912 the 1st defendant sold certain properties which were the subject matter of this suit to the plaintiff, these properties being certain properties which belonged to the family of Ramaswami Chetti and defendants Nos. 1 and 2 but which were alleged in the prior litigation by Ramaswami Chetti to have been dedicated to charity. The question we have to consider now is whether the 1st defendant at the date of sale had any interest in the plaint properties.

In the prior Original Suit No. 80 of 1907 Ramaswami Chetti expressly mentioned these charity properties in his plaint, but said that, as definite arrangements had been made in the family for their management, it was unnecessary to obtain any relief in respect of them and, therefore, they were not included in the suit. The 1st defendant in his written statement no doubt asked that the plaintiff's suit should be dismissed, but in paragraph 24 he claimed

that if there were a partition those charity properties should also be divided, and the 2nd defendant put forward a similar plea. The *razinamah* does not specifically relate to these charity properties, but we are clear, after a careful consideration of its terms, that they also formed the subject-matter of the compromise. The *razinamah* begins with the following words: "Whatever may be the claims of us both", and we see from the plaint and written statements in that suit that a claim had been put forward in respect of the charity properties by the defendants, and the plaintiff had pleaded that they were not divisible. The *razinamah* then goes on to deal in detail with several of the contentions in the 1st defendant's written statement, and in respect of one of them it says in paragraph 6 that the dispute had already been settled, and finally paragraph 7 reads as follows: "That the parties herein...have no right against one another in respect of property." It is clear that there had been no prior settlement between them about the charity properties and it is equally clear that the compromise was in respect of all their claims, and amongst these claims must be included the claim of 1st defendant to share in the charity properties. We are, therefore, of opinion that the charity properties formed part of the subject-matter of the compromise.

The next contention of the appellant is that, even if the charity properties were included in the compromise, they were not affected by the decree passed thereon, because the properties not forming the subject-matter of the the suit, the compromise decree could not affect them. As these properties were referred to in the plaint as being family properties though not divisible, and in the written statements an allegation was made that they were divisible before giving a decree for partition, it would have been necessary for the Court to decide the question of their partibility and if it found that they were partible, these properties must necessarily have been included in the partition decree. In this respect they undoubtedly formed the subject-matter of the suit. The contention that no stamp duty had been paid specifically in respect of these properties, is not of much importance, for even if the decree had been given without stamp duty being paid, it would not invalidate the decree, and we see that in valuing partition suits it has been held by this Court that the valuation is to be according to the amount at which the relief sought is valued in the plaint [*vide Boganadam Rangiah Chetty* v. *Boganadam Subramania Chetty* (1)]. In this view of the matter, we must hold that the *razinamah* decree did deal with the charity properties and consequently it is unnecessary for the respondent to fall back upon the *razinamah* itself. It is, therefore, unnecessary to decide the objection taken by the appellant that the *razinamah*, not being registered, cannot have effect as against the immoveable property.

The next objection urged against the *razinamah* decree is that it is a decree which could not have been passed in that suit and consequently is an absolute nullity. Reliance is placed on *Lakshmana Chetti* v. *Chinnathambi Chetti* (2) and *Gobind Chandra Sardar* v. *Bhagabat Sardar* (3). The case of *Lakshmana Chetti* v. *Chinnathambi Chetti* (2), however, does not seem to be authority for such a broad proposition, for all that was decided there was that when parties to a partition suit had submitted to arbitration, the award made upon their submission could not be passed into a decree because there were some minors who were parties to the suit and leave of the Court had not been obtained under section 462, Civil Procedure Code, either before the submission to arbitration or after the award. The case of *Gobind Chandra Sardar* v. *Bhagabat Sardar* (3) is somewhat more in favour of the appellant, though it does not in terms say that such a decree is a nullity, for the decree in that case had been based on a compromise to which several of the defendants had not been parties, and it was held that it would not be binding upon them and that no decree ought to have been given in accordance with its terms and consequently the consent decree was set aside by the order in that case. Although this is authority for saying that the consent decree was

(1) 8 Ind. Cas. 512; 21 M. L. J. 21; (1910) M. W. N. 755; 9 M. L. T. 3.
(2) 24 M. 326.
(3) 27 Ind. Cas. 242.

wrongly made, it does not appear to be any authority for holding that that decree was a nullity *ab initio*. In order that the decree should be a nullity, it must be one passed without jurisdiction. If the Court had jurisdiction, the fact that it passed a wrong order would not make its order a nullity. A Court has jurisdiction to decide wrong as well as right, and if it decides wrong, the wronged party can only take the course prescribed by law of setting matters right. In this case the Court has jurisdiction to try the partition suit and whether it was right or wrong in passing the decree it did, it certainly had jurisdiction to do so. This question has been considered in *Thuljaram Row* v. *Gopala Aiyan* (4) and we agree with Srinivasa Aiyangar, J., that the "true rule is that if the Court has jurisdiction to pass orders of a particular kind, that in a particular case it passed an order which it should not have passed is not a case of total want of jurisdiction so as to render that order a nullity." If the decree is not a nullity, it must be binding, at any rate, on the 1st defendant and under that decree he gave up all his rights to the plaint property and was, therefore, unable to pass any title to the present plaintiff. Whether that decree is binding on the 2nd defendant who was not actually a party to it, the suit as against him having been withdrawn previously, need not, we think, be decided now. It is open to him to question it if he so wishes, but whether he can do so effectually when the managing member of his family effected a partition between the 1st defendant and the other members of the family is a doubtful point which can be left for determination when necessary.

In the result the second appeal fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

(4) 40 Ind. Cas. 611; 32 M. L. J. 434; (1917) M. W. N. 234; 21 M. L. T. 229.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 579 OF 1917.

May 30, 1918.

Present:—Mr. Justice Shah Din.

DASA—DEFENDANT—APPELLANT

versus

Musammat HIRAN—PLAINTIFF—RESPONDENT.

Custom—Gift to stranger—Donee dying childless—Land, whether reverts to family of donor—Person no having locus standi *to question gift, whether can set up invalidity of gift.*

Where land is gifted to a perfect stranger who is not in any way related to the family of the donor, there can be no reversion of the land gifted to the donor's family on the failure of the donee's line. [p. 441, col 2.]

A person who has no *locus standi* to question the validity of a gift, is precluded from disputing its validity on any ground whatever [p. 442, col. 1.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 9th October 1916.

Bakhshi *Tek Chand*, for the Appellant.

The Hon'ble Mr. *Sohan Lal*, for the Respondent.

JUDGMENT.—A preliminary point is urged by the Pleader for the respondent in this case to the effect that since the original donee Sobha's line has become extinct, the land in suit reverts to the line of the donor and, therefore, the present appellant, Dasa, who is brother of Sobha, donee, has no *locus standi* to prosecute this appeal. The record, however, shows that Sobha, donee, was a perfect stranger and is not proved to have been related to the family of the donor; hence the principle laid down in *Nihala* v. *Rahmatullah* (1) is fully applicable to this case, and there can be no reversion of the land gifted to the donor's family. The preliminary objection is, therefore, overruled.

On the merits of the case it seems to me that the District Judge was entirely wrong in raising for the first time the question of the *factum* of the gift in favour of Sobha and in holding that no gift, as a matter of fact, had ever taken place. The gift was made by Larja to Sobha by a registered deed as far back as the 20th of February 1909 and mutation was sanctioned in accordance with the gift on the 12th of May 1909 in favour of the donee. Subsequently, there was litigation between the donor and the donee over the gift and the donee obtained a decree against

(1) 137 P. R. 1908.

the donor in respect of the land gifted on the 18th of March 1910. The plaintiff never questioned the *factum* of the gift; all that he contended was that the gift was invalid in her presence. On this point the District Judge has found against the plaintiff, holding that she, as a widow, had no *locus standi* to question the validity of the gift. In these circumstances, it was wrong on the part of the District Judge to set up a new case for the plaintiff and to hold that, as a matter of fact, no gift had been made by Larja in favour of Sobha.

As regards the question of the alleged undue influence under which the gift is said to have been made, it is clear that since the plaintiff has no *locus standi* to question the validity of the gift, she is precluded from disputing its validity on any ground whatever; the gift, whether it was valid or not, is a perfectly good one so far as the plaintiff is concerned. I accept the appeal, set aside the judgment and decree of the District Judge and dismiss the plaintiff's suit with costs.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 163 OF 1917.

January 8, 1919.

Present:—Justice Sir Ernest Fletcher, KT., and Mr. Justice Walmsley.

MOHENDRA CHANDRA GHOSAL—DEFENDANT—APPELLANT

versus

RAM RATAN TEWARI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 97—Preliminary decree, when can be passsd—Specific performance, suit for—Decree, conditional, whether preliminary.

A decree in a suit for specific performance of a contract, though conditional in form, is not a preliminary decree. A preliminary decree can only be drawn up in those cases for which express provision is made in the Civil Procedure Code.

Appeal against the decree of the District Judge, Chittagong, dated the 31st July 1916, confirming that of the Munsif, Chittagong, dated the 12th May 1915.

Mr. *U. N. Sen* and Babu *Probodh Kumar Das*, for the Appellant.

Babu *Chandra Sekhar Sen*, for the Respondents.

JUDGMENT.—This is an appeal against a decision of the learned District Judge of Chittagong confirming a decision of the Munsif of the same place. The judgment appealed against is not really one which the learned District Judge adjudicated on the merits, because the learned Judge came to the conclusion that the appeal ought to have been disposed of on the preliminary point. The point which commended itself to the learned Judge is this. The suit out of which this appeal arises was one for specific performance of a contract and the decree was drawn up in a conditional form. However, the learned Judge came to the conclusion that the decree against which the appeal had been preferred was a preliminary decree and that the final decree having been passed no appeal lay to his Court. It is quite obvious that the learned Judge is wrong and it has not been suggested that he is right. The provisions of the Civil Procedure Code about preliminary and final decrees apply to decrees that are authorized to be drawn up as preliminary and final decrees under the provisions of the Code, and not to a decree like the one which the learned Judge considers in his own opinion as a preliminary decree.

The judgment of the Court below must, therefore, be set aside and the case remitted to the Court of the District Judge to have the appeal re-heard on the merits. The costs of this appeal will abide the result of the re hearing by the lower Appellate Court.

Case remanded.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS PETITION No. 241 OF 1918.

August 3, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

PARMAN—PETITIONER—APPELLANT

versus

LHASSU—PLAINTIFF—RESPONDENT.

Punjab Tenancy Act (XVI of 1887), s. 77 (3) (d)—Occupancy rights, suit to establish, by ejected tenant—Jurisdiction of Civil and Revenue Courts.

A suit by a person, other than a tenant, to establish his claim to a right of occupancy is not one under section 77, sub-section (3), clause (*d*) of the Punjab Tenancy Act, and is, therefore, not excluded from the jurisdiction of the Civil Courts. [p. 443, col. 2.]

Therefore a person, who has been dispossessed from his tenancy in accordance with a notice issued under section 43 of the Punjab Tenancy Act, and after having instituted a suit to contest his liability to ejectment can sue in the Civil Court for possession of the land from which he had been ejected on the ground that he has a right of occupancy therein. [p. 443, cols. 1 & 2.]

Per *Martineau, J.*—The proviso to sub-section (3) of section 77 of the Punjab Tenancy Act applies where in a suit cognizable by and instituted in a Civil Court it becomes necessary to decide any matter in respect of which any suit falling within one of the groups of the sub-section might be instituted. [p. 444, col. 1.]

Petition for review of the order passed by Mr. Justice Scott-Smith, on the 8th April 1918, reported as 46 Ind. Cas. 811.

Mr. *Fakir Chand*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.

SCOTT-SMITH, J.—The facts of this case are given in my order, dated the 8th April 1918, in Civil Appeal No. 1429 of 1917.* The plaintiff-respondent applied for a review of this order and I directed that it should be heard by a Division Bench as the point to be decided was one of importance and an authoritative decision was necessary. Bakshi Tek Chand raised a preliminary objection to the effect that there was no sufficient ground for review; but we overruled this objection as we considered that the question involved should be fully considered. The question is whether a person, who has been dispossessed from his tenancy in accordance with a notice issued under section 43 of the Punjab Tenancy Act, and after having instituted a suit to contest his liability to ejectment, can thereafter sue in the Civil Court for possession of the land from which he had been ejected on the ground that he has a right of occupancy therein. The case is exactly on all fours with the one reported as *Kharku* v. *Dittu* (1). The plaintiff, in order to succeed in his case, has to prove that he has a right of occupancy as alleged by him under section 8 of the Tenancy Act; having been dispossessed from his tenancy he is no longer a tenant, and a suit by a person, other than a tenant, to establish his claim to a right of occupancy is not one under section 77, sub-section 3, clause (*d*) of the Punjab Tenancy Act and is, therefore, not excluded from the jurisdiction of the Civil Courts. In my order disposing of the appeal I gave it as my opinion that the case was one to which the proviso to section 77 of the Tenancy Act applied, because the question whether *a tenant* has a right of occupancy is a matter which can be heard and determined only by a Revenue Court. I am now of opinion that I was mistaken in this view, because I considered the plaintiff to be still a tenant after his dispossession. I am, therefore, of opinion that the particular matter here in dispute is not one which is excluded from the jurisdiction of the Civil Courts and that the proviso does not apply.

I have read the recent Full Bench case No. 36 of 1917 [*Akbar Hussain* v. *Karm Dad* (2)] decided on the 8th April 1918, in which there are certain remarks indicative of the view that an *ex tenant* can look for no relief outside the Revenue Courts, but the present question was not then before the Court. That was a suit for compensation by a tenant who had been forcibly dispossessed and had within a year recovered possession of his tenancy. The Judges who were parties to that ruling were not at that time considering the case of a tenant who had been dispossessed in due course of law, and some of their remarks would appear to go beyond the question which was actually before the Court.

I would, therefore, accept the review and would hold that the suit was rightly tried by the Civil Courts, and I would return the case to the Judge in Chambers for decision of the appeal.*

(1) 70 P. R. 1893.

(2) 48 Ind Cas. 8; 90 P. R. 1918 (F. B.).

*See 46 Ind. Cas. 811—*Ed.*

*See *Parman* v. *Ghantha*, 51 Ind. Cas. 484; 50 P. R. 1919.—*Ed.*

I would further order costs to follow the event.

MARTINEAU, J.—I agree that the suit is cognizable by a Civil Court.

On the question of the applicability of the proviso to section 77 (3) of the Tenancy Act I was at first disposed to differ from my learned brother, but on a fuller consideration I think that his view is correct. The proviso to sub-section (3) applies where in a suit cognizable by and instituted in a Civil Court it becomes necessary to decide any matter which can under this sub section be heard and determined only by a Revenue Court, that is to say, matter with respect to which any suit falling within one of the groups of the sub section might be instituted. The matter which has to be decided here is whether the plaintiff has a right of occupancy, and a suit instituted by him in respect of this matter would not be one falling within sub-section (3), as he is not now a tenant. The proviso to sub-section (3), therefore, does not apply in the present case.

I concur in passing the order proposed by my learned brother.

Review accepted.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 291 OF 1918.

February 14, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

Babu JATADHARI SINGH AND OTHERS—JUDGMENT DEBTORS—APPELLANTS

versus

Babu BALDEO LAL—DECREE-HOLDER—RESPONDENT.

Mortgage decree—Order in which properties should be sold—Decree-holder, right of—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 4.

Under Order XXXIV, rule 4 of the Civil Procedure Code, it is the duty of the Court in making a mortgage-decree to order that the mortgaged property or a sufficient portion thereof be sold. This gives a right to the Court making the decree to declare what portion of the mortgaged properties shall first be sold, but that discretion is not to be arbitrarily exercised and is subject to the general principle that the Court cannot prejudice the rights of the mortgagee if he has not himself done any act which prejudices the rights of those having equities against the mortgagor. It is to give effect to this principle that the provisions relating to marshalling and contribution have been enacted. [p. 445, cols. 1 & 2.]

In the absence of a direction in the decree to the contrary, this discretion vests in the execution Court. [p. 445, col. 2.]

Unless there are any equities requiring marshalling and contribution, the decree-holder has the fullest right to bring to sale whichever property he wishes first to sell. [p. 445, col. 2.]

Per *Jwala Prasad, J.*—If a mortgage-deed specifically says that the properties on default of payment of the mortgage-money would be sold in a particular order, it would not be open to the decree-holder to change that order in seeking to enforce the re-payment of his money. If there is no specific mention of the order in which the properties are to be proceeded against for the enforcement of the loan, the hands of the decree-holder would not be fettered. [p 446, col. 2.]

Appeal from a decision of the District Judge, Gaya, dated the 31st October 1918, affirming that of the Subordinate Judge, Gaya, dated the 22nd June 1918.

Mr. *Rai Guru Saran Prasad*, for the Appellants.

Messrs. *Naresh Chandra Sinha, D. N. Sircar* and *Bimla Charan Sinha*, for the Respondent.

JUDGMENT.

MULLICK, J.—This second appeal arises out of the execution of a mortgage-decree in respect of seven properties. In the first execution all the seven properties were put up to sale. There were no bidders for items Nos. 1, 2, 3 and 4. Property No. 5 was sold and fetched a sum sufficient to discharge the decree, but on the objection of the judgment-debtors the sale was set aside. In the second execution only properties Nos. 4 and 5 were put up to sale. There were no bidders again for property No. 4 and property No. 5 alone was sold but that sale, too, was set aside.

In the execution with which we are dealing, *viz.*, the third execution, properties Nos. 4 and 5 were again put up to sale. There were no bidders for property No. 4 and property No. 5 was knocked down for a sum of Rs. 4,400.

The judgment-debtor made an application to set aside the sale on the ground of material irregularity and inadequacy of price and also on the ground that no notice of the settlement of the sale proclamation was served upon him. But it has been found on appeal by the District Judge that there was no irregularity in the con-

dust of the sale and the application was dismissed.

The judgment is conclusive on this point and the learned Vakil for the appellants admits that no second appeal lies so far as the objection on the ground of material irregularity is concerned.

But he contends that it was the duty of the executing Court to sell the properties in the order given in the decree and that it was not open to the Court to sell property No. 5 before selling properties Nos. 1, 2, 3 and 4. It is contended that this is a question relating to the execution and satisfaction of a decree arising between the judgment debtor and the decree-holder under section 47 of the Civil Procedure Code, and that, therefore, a second appeal lies against the decision in this matter.

Now, the question is whether a mortgagee decree-holder has a right to enforce his mortgage charge by the sale of any property over which his lien extends. The authorities in the Calcutta High Court are all unanimous on this point, and hold that the execution Court ought not ordinarily to fetter the discretion of the decree-holder to put up to sale whichever property he wishes first to sell. See *Musammat Hoolas Kooeree* v. *Musammat Bibee Sufeehun* (1), *Mohunt Kishun Dayal Gir* v. *Sattar Buksh Khan* (2), *Khub Lal Singh* v. *Navabi Hurmu i Begum* (3), *Amir Chand* v. *Bukshi Sheo Persad Singh* (4) and *Midnapur Zemindary Co., Ltd.* v. *Abinash Chundra Mitra* (5). So also was it held by their Lordships of the Allahabad High Court in *Bhikhari Das* v. *Dalip Singh* (6).

Under Order XXXIV, rule 4, Civil Procedure Code, it is the duty of the Court in making a mortgage-decree to order that the mortgaged property or a sufficient part thereof be sold. This, no doubt, gives a right to the Court making the decree to declare what portion of the mortgaged properties shall first be sold; but that discretion is not to be arbitrarily exercised and is subject to the general principle that the Court cannot prejudice the rights of the mortgagee if he has not himself done any act which prejudices the rights of those having equities against the mortgagor. It is to give effect to this principle that the provisions relating to marshalling and contribution have been enacted.

In the absence of a direction in the decree to the contrary, it would seem that this discretion vests in the execution Court also.

The learned Vakil for the appellants relies upon the following cases: *Syed Mahomed Siddik* v. *Ram Lal Mandar* (7), *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (8), *Appaya* v. *Rangayya* (9) and *Subraya Venkatesh* v. *Ganpa* (10).

Some of these cases relate to contribution and do not apply to the facts of the case before us; but even in those cases it has been recognized that as long as the right of contribution as between the mortgagor and the purchaser is unaffected by any act of the mortgagee, his right to be paid the whole of the debt out of any portion of the mortgaged property he wishes to comprise in his suit cannot be questioned.

The same principle applies to the right to marshal.

Therefore, unless there are any equities requiring marshalling and contribution, the decree-holder has the fullest right to bring to sale whichever property he wishes first to sell. Here there are no such equities, and, therefore, the Court ought not to fetter the will of the decree-holder. But from the proceedings it would seem that the Court was fully aware of the fact that it was selling a property out of the order in which it appeared in the decree of the trial Court, and that the Court did not choose to fetter the decree-holder's discretion. The learned Vakil for the appellants contends that the Court did not direct its mind to this question, and that the judgment-debtors had no notice of the service

(1) 8 W. R. 379.
(2) 11 C. W. N. xxvii (27).
(3) 9 C. W. N. cxcviii (198).
(4) 34 C. 13; 4 C L. J. 573.
(5) 50 Ind. Cas. 790; 23 C. W. N. 308; 29 C. L. J. 297.
(6) 17 A. 434; A. W. N. (1895) 83; 8 Ind. Dec. (N. S.) 601.

(7) 7 Ind. Cas. 4; 15 C. W. N. 80.
(8) 29 M. 217.
(9) 31 M. 419; 3 M. L. T. 287 (F. B.); 18 M. L. J. 229.
(10) 11 Ind. Cas. 989; 35 B. 395; 13 Bom. L. R. 675.

of the sale proclamation. This ground was taken before the execution Court and was found against the judgment-debtors. It was not pressed before the District Judge, and the law does not allow any further appeal on this point. Therefore, we must take it that the sale proclamation was served in accordance with law.

Then it is contended that the notice for settling the sale proclamation had not been served upon the appellants. That, too, has been found against them and the judgment of the lower Court is final on this point.

Therefore, we must hold that although the Court had a discretion to settle the order in which the properties were to be sold, the Court has in this case exercised this discretion rightly and that we ought not to interfere.

In this view of the case the appeal must fail and be dismissed with costs.

JWALA PRASAD, J.—It appears to me that the question whether the decree-holder was entitled to sell the mortgaged property item No. 5 out of its order in the mortgage decree, does not properly arise in this appeal. The decree-holder in earlier execution made strenuous efforts to sell the properties in the order in which they are described in the decree, but when the properties were put up to sale, Nos. 1, 2 and 3 fetched no value. There was, therefore, no remedy left to the decree-holder but to proceed against properties Nos. 4 and 5. In the subsequent execution property No. 4 also fetched no value, and in the present execution the decree-holder, therefore, has proceeded against property No. 5. The decree-holder, while applying for the sale of item No. 5, clearly stated that there was no bid for the other properties at the previous sales and prayed that the property item No. 5 be sold. This was allowed by the Court and hence the property was sold under the direction of the Court. It would thus appear that the order of the mortgaged properties mentioned in the decree has not been at all disturbed in execution by the decree-holder. As the question has arisen, I must say that in the beginning I had entertained some doubt as to the right of the decree-holder to change the order of the properties described in the mortgage bond or the decree. After carefully considering the authorities on the point I have to a great extent, if not altogether, modified my view. The right to sell the properties arises out of a contract between a mortgagor and a mortgagee as embodied in the mortgage-deed. If that deed specifically says that the properties, on default of the payment of the mortgage-money, would be sold in a particular order, I do not think it would be open to the decree-holder to change that order in seeking to enforce the repayment of his money. If, however, there is no specific mention of the order in which the properties are to be proceeded against for the enforcement of the loan, the hands of the decree-holder would not be fettered. The mortgage decree generally follows the mortgage bond in describing the order in which the properties should be sold, unless the Court for certain reasons directs that certain properties be sold over the others. In the present case it has not been shown that there was any agreement between the parties that the properties mortgaged were to be sold in the order in which, as a matter of course, they have been mentioned in the mortgage bond. There is also no particular direction in the decree as to the order in which the properties are to be sold. The right to select the properties for the enforcement of his loan would, therefore, in the first instance be in the decree-holder. For good reasons, the Court has the undoubted discretion to direct that the discretion of the decree-holder should not prevail, and that the properties should be sold in certain other manner. It was open to the judgment debtors or any other person affected by the sale to show that the sale of property item No. 5 should have been postponed until the other properties in the mortgage decree had been sold. No attempt has been made in this case to show that the right of any one has, as a matter of fact, been prejudiced by selling property No. 5 in the way in which it has been done in the present case. I, therefore, agree that the appeal should be dismissed.

Appeal dismissed.

BASHI RAM *v.* HASSAN MUHAMMAD.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 92 OF 1919.

January 27, 1919.

Present:—Mr. Justice Broadway.

BASHI RAM—AUCTION-PURCHASER—PETITIONER

versus

HASSAN MUHAMMAD—JUDGMENT DEBTOR AND BELI RAM—DECREE-HOLDER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 90, 92—Execution of decree—Sale—Objections, when can be made—Fraud, plea of—Specific assertions necessary—Application to set aside sale, when competent—Appeal, second, whether maintainable—Revision—High Court, power of interference of—Limitation Act (IX of 1908), ss. 5, 18, Sch. I, Art. 166.

Objections to an execution sale on the ground of fraud can only be made. under rule 90 of Order XXI of the Civil Procedure Code, prior to the confirmation of the sale. [p. 448, col. 1.]

Fraud should be specifically set out with all the necessary details so as to enable the opposite party to meet a specific set of assertions. [p. 448, col. 2.]

One *B.* obtained a decree against *H.* the decretal amount being made realisable from the latter's property in the event of non-payment. *B.* having sued out execution, the house of *H.*, was sold on the 19th December 1916 and on the 27th January 1917 the sale was confirmed in favour of one *B R.*, who was granted the usual certificate on the 12th February 1917. On the 1st November 1917 *H.* filed an application for the cancellation of the sale on the ground that it had been effected fraudulently and that the proceedings had been irregular. The Munsif dismissed the application as time-barred and as having been made after the decree had been satisfied. On appeal the District Judge, holding that the application was competent and within time, remanded the case for enquiry into the allegations made by *H.* The auction-purchaser *B R.* preferred a second appeal against this order:

Held, (1) that the sale having been confirmed, it could not be attacked except by a separate suit; [p. 448, col. 1.]

(2) that the Munsif having acted under rule 92 of Order XXI, Civil Procedure Code, no second appeal was competent; [p. 448, col. 1.]

(3) but that the Appellate Court had power to interfere on revision; [p. 448, col. 1.]

(4) that the application, having been made more than 30 days after the date of the sale, was time-barred under Article 166 of the Limitation Act; [p. 448, cols. 1 & 2.]

(5) that time could not be extended under section 5 of the Limitation Act and in order to avail himself of section 18 of the Act the applicant must show that he was by fraud kept from the knowledge of his right to apply for the sale to be set aside; [p. 448, col 2.]

(6) that the applicant having failed to establish this was not entitled to any relief. [p. 448, col. 2.]

Petition for revision of the order of the Additional District Judge, Gujranwala, dated the 8th May 1918, reversing that of the Munsif, 2nd Class, Gujrat, dated the 6th December 1917 and remanding the case to the lower Court for re-decision according to law.

Bakhshi *Tek Chand*, for the Petitioner.

Lala *Shamair Chand*, for Mr. *M. L. Puri*, for *Hassan Muhammad*, Respondent.

JUDGMENT.—On the 26th November 1915 one Beli Ram obtained a decree against Hassana on a compromise. The sum decreed was Rs. 243 and was payable by the 26th April 1916. In default of payment the money was realisable from Hassana's house and other property.

The money was not paid by the date fixed and on the 27th July 1916 Beli Ram sued out execution asking for the sale of the house.

The sale was effected on the 19th December 1916, and the list of bids shows that the judgment-debtor was present at the time of sale. On the 27th January 1917 the sale was confirmed in favour of Bashi Ram for Rs. 270 and on the 10th February 1917 the record was consigned to the Record Room, the decree being stated to have been satisfied.

Bashi Ram was granted the usual certificate by the Court on 12th February 1917. On the 1st November 1917 Hassana filed an application for the cancellation of the sale on the grounds that it had been effected fraudulently and that the proceedings had been irregular. The application did not state under what provision of the Civil Procedure Code it was made.

On the 6th December 1917 the learned Munsif dismissed the application, holding

(1) that inasmuch as it had been made after the decree had been satisfied it was not competent;

(2) that it was barred by time, and

(3) no fraud had been proved.

Hassana then appealed to the Additional District Judge, who held that the application was competent and apparently within time and remanded the case to the learned Munsif directing him to make an enquiry into the allegations made by Hassana. Against this order Bashi Ram has preferred this second appeal through Mr. Tek Chand and Mr. Shamair Chand has appeared for Hassana.

Mr. Shamair Chand raised a preliminary objection to the effect that no second appeal

lay. He contended that the application made by his client could only have been, and was, made under Order XXI, rule 90, Civil Procedure Code, and that the order of the Munsif was passed under Order XXI, rule 92, Civil Procedure Code, and was, therefore, appealable under Order XLI, rule 1 (*j*), Civil Procedure Code. He then contended that the order passed on appeal was final and referred to section 104 (2), Civil Procedure Code. He further contended that an application could be made under Order XXI, rule 90, Civil Procedure Code, on the ground of fraud at any time after the sale attacked had been confirmed and that in fact the only way to get a sale such as this set aside on the ground of fraud was by having recourse to the provisions of Order XXI, rule 90, Civil Procedure Code, as no separate suit could be brought.

Mr. Tek Chand, on the other hand, argued that once a sale had been confirmed it could not be attacked except by a separate suit, and that, therefore, no order could be passed under Order XXI, rule 92, Civil Procedure Code, and thus no appeal lay to the District Judge.

In any event, he contendsd that if no second appeal lay, this Court should act on the Revision Side.

Having regard to the wording of Order XXI, rule 92, Civil Procedure Code, I am inclined to the view that Mr. Tek Chand's contention is correct, and that objections to a sale on the ground of fraud can only be made under rule 90 prior to the confirmation of the sale. At the same time, it seems to me that the Munsif was acting under rule 92 and that, therefore, no second appeal was competent and I, therefore, hold accordingly and dismiss the appeal as an appeal.

I think, however, that I should interfere on revision—that I have the power to do so I have no doubt and it seems to me that this is a case in which I should exercise this power, for the reasons that this Court exercised it in Civil Revision No. 10 of 1919 [*Asa Nand* v. *Jhangi Ram* (1)], decided by Chevis, J., on the 3rd January 1919. The application is undoubtedly barred under Article 166 of the Indian Limitation Act as having been made more than thirty days after the date of the sale. Time cannot be extended under section 5 of that Act and section 18 is the only section that can be appealed to. The learned District Judge has not referred to this section specifically, but I assume he had that section in his mind. In order to avail himself of that section, however, it is necessary for Hassana to show that "he was, by fraud, kept from the knowledge of his right to apply for the sale to be set aside." He, however, has never alleged any such fraud. His allegation is that he had entered into an arrangement with Beli Ram under which Beli Ram undertook not to get the house sold and that despite this undertaking the house was brought to sale.

Mr. Shamair Chand urged that the allegation was a general one of "fraud" which included this kind of fraud as well, but in this I am unable to agree.

Fraud should, in my opinion, be specifically set out with all the necessary details so as to enable the opposite party to meet a specific set of assertions, and the only circumstance alleged by Hassana is that his decree-holder executed the decree in breach of an undertaking not to do so.

The learned Judge appears to have gone out of his way to raise a case for the judgment-debtor that he himself never contemplated and in doing so the learned District Judge has wholly misunderstood the real point regarding limitation. Incidentally, his order of remand is bad, for he has remanded the question of fraud for enquiry whereas the learned Munsif has already found that no fraud had been proved.

I accordingly accept this as a petition of revision and setting aside the order of the learned District Judge, restore that of the learned Munsif.

The respondent must pay the petitioner's costs throughout.

Petition accepted.

(1) 50 Ind. Cas. 610; 2 P. W. R. 1919; 29 P. L. R. 1919.

SUSHIL CHANDRA v. EMPEROR.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 214 OF 1918.

September 18, 1918.

Present :—Mr. Lindsay, J. C., and Mr. Stuart, A. J. C.

SUSHIL CHANDRA LAHIRI—ACCUSED —APPELLANT

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Admission by witness that previous statement is false —Court, duty of—Criminal trial - Prosecution, duty of —Accused refusing to explain evidence against him— Presumption—Penal Code (Act XLV of 1860), s. 109— Abetment, what amounts to.

Where in cross-examination a witness admits that a statement previously made by him relative to a certain fact is a false statement, he ought to be asked in re-examination by the prosecution, or at any rate by the Court, why he made a statement which was false. The mere fact that the witness acknowledges the previous statement to be false is no justification for rejecting such previous statement, if on other grounds the Court is able to reach the conclusion that that statement is in substance true. [p. 459, col. 2.]

A person accused of a crime is under no obligation to offer any explanation of his conduct or of any circumstances which direct suspicion towards him. He may, if he chooses, let the case against him rest entirely upon the prosecution evidence or he may meet the charge in any other way he thinks fit. It is the duty of the prosecution to prove its case, but when such proof has been given and the time comes when the prosecution evidence, whether direct or circumstantial, has to be weighed, it is impossible for a Court to ignore the fact that it is unweakened or unrebutted by contrary evidence, which might have been produced if the facts alleged were not true. The Court has nothing to do with the reasons which lead an accused to meet the case against him with silence; he is at liberty to defend himself in any way he thinks proper, but the Court cannot ignore the consideration that the prosecution evidence has been left unrebutted. [p. 463, col. 2; p. 464, col. 1.]

Where two persons set out to accomplish a particular act and agree that, if the necessity should arise, they would resort to the use of firearms, with which they provide themselves, and on the necessity arising one of them indulge in shooting, the other must be treated as having abetted the shooting, as this takes place in pursuance of the common intention which inspired the two persons. [p. 465, col. 1.]

Appeal against the order of the Sessions Judge, Lucknow, dated the 13th August 1918.

The Hon'ble Pandit *Jagat Narain Mulla* and Messrs. *N. C. Dutt*, *Jiban Krishna Banerji* and *H. K. Sanyal*, for the Appellant.

Mr. *Ross Alston* and the Government Pleader, for the Crown.

JUDGMENT.—This is the appeal of Sushil Chandra Lahiri, a Bengali Brahman, aged 27, who has been convicted by the Sessions Judge of Lucknow on a charge of abetment of murder (sections 302 and 114, Indian Penal Code) and sentenced to death.

The crime in which the accused is found to have been concerned was committed about 8·30 P. M. on the night of the 9th February last in a narrow lane in that quarter of Lucknow City which goes by the name of Ghasiarimandi, and the first report of the affair was made about 9 P. M. that night at the Police Post in Aminabad. Seven people, residents of the quarter, went and informed the Police that they had heard three reports which sounded like the explosion of bombs; that they had come out of their houses and found the dead body of a man propped up against the ledge which runs along the front wall of the houses in the lane. The Police from the outpost went at once to the spot and arrangements were made to watch the body pending the making of a report at the Kotwali Police Station in Hazratganj. It is stated that three round felt caps were found close to the corpse and also the empty case of a cartridge which was afterwards found to be a Mauser cartridge case.

None of the people of the neighbourhood were able to recognise the deceased man, who was dressed Bengali fashion and wore a short beard. In the morning the Police had photographs of the corpse taken which were circulated, and copies of these photographs were shortly afterwards (*i. e.*, some time in the month of February) shown to a youth named Moreshwar Rao Kaple, a pupil in the High School at Allahabad, who, after keeping the photographs for two or three days, informed Mr. Sonds, the Police Officer in charge of the inquiry, that he was certain that they were pictures of his brother Vinayak Rao Kaple.

This boy has given evidence in the trial. He explains that he had not seen Vinayak for about three years (he saw him last in March 1915) and it was for this reason that he hesitated at first in recognising the pictures. He told Mr. Sonds, on seeing the photographs for the first time, that he thought the body was that of his brother but not feeling sure he

asked to be allowed to keep the photographs for a day or two. He was then able to declare positively that he recognised the picture as that of the body of his brother. The lad states in Court that he is certain about the identification and we may say at once that we accept his evidence.

We mention this at this stage, as it has been argued on behalf of the appellant that the identity of the deceased with Vinayak Rao has not been established. In our judgment it has.

This man Vinayak Rao Kaple was known to the Police as an active and prominent member of a revolutionary society operating both in Bengal and in the United Provinces. He had been wanted by the Police since March or April 1915 in connection with the Benares conspiracy case. Another person who was similarly wanted was the accused appellant Lahiri, and a third was Nripendra Nath Chakravarti, still absconding, the man who according to the findings of the Court below fired the shot which killed Kaple on the night of the 9th February. It is clear from the Police evidence that it was suspected from the first that the murdered man was Vinayak Rao; a fact which accounts for the photographs having been shown to the lad Moreshwar Rao; but the deceased was not known to any one in Lucknow by that name; we have it that to some he was known as "Satyen" (though a Maratha he dressed and spoke like a Bengali), to others as "Bara Babu."

To resume the history of the Police investigation, the accused Lahiri was arrested in Lucknow on the 22nd February and he was found in possession of arms and ammunition, the latter consisting of over 200 loaded cartridges for use with a Mauser pistol. From the evidence of Mr. Goldie, Deputy Commissioner of Police, Calcutta, it appears that these cartridges found in the prisoner's possession and marked with the letters "K. B." correspond in appearance with those which were stolen from Messrs. Rodda of Calcutta some time ago. Mr. Goldie knows that 50 Mauser pistols and 45,000 rounds of ammunition were so stolen, and has official knowledge of the marks on the stolen cartridges. He was able further to depose that Exhibit A2, the empty case which was picked up at the scene of the murder, bears the same mark as the stolen ammunition.

Lahiri after his arrest was charged with an offence under the Arms Act; he was convicted, and the sentence of 5 years' imprisonment which he got is still running.

The next event of importance in the course of the Police investigation was the arrest on the 3rd April of a youth named Shankar Lal, who is one of the principal witnesses in this case. He is a lad of 18 who at the time of the murder was a pupil of the Church Mission High School in Lucknow, reading in the 9th Class. He had entered this school in August 1917, having previously been a pupil of a school in Aligarh known as the Dayanand Arya Vedic Pathshala, and was living in the house outside of which the corpse of the murdered man was found.

This boy disappeared from school immediately after the murder and turned up in Aligarh on the 1st April, where he went to stay with his brother (or cousin) Bhoj Raj who is employed on the railway. The latter, who seems to have been aware that the Police were looking for Shankar Lal in connection with the murder case, questioned him and eventually took him to the District Magistrate to whom Shankar Lal made a statement which was duly recorded. This is Exhibit B12 on the record. All he said on this occasion was that he knew nothing about the murder. He had heard that a murder had been committed in front of his house; he got frightened and ran away to Moradabad, where he remained till the time he came to Aligarh to his cousin Bhoj Raj. The Magistrate after taking Shankar Lal's statement let him go, but he was arrested the same evening (3rd April) and was sent to Benares on the 5th. He arrived at Benares on the 6th and was interviewed on the evening of that day by two officers of the C. I. Department, Deputy Superintendent Mukerji and Inspector Banerji.

The next day (7th April) he was placed before Mr. Pim, the District Magistrate of Benares, to whom he made a long statement admitting that he knew about the murder. He related the story of his initiation into the revolutionary society to which he belonged and of his life in Lucknow

after he moved there from the school at Aligarh. He wound up his story by telling Mr. Pim that the statement he had made a few days previously to the District Magistrate of Aligarh was false.

Exhibit A 63 is a copy of the statement made by Shankar Lal to Mr. Pim on the 7th April. The next thing we know is that on the 12th April 1918, Shankar Lal, at the Central Jail, Lucknow, identified the prisoner Lahiri as the person whom in his statement to Mr. Pim he had described as "the man" and whom he had on one occasion heard described as "Thermometer." It seems that Shankar Lal was not aware before his arrest of the accused's real name. On the same day Shankar Lal was taken to the Hazratganj Police Station by Mr. Sonds and there were placed before him 10 round felt caps including the three which had been picked up at the scene of the murder. After a long scrutiny he selected one cap (Exhibit A5 in the case) which he declared to be exactly like the cap which "the man" was in the habit of wearing. This was one of the caps found near the dead man's body on the night of the 9th February. Mr. Sonds noticed that while Shankar Lal was handling the caps he looked a long time at another cap (marked Exhibit A4 at the trial), and he asked him why he had done so. Shankar replied that the cap looked like one worn by another man, Shambhu Dayal, whom he had mentioned in his statement to Mr. Pim. He explained that he had hesitated to say so because he did not feel quite sure.

This cap (Exhibit A4) is also one of the caps recovered at the scene of the crime. The third cap (Exhibit A6) was not identified by Shankar Lal.

We pass on now to describe how the evidence of the other principal witness in the case came to be available. The real name of this witness is Tejendra Mohan Ghosh. He is a Bengali Kayasth, aged 20 years, and a resident of Dacca. According to the evidence of Mr. Goldie, Tejendra had been known for some time as a member of a revolutionary society in Bengal and the Police in that province were seeking to arrest him.

Nothing seems to have been known in these provinces about Tejendra. Mr. Biggane, an officer of the C. I. Department in the United Provinces, deposes that he knew nothing of this man before this case was set going, while Deputy Superintendent Mukerji swears that the first occasion when he saw Tejendra was on the day when he was produced to give evidence in the Court of the Committing Magistrate. That day was the 13th July 1918, the day after Shankar Lal had been examined in the course of the commitment proceedings.

The evidence shows that Tejendra was arrested in Calcutta on the 3rd July 1918 as a member of the revolutionary party who was suspected of having been concerned in a "political" dacoity.

Mr. Goldie saw Tejendra on the afternoon of the 3rd July and again on the 4th July, when he recorded Tejendra's statement. Mr. Sonds went down to Calcutta and saw Tejendra on the 7th July and finally Tejendra arrived in Lucknow early in the morning of the 13th July. Mr. Sonds, who had meantime returned to Lucknow, met Tejendra at the Railway Station. He drove with him round the city where Tejendra pointed out the scene of the murder and various other places, subsequently a shop in Aminabad, where he had purchased a pair of shoes (pumps) when he was flying from the scene of the crime to the Railway Station.

The witness was then taken to the Police Station in Hazratganj, where identification proceedings were held under the supervision of Mr. Nehru, the City Magistrate (Mr. Nehru's evidence and the record of the proceedings, Exhibit A87).

Eighteen persons, one of whom was the witness Shankar Lal, were drawn up in front of a screen behind which were Tejendra and Mr. Nehru. It is proved that from this position in which Tejendra could not be observed he picked out Shankar Lal, saying that he was a youth who was known to him as "Lala". After this Tejendra was mixed with a crowd of 18 other Bengalis and Shankar Lal picked him out as a man whom he knew, not by his real name but by the name of "Bangal". (This point is made clear by Shankar's evidence in Court.)

Tejendra was next taken by Mr. Nehru to the Lucknow Jail and there, out of a group of 22, he picked out the accused Lahiri as being the man he knew by the names of "Chemist" and "Thermometer". After this Tejendra was taken to Court

and examined as a witness. At present all that need be said is that he deposed that the prisoner was on the spot when the murder was committed, that he came there accompanied by the man who actually shot Satyen (a man who was known to him by the name of "Rajju" or "Raju"), that Lahiri had a revolver which he tried to fire three times at the witness (it missed fire each time), and that he (witness) had a struggle with Lahiri in the course of which he gained possession of Lahiri's revolver. He described the struggle between "Satyen" and "Raju" and how he managed to snatch the Mauser pistol from the latter. Finally, he described how, after the accused and Raju ran away, he found that "Satyen" had been mortally wounded and how, after propping him up in the position in which the body was afterwards found, he made his way to the railway station and escaped *via* Benares to Calcutta.

We have thought it expedient to explain with all this detail the manner in which the statements of Shankar Lal and Tejendra became available as prosecution evidence. It is practically upon the statements of these two youths that the whole case for the prosecution rests, and the history of the way in which they came into Court will prove to be a matter of the first importance when we come to discuss the value of their testimony.

Apart from their statements, there is on record a considerable volume of oral and documentary evidence which is either formal or introductory, and, for reasons about to be stated, it will not be necessary for us to examine in detail the introductory evidence led to show the relation in which the prisoner stood towards the deceased, the two witnesses whose names have been mentioned, the man Raju, and another man Ram Prasad *alias* Narsingh Prasad, both of whom have hitherto avoided arrest. The purpose of the introductory evidence was to show that all these persons were, prior to the date of the murder, associated together as members of a revolutionary society and that the murder was the result of a quarrel between the prisoner and his friend Nripendra (*alias* Raju *alias* Shambhu Dayal) on one side and Tejendra and the deceased on the other.

The learned Counsel, who has appeared before us to argue the case for the appellant, has admitted that practically all of the evidence which relates to the events preceding the 9th February is true. He informed us as soon as he opened his case that he admitted that Lahiri was a member of a revolutionary society; that he and the other persons just mentioned were associates, all members of the same party; that they had met from time to time at Agra, Aligarh and Lucknow; that Lahiri had been to Agra on the 30th January and had met there the deceased, the witness Tejendra and the man Raju, and that there had been some dispute between Lahiri and the deceased, though it was claimed that this dispute had been settled before the date of the murder.

We lay stress upon these statements made by the learned Counsel because the admissions contained in them have been made for the first time in this Court. Neither in the Court of the Magistrate nor before the Judge did Lahiri make an admission of any kind. The only statement made by the accused before the Magistrate was that he had nothing to say there When he was on his trial in the Court below, all that he stated by way of reply to the prosecution evidence was: "I was not present when the murder took place. I know nothing about it", and having said this he informed the Judge that he declined to answer any questions, and that he had no witnesses to call.

In the lengthy petition of appeal, sent by the prisoner to this Court, a petition obviously written by himself in English, there are passages which might be interpreted as containing admissions of the accused's membership of a revolutionary society and of his acquaintance with the deceased, the two witnesses Shankar and Tejendra and others whose names crop up in the prosecution story. But, immediately before the appeal was called on for hearing, we received a further petition from the accused in which he is anxious to point out that his previous petition is not to be understood as containing any admissions of fact but that anything in the shape of admissions was to be considered only as admitted "for the sake of argument."

We placed this petition in the hands of the appellant's learned Counsel and it was after seeing it that he opened his case and made the admissions to which we have referred. The learned gentleman is, if we may say so, the most experienced criminal lawyer of the Oudh Bar and we may take it that he made these admissions with a full sense of responsibility; at the same time, we desire to say that although this introductory evidence was not examined in detail at the time of arguments, we have scrutinised it all very closely and have arrived at the conclusion that whether the facts to which it relates are admitted or not, they are fully proved.

Before we proceed to the task of dealing with the statements of Shankar Lal and Tejendra, we may properly refer to the evidence of the medical witness who made the *post mortem* examination of the body of the deceased. He is Dr. Musharraf Ali, Assistant to the Civil Surgeon of Lucknow, and he proved the report (Exhibit A45) which he drew up after examination of the body, as also Exhibit A46, a memorandum containing an expression of his opinion on certain matters which he made over to the Police in the person of Deputy Superintendent Abul Qasim.

The evidence proves that the cause of death was hæmorrhage due to a bullet wound. The bullet entered the belly below the navel and emerged over the right buttock after penetrating the intestines.

There were other marks of injury on the body including two contusions in the region of the forehead and a contused wound on the back of the head. The remaining injuries were a contusion of the right thumb and several abrasions. All of these point to the conclusion that the deceased man was involved in a struggle at the time he was shot.

The only important thing to notice in the memorandum given to the Police (Exhibit A46) is that the Doctor, though not prepared to give any definite opinion regarding the distance from which the fatal shot was fired, was nevertheless inclined to believe that the shot was not fired at very close quarters, an opinion which derives a certain amount of support from the fact that there is nothing to show that the clothing of the deceased in the neighbourhood of the wound was burnt or scorched, as it might have been had the body been quite close to the muzzle of the pistol when the shot was fired. We mention the evidence on this point, because it was suggested in the course of argument that it was possible that in the course of the struggle for its possession the pistol might have gone off by accident.

We come now to the evidence of the witness Shankar Lal.

We may pass lightly over the introductory portion of his statement in which he describes how he first made the acquaintance of the prisoner at Aligarh and how at the prisoner's instance he removed from Aligarh to Lucknow in the month of August 1917. He tells us how at Aligarh he became acquainted at school with the man Nripendra Nath whom he always knew as Shambhu Dayal, a man whom he also met in Lucknow and whom he knew to be a close friend of the accused. We have the story of the accused's disappearance from Lucknow for a short time (about November 1917) and of his return, which was preceded by a day or two by the arrival of two strangers whom he got to know as "Bara Babu" and "Bangal," meaning respectively the deceased man Satyen (or Vinayak Rao) and the witness Tejendra Mohan Ghosh. He tells us how these two and "Shambhu Dayal" went away from Lucknow and how he next saw them after the lapse of a considerable time on the day of the murder.

The witness, it may be explained, knows nothing of the visit of these three men to Aligarh and Agra or of the incidents at those places deposed to by the witness Tejendra.

Coming closer to the time of the murder, Shankar Lal states that a day or two before the 9th of February the accused had mentioned to him that the deceased ("Bara Babu") had been spending money in improper ways. The accused also warned him not to allow 'Bara Babu" to come and live with him, telling him at the same time that he might receive "Shambhu Dayal" in case he came back to Lucknow. The witness explains here that for some time before the murder the accused had shifted his abode to a quarter of which he was ignorant, though he used to see the

accused nearly every day, because he used to come in the evenings to fetch the "Leader" newspaper which witness used to purchase for him.

On the morning of the 9th February Shankar Lal came back from the eating house where he was in the habit of taking his food. The time was about 9 A. M. and he found "Bara Babu" and "Bangal" sitting at his door. They began by asking him about "the man," (*i.e.*, the accused), where he was living, what he was doing, and in what state of health he was. Shankar Lal denied to them that he knew the residence of "the man", and no doubt in view of the previous warnings of the accused tried to put them off to the best of his ability. They insisted on his procuring them some food, which he did, and soon after they departed, having delivered to him a letter marked "Urgent", which the witness looked up in a box (from which it was afterwards recovered by the Police). The witness adds that the two men also asked him if "Shambhu Dayal" had been to see him and that he answered "No."

All this happened about 10 A. M., and the next thing we have is that at about 3 P. M. the same day while he was in class at school Shankar Lal was called out and met "Shambhu Dyal", who at once asked him if he had had a visit from the "Bara Babu" and "Bangal".

Shankar then told him all that had passed that morning and "Shambhu Dayal" then went away. In the evening after school, the witness went as usual and bought the "Leader" and went home expecting to have a visit from the accused at the customary time, *i.e.*, between 6 and 7 P. M.

The accused did not come and the witness, tired of waiting for him, went off to have his dinner at the eating-house.

Before he had finished his meal there the prisoner appeared at the door and asked the manager of the establishment for Shankar Lal. The latter hearing his name mentioned turned round and saw the accused who told him to hurry up with his food.

Having eaten his dinner, the witness went out and the accused then told him that he would have to go with him. Shankar Lal asked why, and the prisoner then said, "We have shot Bara Babu but he is not dead and we have lost our pistols there. You should not go to your house lest he kill you."

The accused then took Shankar Lal off to his house in the Maulviganj quarter—a house which we may here mention was subsequently pointed out by the witness to Mr. Sonds—the same house in which Lahiri was arrested on the 22nd February.

Shankar Lal describes the accused as having been in a state of perturbation (*ghabraya hua*) when he met him at the eating house. He states, moreover, that the accused had no cap but was wearing round his head and face an article of apparel which he has described at one time as a "comforter" (*guluband*) and at another as a "wrapper" (*chadar*).

Shankar then describes his arrival at the house in Maulviganj. The door was opened by "Shambhu Dayal", who also appeared to be agitated. As soon as they got to the upper room, the prisoner asked "Shambhu Dayal" where Ram Prasad was. Shambhu said he did not know, upon which the accused remarked: "He must have turned traitor and gone to the side of Bara Babu."

At this stage there was a knock at the door. The prisoner took up a revolver while "Shambhu" and the witness armed themselves with *lathis*. Before the door was opened, they called out asking who the visitor was: Ram Prasad replied and stated that he was alone. He was then admitted, and as he came in the prisoner said to him:—"Had Bara Babu been with you, I would have killed you." After Ram Prasad came in the accused. Shambhu and he began to talk of what had just happened.

Ram Prasad told them how Bara Babu and "Bangal" had come to him in the course of the day trying to find out from him where the accused lived. Ram Prasad's story was that he bluffed them by taking them round the city the whole afternoon and he described how in the evening they brought him to Shankar Lal's house. Ram Prasad then added that he fled from the scene as soon as the first shot was fired.

The rest of the story Shankar Lal heard from the accused and "Shambhu Dayal". They told him that they thought that Ram Prasad had been captured by "Bangal" and the "Bara Babu" and that they had armed themselves and gone out to search for him intending to release him. They then described how they had come upon Ram Prasad sitting in the lane with "Bangal" and "Bara Babu" outside Shankar Lal's house and spoke of the struggle which ensued. "Shambhu" approached the three men and was gripped by "Bara Babu". Thereupon "Shambhu" began to shoot. He was then rushed by "Bara Babu" and "Bangal", who managed to throw him. When he fell he lost the pistol.

The accused said that while the struggle was going on, he tried three times to shoot "Bangal" with his revolver but the weapon missed fire on each occasion. "Bangal" then tackled the accused and threw him and in this way accused lost his revolver. "After that," said the accused, "I came to you," meaning Shankar Lal.

The witness adds that he noticed stains of blood on "Shambhu's *dhoti*" and on the accused's "wrapper" or "comforter". He then goes on to narrate how he was sent away with Ram Prasad to Benares a few days after the murder, how he spent his time up till the time of his arrival and arrest at Aligarh.

Such is the story of the youth Shankar Lal which, in so far as it purports to give an account of the murder, does not profess to be the statement of an eye witness but a description of the affair given to him immediately afterwards by three men who alleged they were on the spot.

From this we turn to the evidence of Tejendra, the statement of a witness who professes to have been present when the murder was done and to have played an active part in the struggle which ended with the shooting of the deceased.

Tejendra describes the manner of his arrival in Lucknow last November in company with his friend "Satyen", the deceased man. He and Satyen were brought to Lucknow by the accused and there they made the acquaintance of Raju (the "Shambhu Dayal" of Shankar Lal's narrative) and of Ram Prasad or "Rammu" whom they also knew as Narsingh Prasad. He goes on to tell how he and "Satyen" went to Aligarh with "Raju" and how they afterwards moved to Agra, where on the 30th January there was a meeting with "Raju" and the accused ("Chemist").

Tejendra deposes that at this meeting a dispute arose between the accused and "Satyen." This story is that the prisoner took the line that "Satyen's" religious belief, or rather want of such belief, disqualified him from membership of the revolutionary society to which they both belonged. He gives us to understand in another portion of his evidence that both "Satyen" and the accused were leading members of the society.

The dispute on the 30th January led to angry language and threats of shooting by the accused. The parties separated without the quarrel having been composed and the accused did not come back to Agra, though it was expected he would.

On the 4th February "Raju", who was living at Aligarh, appeared again at Agra and, acting the part of an agent of the accused, tackled "Satyen" once more on the subject of his belief. "Satyen" resented being questioned by "Raju" and refused to discuss matters.

That this part of Tejendra's evidence is no fiction is proved by a letter, Exhibit A 47, which is shown to be in the writing of "Raju" (*alias* Nripendra). The letter is dated the 4th February and was sent to Lahiri to a fictitious address at the Reid Christian College, Lucknow. It never reached the accused for it was sent by the College authorities to the Dead Letter Office and was subsequently handed over unopened to the Police.

In this letter "Raju" writes that "Parbhu Das" (another name for the deceased) was "not willing to give out his decision to me."

"He says I am not entitled to hear the same direct from him."

The writer then goes on to say that it would be advisable for the accused to come so that the dispute might be settled "favourably or otherwise." The writer adds that "Bangal" (Tejendra) seems to be playing a double game diplomatically and he winds up by saying that "he has not made any compromise whatsoever."

It is absolutely clear, therefore, on this evidence that on the date this letter was written there was some dispute between the accused and "Satyen" and that the writer "Raju" (Shambhu Dayal) was acting on the accused's behalf for the purpose of having the dispute settled. The nature of the quarrel is not alluded to, but it must have been with reference to, something urgent in view of the statement that a prompt settlement "favourable or otherwise" was called for.

To come back to Tejendra's statement; the next thing that happened was on the 8th February, when Raju appeared at Agra again representing that he had come from Lucknow where he had gone to see the accused who was ill. He told them that he had sent "Satyen" a letter—sent apparently to an accommodation address—which "Satyen" had not received when "Raju" came to the house.

"Raju" remained some little time and after he had had some food which he got Tejendra and "Satyen" to prepare for him, he left the house. Soon after he had gone, it was discovered that a Mauser pistol and some cartridges which "Satyen" had kept in his bedding were missing and when this fact was discovered, they jumped at once to the conclusion that "Raju" had stolen these articles and at once determined to pursue him to Lucknow, whither they concluded he had gone. It may be mentioned here that the letter which Raju had sent to Satyen at Agra was delivered to Satyen after Raju had escaped and was found in one of Satyen's pockets after his death.

The language of the letter suggests that it was written for the purpose of deceiving Satyen by telling him that the writer Raju was unable to visit him after all as he had received an urgent call to Lucknow to see "Thermometer", or it may be that Raju after writing the letter changed his mind and determined to go to Agra before travelling to Lucknow.

Be that as it may, it is clear that Tejendra and "Satyen" were convinced that a trick had been played upon them and off they started for Lucknow in pursuit of "Raju".

They arrived in Lucknow about 8 A. M. on the morning of the 9th February without having overtaking "Raju" and they went at once to the house of Shankar Lal.

Tejendra's story of their meeting with Shankar tallies exactly with what is stated by Shankar regarding this matter. They plied Shankar with questions for the purpose of finding out where the accused lived and they also enquired about "Shambhu Dayal." Tejendra describes how they wrote the urgent letter which they got Shankar Lal to look in his box. This was all done by way of a trick: they wanted to see if the stolen Mauser pistol had been left with Shankar and put by him in his box. After having food which Shankar procured for them, they went off in search of Ram Prasad in order to learn from him, if they could, the whereabouts of the accused. They came upon him later on in the day and he took them all round the city without telling them where the accused was living. In the evening they made Ram Prasad take them to Shankar's house, where they sat down in the expectation that the accused would come there. While they were sitting there in the dark two men, subsequently recognised by the witness as the accused and Raju, approached them and then began the struggle which terminated in the murder.

Tejendra says he seized one of the men by the *shawl* and asked him who he was. The man fired at once and was then tackled by Satyen. After this Tejendra says he heard two more shots and he then perceived that the second man was covering him with a revolver. He at once rushed his assailant, gave him a blow in the face and wrenched the revolver from his hand. The revolver did not go off and the witness says that the same night when he examined the weapon in the train he discovered that it had missed fire three times.

Tejendra swears that the man from whom he took the revolver was the accused Lahiri, from whose face the wrapper had fallen in the course of the struggle.

Having disposed of the accused, Tejendra turned round to Satyen and the other man who were wrestling on the ground. He recognised this other man as Raju and he snatched the Mauser pistol from him. Raju then ran away and the witness tried to help Satyen to move off. The latter was able to walk only a few steps

and then lay down, saying that he was done for. Tejendra, seeing that he was in a bad way, propped him up against the ledge in front of Shankar's house and then bolted taking with him the revolver and the pistol. In the struggle he lost his shoes and on the way to the Railway Station he bought a pair of pumps at a corner shop. He also lost his cap and later on, that is to say, on the 13th July when he gave evidence before the Magistrate, he saw it in Court and identified it, Exhibit A6.

The rest of Tejendra's story deals with his movements between the night of the murder and the 3rd July, when he was arrested in Calcutta, and he also describes how he was brought to Lucknow on the morning of the 13th July, when he drove round the city with Mr. Sonds and pointed out to him the various places referred to in his story, including the corner shop where he bought the pumps after the the murder. We may state here that Abdul Wahab, the proprietor of this shop, produced his account book in Court, which shows that the last entry of the 9th February relates to the sale of a pair of "pump shoes" for Rs. 6.

Having now set out the substance of the statements made by the two principal witnesses in the case, we proceed to consider the grounds upon which it has been attacked and the arguments which have been advanced for the purpose of showing that neither witness can be believed.

We have mentioned already that the prisoner refused to make any statement in the Courts below beyond a bare denial—he was not at the scene of the murder and knew nothing about it. He has in his petition of appeal furnished us with an accurate and exhaustive criticism of the statements of the two principal witnesses and we shall now deal with the points he raises, points which were all argued before us by his learned Counsel.

First, we have it contended that Shankar Lal's story is false because there is some evidence to show that he himself was at the scene of the murder, and we are asked to hold that the inference is that Shankar Lal is trying to screen himself by throwing the blame upon the accused who was really not there.

This contention is founded on a statement made by Shankar Lal in cross-examination in the Sessions Court. We have already mentioned that after his arrest Shankar Lal was brought to Lucknow and asked to identify certain caps. We have it that out of 10 caps placed in front of him he picked two out of the three caps which were found at the scene of the murder. He described one of them, Exhibit A5, as being like the cap worn by "the man." As to Exhibit A4 he said it resembled the cap which "Shambhu Dayal" wore, but he wasn't very sure about it.

In the Sessions Court in cross-examination Shankar Lal was asked with reference to the cap A4 whether it was not his, whether he had not had it washed, and whether it had not shrunk in the process of washing or cleaning. He said yes, the cap had once been his, it got old and dirty, he had had it cleaned, and after this he and "Shambhu Dayal" had exchanged caps. This statement about the cap Exhibit A4 was made for the first time in the Sessions Court, and it would be interesting to speculate how the accused's Counsel got the information which enabled him to put these questions. They can hardly have been mere lucky shots. But we are asked to discard the whole evidence of Shankar Lal on this ground. The Counsel for the Crown, on the other hand, argues that all this is an indication of good faith on the part of Shankar Lal.

Our opinion is that the admission does not damage the evidence in any way, for if the case is that the cap had been cleaned and had shrunk, the inference would be that it had ceased to fit Shankar Lal and would no longer be of any use to him and there would be nothing strange in his exchanging it for Shambhu Dayal's. We believe the story of the boy to be perfectly straightforward and have no doubt he would have said the same thing earlier, had he been examined or cross-examined about it. From the note of the identification of the caps it is clear that Shankar Lal was very careful and cautious, and we think his evidence on this part of the case is reliable, though of course it does not pretend to be conclusive as to the identity of the caps. We observe that the accused says nothing in his appeal about the cap Exhibit A5 which Shankar Lal believed

to be his (accused's) property. He has never denied that Exhibit A5 is his cap and as that cap was found at the scene of the crime, it is a litte difficult to see how it is to be suggested that Shankar Lal, who was present at the murder, is putting in his own place the accused who was not. Even if we assume that Exhibit A4 is Shankar's cap, we have it that Exbibit A5, which is said to be the accused's cap, was found at the spot as well.

The next point made against Shankar's story is the little variation he has made in describing the article worn by the accused round his head and neck. It is true he called it a "comforter" (*gulubund*) in his earlier statement and a "wrapper" in his latest statement, and this is put forward as an argument to support a theory of concoction. Shankar's statement, it is said, has been trimmed to agree with Tejendra's, for he spoke of a wrapper and not a comforter. There is absolutely no merit in this argument. It was demonstrated to us in Court that a grey wrapper (*chadar*) folded and tied round the neck and head would look exactly like the grey woolen comforter belonging to the accused which was produced before us.

Then it is said, "Shankar Lal told the Court that the man's comforter was stained with blood." How can that be possible when Tejendra's evidence shows that the accused was never in actual contact with the murdered man?

This argument is of no avail. Shankar Lal described stains which he may have thought to be stains of blood, and, on the other hand, Tejendra says he gave the accused a blow on the face with his fist which may have drawn blood. Next, we have the point made that the Manager of the eating-house was not called to support Shankar's story that the accused came there after the murder and took him away. We are asked for this reason to discard the whole story of Shankar Lal.

We asked Mr. Ross Alston who appeared for the Crown why this man was not called. He could only say that the prosecution deliberately refrained from calling him for certain reasons which he was not permitted to disclose.

We may take it then that the manager of the eating-house would not have supported Shankar's story.

Assuming this to be so, can we be asked to reject Shankar's statement for this reason? There is no room for doubting that Shankar Lal was living alone in his house in the lane and was attending school. He must have had food somewhere, and what can there be more probable than that he should go to an eating-house twice a day for his meals? We have not the slightest doubt that he did go every day to this place which he calls the "*Bhojan Bhandar*", and we fail to see why we should not believe that he was there on the evening of the 9th February at his usual dinner hour. Of course, there is the fact that there is no corroboration of the statement that the accused came there and took him away. That is a fact to be considered; another fact which must also be taken into account is that the accused has never denied having gone to the eating-house that night.

We pass on to examine the next ground upon which the evidence of Shankar Lal is impeached. Reference is made to his admission that the statement he made to the District Magistrate of Aligarh on the 3rd April was false and the suggestion is made that the statement which he made to Mr. Pim on the 7th April was inspired by the C. I. D. Officers, with whom he was in contact on the 6th April after he had been brought to Benares.

This suggestion or theory rests upon certain statements made by Shankar when cross-examined in the Sessions Court. What he says is this. After he arrived at the Police Station in Benares, he received a visit from the two C. I. D. Officers Mukerji and Banerji. They asked him to say all he knew about "politics", and they told him they knew he was "a political" man. They made no mention of the murder. Shankar says he then told them what he knew about "politics" and made no statement about the murder.

The officers then told him that the murder had been committed in front of his house and that he must, therefore, know something about it and they invited him to disclose what he knew. Shankar says he then told them all he could. He deposes that the officers never asked him anything about Lahiri. Nor did they tell him that any one had been arrested on account of the murder.

All this passed in the course of conversation; nothing was recorded at the time. In

the evening Mukerji and Banerji came again and began writing down his statement. They did not finish the writing of it that night; they came and did so next morning and after that Shankar was taken before Mr. Pim.

It will be observed that there is not a word here to suggest that either Mukerji or Banerji put any statements into Shankar's mouth or did anything beyond pressing him to reveal what he knew.

Let us turn now to the evidence of Deputy Superintendent Mukerji. He says he first saw Shankar at Benares on the 6th April between 4 and 5 P. M. He left him for an hour or two and came back and remained with Shankar till about 10 P. M., and in cross-examination he stated (as Shankar had done) that he began recording the statement on the evening of the 6th and finished on the morning of the 7th. Mukerji was hardly cross-examined at all and not a single question was put to him for the purpose of eliciting what had passed between him and Shankar before the statement was made. Nor was it even suggested to Mukerji that he had supplied Shankar with facts which he reproduced before Mr. Pim the next morning.

As for Inspector Banerji, he was not questioned at all about his interview with Shankar Lal. We may, therefore, say at once that there is absolutely nothing on record to indicate, much less prove, that the statement which Shankar made on the 7th April was inspired by these two officers. And further consideration shows that the statement could not possibly have been prompted by them.

We have it that Shankar Lal never knew the name of the accused till after he made his statement. He knew the prisoner only as "the man" or "Thermometer." He knew "Tejendra" only as "Bangal", the deceased as "Bara Babu" and Nripendra as "Shambhu Dayal."

Mukerji and Banerji knew nothing of Tejendra at all. They knew the accused only by his real name of Lahiri, the deceased by his real name Vinayak Rao Kaple, and the third man by his real name Nripendra Nath Chakravati.

In these circumstances, how is it possible to conceive that they should have prompted a story in which these men are described by names which they did not and could not have known?

This argument disposes conclusively of any theory that Shankar was taught the long story which he gave out to Mr. Pim on the morning of the 7th April.

Then, as regards the admission of Shankar Lal that his statement at Aligarh on the 3rd April was a false statement. There is no doubt that the admission was made. It is, we think, to be regretted that the witness was not asked why he made a statement which was false. We do not suggest that the accused's Counsel should have put the question: but it ought to have been put in re-examination by the prosecution, or at any rate by the Judge.

A possible explanation is that Shankar, when he appeared before the Magistrate of Aligarh, was anxious to support the story he had already told his cousin Bhoj Raj, namely, that he was not mixed up in any revolutionary politics and that he knew nothing about the murder. But this of course is mere conjecture as we have no explanation given by the witness himself.

But if, on other grounds, we are able to reach the conclusion that the statement made on the 7th April is in substance true, we should not be justified in rejecting it merely because the witness acknowledges having made a false statement four days before.

We have now to consider an argument which has been strongly pressed before us.

It will be remembered that the story for the prosecution is that three shots were fired. Shankar Lal says that in the account given to him by the accused, "Shambhu Dayal" and Ram Prasad it was distinctly said that the number of shots fired was three. This is also the story of Tejendra. Now it is the fact that only one empty case was found in the lane; it is also a fact that only one bullet was found and this was embedded in the wall of a house not fronting the lane but round a corner at a place where a short blind alley branches off from the lane a few yards to the south and east of Shankar Lal's house.

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The argument is that because only one empty case and only one bullet were found, there could not have been three shots and so we are asked to hold that both Shankar and Tejendra have been tutored to say that there were three shots so as to make their statements tally with the first report. Another argument is that because the bullet was found round the corner, the shot could not have been fired in the lane at Shankar's house as represented by Tejendra. We cannot admit the validity of the argument that because only one bullet was found there can only have been one shot. Bullets fired from a high velocity weapon like a Mauser pistol may ricochet and disappear into space. The absence of the empty cases may be accounted for in other ways. It is not to be doubted that a crowd gathered in the lane after the murder and small articles like the empty cases might easily be trodden down or kicked away into a drain.

The fact remains that seven persons, all living in the neighbourhood, went at once to the Police outpost and said they had heard three shots. There could be no possible reason for these people to go and make a deliberately false statement to the Police. Is it possible to imagine that they were all mistaken and that as a matter of fact they could have heard only one report? We think not. One of the men who went to the Police was Kali Charan Brahman, a teacher in a school in Lucknow. In his evidence he says he heard three shots and he only qualified this statement in cross-examination by saying that to the best of his recollection he heard three shots. Maiku Mochi, another of the men who went to the Police, swears that he heard three shots. He was not cross-examined on this point.

We are satisfied from this evidence that as a matter of fact no less than three shots were fired and we hold that these statements cannot be disposed of merely by showing that only one bullet and one empty cartridge case were recovered at the spot. As regards the other point, namely, the recovery of the bullet in the wall round the corner, it may be admitted that this fact cannot be reconciled with a literal interpretation of Tejendra's evidence. But we could hardly expect to have from a witness who himself took part in it an absolutely accurate account of a struggle which took place in a dark lane. There was, according to Tejendra, a somewhat prolonged encounter between the deceased and the man Raju who had the Mauser pistol, and in a struggle of this kind there would obviously be a shifting of ground as the parties dragged each other about in the fight for possession of the pistol.

It is proved from the plan of the scene of the crime that marks of blood were found at three points marked 6, 7, 9, all of which are to the south of the corner of the blind alley, and it is clear that if a shot were fired either from 6 or 7 the bullet might easily have found its way into the wall of the corner house.

Again, the plan shows that one of the felt caps was found at point 8 in the plan, showing clearly that the struggle could not have been confined to the area immediately in front of Shankar Lal's house. Lastly, we know that the dead body was propped up by Shankar's house. In his statement to the Magistrate Tejendra said that after the assailants went off he lifted "Satyen" up. "Satyen" was able to stagger a few steps; he then collapsed, saying "the *salas* have shot me; I cannot walk any further."

It was then that Tejendra laid him on the ground besides Shankar's house, and the inference is that the place where "Stayen" lay before he moved with the assistance of the witness was a few paces to the south of Shankar's house, in other words, either opposite or to the south of the corner of the blind lane.

We have now touched upon all the points raised against the story of Shankar Lal and turn to consider the criticisms directed against the statement of Tejendra. In his petition of appeal the accused draws attention to the letter Exhibit A63, which was found in one of the deceased's pockets. We have already mentioned this letter and described how the deceased came to get it at Agra on the morning of the 8th February. It was written by "Raju" at Aligarh on the 7th and we know that "Raju" (*alias* Shambhu Dayal) was in Aligarh on that date because we have the Exhibit A61, the application made by "Shambhu Dayal" on the 7th to his school master

in Aligarh asking for leave for 3 days as he had fever.

The accused points to the statement of Tejendra to the effect that when "Raju" came to Agra on the morning of the 8th he represented that he had come from Lucknow, which was impossible if he had been at Aligarh the day before. It is difficult to see how this in any way affects the evidence of Tejendra. If Raju made a false statement, it does not follow that Tejendra's story is false. The accused further points out that if Raju stole the pistol on the 8th, it cannot be said that he did so with the accused's knowledge as he was in Lucknow on the 8th while Raju was at Aligarh.

This argument leads nowhere: it is evident that the accused was corresponding with Raju and a suggestion to steal the pistol could easily have been conveyed by letter. Moreover, it does not appear to us to matter much whether Raju stole the pistol at the accused's instigation or not.

Then, we are asked to consider another point arising out of the evidence of Messrs. Biggane and Goldie, who deposed to having received some information that the deceased man and Tejendra disappeared from Calcutta in consequence of their having misappropriated a Mauser pistol and a portion of the proceeds of a dacoity.

It is not stated in what way this evidence, which is only hearsay, affects the present case. Possibly, the suggestion is that if the two men fled from Calcutta in this way, the story of their having been brought by the accused to Lucknow is not true. But the prisoner's learned Counsel has admitted the fact that they were so brought and has admitted that the accused associated with them at Lucknow, Aligarh and Agra.

The next argument is based upon an alleged discrepancy between the statements made by Tejendra in the Magistrate's Court and before the Judge.

In his first statement he said that the first shot was fired at "Satyen". In the later statement he said it was fired at himself. An examination of the record shows that the later statement is one based on inference and not on observation.

After making the first statement he was shown his own cap, Exhibit A6. He observed a hole in it and seeing this he drew the conclusion that the first shot had been fired at him and that the bullet had grazed the cap.

It is impossible for us to say that the mark on the cap could have been caused by a bullet: to us it looks more like a hole caused by burning which might have been caused by the flame issuing from the barrel, provided the latter was in contact with the cap. But we are not convinced that the so-called discrepancy is a discrepancy at all. If Tejendra and Satyen were sitting close together, as he says they were, and the lane was in darkness, it would be practically impossible for the witness to say that the pistol was aimed at one rather than the other.

Then, we have a suggestion that Tejendra was "coached" in his story at Calcutta, though it is carefully explained that no suspicion on this score is laid against the European Police Officers, Mr. Goldie or Mr. Sonds. It is hinted that he was possibly tutored by the Bengali Officers who interviewed him after his arrest. It is said that by the 3rd July there was in existence a printed history of the Lucknow murder containing the statement made by Shankar Lal on the 7th April and that, possibly, this document was available to the Bengali Police Officers.

It is true that by the end of May Mr. Sonds had compiled a printed narrative of the murder and a copy of this pamphlet was shown to us in Court. It is marked "Confidential". Mr. Alston admitted to us that this document was shown to the Judge in the Court below, not for the purpose of letting in anything which was not in evidence, but merely because it contained a printed record of Shankar Lal's statement which the Judge consulted for his own convenience. We observe that although it was known to the accused's Counsel that this document was in Court, he never suggested to Mr. Sonds the possibility of its being used in Calcutta for the purpose of tutoring Tejendra, and we may here repeat what we have said before, namely, that Shankar Lal and Tejendra did not know the principal characters in this drama by the same names. It is true that they both knew Lahiri by the sobriquet of "Thermometer". But Nripendra was known to

Shankar Lal as "Shambhu Dayal", to Tejendra he was "Raju". The deceased man, whom Tejendra knew as "Satyen," was "Bara Babu" to Shankar Lal. Consequently, it is not apparent how Shankar Lal's statement, if it was seen by or read to Tejendra, could have helped him to tell in Court the story he told immediately after his arrival from Calcutta on the morning of the 13th July.

We must dismiss altogether the theory that Tejendra was tutored by the Police in Calcutta.

Next, it is said that Tejendra's declaration that the accused shot the deceased out of jealousy is in conflict with another statement of his that the two men were on good terms. We have already touched upon this matter. There is nothing to indicate that they were hostile to each other up till the 30th January 1918 but, as we have said, there is the clearest possible evidence that there was a quarrel on that date which had not been settled up to the day of the murder and we think there is good ground for holding that jealousy was at the bottom of the dispute. Both men were "leaders" in the society and one was probably trying to exalt himself above the other.

Then the learned Counsel has raised another point. He says while Tejendra says he left his shoes behind when he ran away, they were never found. That is so, and there is no explanation except the possible one that they may have been picked up or otherwise removed from the spot by some of the crowd before the Police arrived on the scene. On the other hand, we have it that Tejendra's story that he ran away barefooted is corroborated by the entry in Abdul Wahab's account-book showing that a pair of pumps was purchased at his shop on the 9th February. Tejendra says he bought the pumps as his shoes had been left behind. Lastly, we are asked to hold that a proof of Lahiri's innocence is to be found in the fact that he stayed on in Lucknow after the others fled. We are not impressed by this reasoning. Lucknow was a safer shelter for the accused than most other places would have been, especially if his associates were themselves out of the way.

Before concluding our discussion of these criticisms of the main prosecution evidence, we may advert to another point raised by the accused. In his evidence (cross-examination) Shankar Lal stated that after he arrived with the accused at the latter's house and met "Shambhu Dayal", the accused asked "Shambhu" if he had the pistol and the latter replied that he had left it there. It is argued that such a question could not have been asked because the two men fled from the scene together and the accused must have known that the pistol had been lost.

It is not at all clear that the two men did escape together. In his statement to the Magistrate, Tejendra said that the accused ran away while the deceased and Raju were still struggling on the ground. It was only after the witness snatched the pistol from Raju that the latter made off. In the Sessions Court, Tejendra varied this statement by saying that while he was fighting with Raju for the pistol, the accused came back and then Raju stood up and he and the accused ran away, though he does not definitely say that they ran away together.

There seems to us to be little force in this argument, for it may well be imagined that the two men, even if they were hurrying away from the scene of the crime, would not be asking questions of each other and we can see no reason to discredit Shankar Lal's statement for the reason suggested. We have done now with the arguments advanced to show that Shankar and Tejendra are not truthful witnesses and may proceed to notice the arguments on the other side.

To take first the story of Shankar Lal. He is a youth of 18 and of little education, a student of the 9th class in a High School. It is hardly possible to conceive that a boy of his years could have evolved out of his imagination the very long and circumstantial story he told to Mr. Pim on the morning of the 7th April. We have already disposed of the theory that he could have had this story pumped into him in the course of a few hours and we are left with the conclusion that he was describing things he had actually seen and heard. A comparison of the statements he has made on three separate

occasions will show that he has been consistent throughout. Any small variations may be traced to cross-examination, of which there was practically none till he appeared in the witness-box in the Sessions Court, and the variations, such as they are, appear to us to be insignificant. The fact that these statements repeated at considerable intervals have remained the same in all essential details is a potent argument in support of the theory that his story is a true one.

The learned Counsel for the appellant has not attempted to deny that in certain respects Shankar's evidence is corroborated by that of Tejendra, as it undoubtedly is, but he has asked us not to rely upon this fact because the corroboration relates to events anterior to the murder.

We bear in mind the fact that so far as the events which happened in the lane at the time of the murder are concerned, the two witnesses do not profess to corroborate each other. As we have already said, Shankar, so far as these facts are concerned, is describing only what he heard afterwards: Tejendra, on the other hand, is describing what he professes to have seen at the spot.

But we are entitled to take notice of the fact that the two witnesses do support each other with regard to matters which happened a few hours before the murder took place, *e. g.*, the meeting at Shankar's house on the morning of the 9th February and the inquiries which Tejendra and the deceased made from him, the handing over of a letter and the other incidents which happened before Tejendra and Satyen went away from Shankar's house. All these incidents are part and parcel of the history of the crime and it may well be argued that if Shankar's story on these points is true by reason of corroboration from an independent witness, there is a presumption that he is telling the truth about subsequent matters as well.

It is not suggested that Shankar Lal bears any malice to the accused: the evidence is all the other way. Shankar was a friend of the accused and the only argument is that having himself been at the scene of the crime he has ignored the ties of friendship and tried to save himself by implicating the prisoner. But if Shankar was present in the lane when the shooting took place, why should Tejendra say he was not there? Shankar was no friend of Tejendra's: in fact, he was in the opposite camp, being a close friend of the accused.

We are satisfied that Shankar was not at the scene of the crime.

We are further satisfied that Shankar's story cannot possibly be attributed to collusion with Tejendra or that the latter had any opportunity of discussing his statement with Shankar, and the absence of collusion being established, the agreement between the two stories is more than mere coincidence.

In the same way, Tejendra's story appears to us to be a substantially true statement of things he had really seen. He could not have invented a tale which tallies so closely with another story told at a place miles away—a story the truth of which is vouched for by many things pointed out by him to Mr. Sonds on the morning of the 13th July. It is impossible to doubt that Tejendra was on the spot when the deceased man was killed and his description of all that took place in the lane agrees in all material particulars with the account given to Shankar Lal by the accused, "Shambhu Dayal" and "Ram Prasad". As we have mentioned before, it is impossible that he should have been tutored to make his story agree with Shankar Lal's and as we have said, his statement regarding the relations between the accused and the deceased is strongly supported by documentary evidence.

The record shows that neither witness was shaken in cross-examination; and, lastly, there is the fact that the accused has made no statement beyond a bold denial of his presence at the scene of the crime and of all knowledge of the murder. In addition to this there is no rebutting evidence of any kind.

We are aware that a person accused of a crime is under no obligation to offer any explanation of his conduct or of any circumstances which direct suspicion towards him. He may, if he chooses, do what the accused has done here, and let the case against him rest entirely upon the prosecution evidence, or he may meet the charge in any other way he thinks fit.

It is, we admit, the duty of the prosecution to prove its case: but when such proof

has been given and the time comes when the prosecution evidence, whether direct or circumstantial, has to be weighed, it is impossible for a Court to ignore the fact that it is unweakened or unrebutted by contrary evidence, which might have been produced if the facts alleged were not true. The only statements made by the accused are: (1) that he was not present at the scene of the murder; and (2) that he knows nothing about it. If he was not in the lane when the murder was done, where was he? He gives no account of his movements on the night of the 9th February. A cap said to resemble a cap he was in the habit of wearing is picked up close to the corpse. He says nothing, does not even deny that the cap is his.

The accused in his petition asserts in this connection that his position was "very critical and delicate", a statement which his learned Counsel explains by saying that his client's mouth was closed in the Court below, because he could not say anything without betraying the persons who were associated with him as revolutionists.

These are matters with which we have no concern whatever: we have nothing to do with the reasons which led the accused to meet the case against him with silence: he was at liberty to defend himself in any way he thought proper, but we cannot shut our eyes to the consideration that the prosecution evidence has been left unrebutted. We have now considered to the best of our power the evidence of the two principal witnesses and have applied to it every test at our disposal. We find it consistent, unshaken and free from any suspicion of collusion or concoction, and the only possible conclusion to be drawn is that it is true.

We are agreed, therefore, that the findings of fact which the learned Judge of the Court below has come to are correct.

There only remains to be considered a point of law raised by the appellant's learned Counsel, a point which, if raised before the Judge, is certainly not discussed by him in his judgment.

It is said that, taking the facts to be as stated in the judgment, the accused was not liable to conviction on the charge of abetment. All that is shown, it is said, is that he was in the company of the man who fired the fatal shot and all he did was to try three times to fire a revolver which did not go off. On these grounds it is urged that Lahiri is not guilty of abetment.

The definition of abetment is contained in section 107 of the Indian Penal Code, and the question to be discussed is whether the evidence shows that the accused instigated the absconder Nripendra to shoot the deceased, or whether he engaged with Nripendra in conspiracy for the shooting of the deceased, or, again, whether he intentionally aided the killing of the deceased.

The finding is that the prisoner and Nripendra arrived in the lane each armed with a loaded weapon. What was their purpose? This is disclosed in the statement of Shankar Lal which we accept as true. Both men had become alarmed at the absence of Ram Prasad: they had become aware that the deceased and Tejendra had arrived in Lucknow in pursuit of Nripendra, who had stolen their pistol; and they knew that Ram Prasad had been seen in their company that afternoon. There was a dispute between the accused and the deceased relating to the latter's right to continue in membership of the society, and it is impossible to doubt that Lahiri was disquieted with the fear that the deceased and Tejendra might win over Ram Parsad to their side. This accounts for the statement made in Shankar's hearing that they were afraid Ram Prasad might have turned traitor and sided with "Bara Babu." It also explains the significance of the remark made by the accused to Ram Prasad, when the latter was admitted into the house in Maulviganj after the murder,—"If Bara Babu had been with you, I would have killed you".

It is not to be doubted, therefore, that on the evening of the 9th February the accused and Nripendra went forth for the purpose of getting Ram Prasad away from the deceased and Tejendra and that they meant to accomplish that purpose by using, if necessary, the firearms with which they provided themselves. They came upon Ram Prasad in the company of Satyen and Tejendra and as soon as the latter made an attempt to seize Nripendra it became apparent that the only way in which they would escape was by shooting. If these are the facts, as we find them to be, we have no hesitation in holding that the

shooting took place in pursuance of the common intention which inspired the accused and Nripendra. They had agreed beforehand to shoot if the necessity arose, and the necessity did arise and as a party to that agreement, Lahiri must be treated as having abetted the shooting of the deceased by Nripendra.

We are agreed, therefore, that the conviction is right. We dismiss the appeal of Sushil Chandra Lahiri and confirming the sentence of death passed upon him direct that it be carried out according to law.

Appeal dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No 88 OF 1919.

May 2, 1919.

Present:—Mr. Justice Das.

MANGU KOERI—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 190, 200, 537—Complaint—Cognizance of case—Failure to examine complainant, whether irregularity or illegality.

Section 190 of the Code of Criminal Procedure which lays down the conditions requisite for initiation of proceedings must be read with section 200 of the Code. [p. 467, col. 2.]

The cognizance of an offence by a Magistrate on complaint is not complete until he has examined the complainant on oath. [p. 467, col. 2]

The omission to examine a complainant under section 200 of the Criminal Procedure Code is not a mere irregularity which can be cured by section 537 of the Code but is an illegality which vitiates the entire proceedings. [p. 468, col. 1]

(Case-law discussed.)

Criminal revision against the order of the Divisional Magistrate, Bhagalpur.

FACTS.—This was a criminal revision against the order of the Divisional Magistrate, Bhagalpur, dated the 12th February 1919, confirming the conviction of the accused under section 16 of the Bye-Laws of Colgong Municipality by the Third Class Deputy Magistrate of Bhagalpur, dated the 4th November 1918.

Section 16 of the Bye Laws of the Colgong Municipality reads as follows, "No person shall, without the general or special permission of the Commissioners, deposit any articles or things on any road except for a temporary purpose or use any road as a place for keeping any carriage, cart or cattle or for washing any article or for any other private purpose. . . ."

The facts briefly are that the accused was charged with exposing for sale jack fruits without the permission of the Commissioners on the Municipal road of Colgong and thereby causing obstruction to the traffic of the people. His prosecution under section 16 of the Bye-Laws was started on a report by the Overseer of the Municipality to the Chairman. The report and the order of the Chairman sanctioning the prosecution were submitted to the Magistrate on a prescribed printed form in pursuance of section 365 of the Bengal Municipal Act. On receipt of this report the Magistrate without examining the Overseer on oath summoned the accused and ultimately in the trial Court the proceeding ended in the conviction of the accused.

Mr. *Gour Chandra Pal* (with him Mr. *Rajendra Prosad*), for the Petitioner, argued that the complainant not having been examined in this case before the accused was summoned, the whole proceedings were illegal. He relied on *Jhuna Lal Sahu* v. *Emperor* (1).

Mr. *Manohar Lal* (Assistant Government Advocate), for the Crown, contended that the non examination of the complainant was a mere irregularity inasmuch as the complainant was examined during the trial. No objection whatsoever was taken by the accused to this irregularity and after conviction he cannot now raise this plea. The test is, "has he been prejudiced?" I submit he has suffered no prejudice at all. I rely on *Baij Nath Singh* v. *Emperor* (2).

The ruling in *Jhuna Lal Sahu* v. *Emperor* (1) is *obiter*, because in that case the accused was all along objecting to the refusal of the real complainant informant, the Rai Bahadur, from coming forward as complainant in the case. Moreover the objection was taken at the earliest opportunity and the High Court was moved before any trial had begun. I rely on *Phagu Sahu* v. *Emperor* (3) and also on the unreported case of this High Court, *i.e.*, *Saheb Tewari* v. *Emperor* (4).

(1) 41 Ind. Cas. 1002; 2 P. L. J. 657; 2 P. L. W. 152; 18 Cr. L. J. 890.

(2) 37 Ind. Cas. 36; 1 P. L. J. 553; 18 Cr. L. J. 52; (1918) Pat. 30.

(3) 38 Ind. Cas. 750, 1 P. L. J. 592; 18 Cr. L. J. 366; 3 P. L. W. 29.

(4) 49 Ind. Cas. 919; 20 Cr. L. J. 247.

JUDGMENT.—The petitioner has been convicted by the Deputy Magistrate of Colgong with 3rd class powers under section 16 of the Bye-Laws of Colgong Municipality and sentenced to pay a fine of Rs. 10. On appeal the conviction was sustained but the fine was reduced to Rs. 5.

The prosecution of the petitioner was started on the report of the Overseer of the Municipality, and the first point that has been argued before me is that the conviction is liable to be set aside inasmuch as cognizance was not taken under one or other of the clauses of section 190 of the Criminal Procedure Code. It is of course beyond doubt that cognizance may be taken in one of three ways:—

(1) Upon receiving the complaint of facts which constitute such offence,

(2) Upon Police report of such facts, and

(3) upon information received from any person other than a Police Officer or upon his own knowledge or suspicion that such offence has been committed.

The report of the Overseer upon which the prosecution was started is clearly not a Police report It was suggested that the information was in prescribed form in pursuance of section 365 of the Bengal Municipal Act and, therefore, (if I have understood the argument right) the report of the Overseer became, by virtue of section 365, a Police report. In my opinion, there is no substance in this contention. Section 365 lays down that, provided all the formalities are complied with, a servant of the Municipality, in receipt of a salary of not less than Rs. 10 per mensem, may exercise the powers of a Police Officer under that section. I have no doubt that all the formalities have been complied with and, therefore, the Overseer, by virtue of section 365 of the Bengal Municipal Act, could exercise the powers of a Police Officer under the section; but it must be remembered that the petitioner was charged with a non-cognizable offence and it has been laid down in the Full Bench case of *King-Emperor* v. *Sada* (5) "that there is no section in the Criminal Procedure Code, 1898, which empowers the Police Officer to make of his own motion any report to a Magistrate in a non-cognizable case; hence, where he files a formal complaint in such a case, he cannot be said to 'make a report' and his complaint falls within the definition of 'complaint' in section 4 (*h*) of the Criminal Procedure Code, 1898." Therefore, the report cannot be said to be a Police report.

Nor can it be said that the Magistrate took cognizance upon information received from any person other than a Police Officer or upon his own knowledge or suspicion that such offence had been committed. If he did take cognizance under this head, it was his duty to inform the petitioner that he was entitled to have the case tried by another Court and the fact that he did not so inform the petitioner shows clearly that he did not take cognizance under section 190 (1) (*c*) of the Criminal Procedure Code.

It appears to me that he did take cognizance upon receiving the complaint of facts which constituted such offence. It is admitted that he did not examine the Overseer or any other person on oath as required by section 200, Criminal Procedure Code, and the question which I have to determine is whether the failure to examine the complainant on oath is merely an irregularity, and, therefore, curable by section 537, Criminal Procedure Code.

An unreported decision of Mr. Justice Jwala Prasad in the case of *Saheb Tewari* v. *Emperor* (4) was relied upon by the Assistant Government Advocate for the proposition that the failure to examine the complainant on oath does not vitiate the criminal proceedings. The learned Judge, although he was of opinion that the examination of the complainant on oath was a very valuable safeguard that the Legislature has provided and must be scrupulously observed and insisted upon, did say in the course of his judgment: "But it has been held by almost all the High Courts that an omission to examine the complainant will not render the trial null and void, and that it is an irregularity which is covered by section 537 of the Code of Criminal Procedure. The rulings reported as *Queen-Empress* v. *Monu* (6), *Girdhari Lal* v. *Emperor* (7) and *Queen-Empress* v. *Murphy* (8)

(5) 26 B. 150; 3 Bom. L. R. 586.

(6) 11 M. 443; 2 Weir 238; 4 Ind. Dec. (N. S.) 309.

(7) 10 Ind. Cas. 156; 11 P. R. 1911 Cr.; 32 P. W. R. 1911 Cr; 146 P. L. R. 1911; 12 Cr. L. J. 217.

(8) 9 A. 666; A. W. N. (1887) 141; 5 Ind. Dec. (N. S.) 881.

support the view." I propose to examine the authorities with a view to see whether there is any justification for the observation of the learned Judge that it has been held by almost all the High Courts that a failure to examine the complainant will not render the trial null and void.

No doubt the view taken in the case reported as *Queen-Empress* v. *Monu* (6) was that the failure to examine the complainant under section 200 was only an error of procedure and so far as I know, that case has never been followed in any other case in Madras. The case reported as *Queen-Empress* v. *Murphy* (8) was considered in the later case of *Kesri* v. *Muhammad Bakhsh* (9). Referring to the case of *Queen-Empress* *Murphy* (8) the learned Judges say: "With all due respect to the learned Judge who decided that case, we are of opinion that the Legislature does require that every complainant shall, as soon as he has prevailed upon the Magistrate to take cognizance...be examined upon oath." I do not think that it can be said that the Allahabad High Court took the view that a failure to examine the complainant is a mere error of procedure, when we find a later case of that Court not following the earlier decision of that Court. The case of *Girdhari Lal* v. *Emperor* (7) is a decision of the Punjab Chief Court and was based upon the earlier decision of the Allahabad High Court. It seems to me that it is not correct to say that it has been held by almost all the High Courts that a failure to examine the complainant will not render the trial null and void.

In the case of *Satya Charan Ghose* v. *Chairman of the Utterparah Municipality* (10) the High Court came to the conclusion that upon receipt of a petition of a complaint it was the duty of the Magistrate, as directed by the Code of Criminal Procedure, to examine the complainant on oath. In the case of *Lokenath Patra* v. *Sanyasi Charan Manna* (11) the High Court came to the conclusion that a Magistrate has no jurisdiction to deal with the case or dismiss it under section 203, Criminal Procedure Code, without complying with the requirements of the law as laid down under sections 200 and 202 of that Code. So far as this Court is concerned, it was laid down in the case of *Jhuna Lal Sahu* v. *Emperor* (1) that it is not open to the Court to take cognizance of a complaint without first examining the complainant on oath.

It seems to me on a reading of section 200, Criminal Procedure Code, that the cognizance of an offence by the Magistrate on complaint is not complete until he has examined the complainant on oath. Section 190 of the Code of Criminal Procedure lays down the conditions requisite for initiation of proceedings and, in my opinion, must be read with section 200 of the Code. It cannot be argued that a Magistrate has taken cognizance of an offence just because some person has thrown on the table a petition of complaint of facts which constitute such offence. The prosecution of the petition is the act of the party and not the act of the Court. The only way in which the Court can indicate that it takes cognizance of the complaint is by at once examining the complainant on oath. Until that is done, in my opinion, cognizance of the offence has not been taken by the Court.

But there is one case of this Court, the case of *Phagu Sahu* v. *Emperor* (3), which lays down that where a Magistrate on receipt of a complaint issued processes before examining a complainant on oath as required by section 200 of the Code of Criminal Procedure, 1898, but it was not shown that the accused had been in any way prejudiced by the irregularity, the conviction of the accused should not be set aside on account of the irregularity, which was covered by section 537 of the Code. The learned Judges in the course of their judgment say: "The learned Vakils for the applicants have been unable to refer us to any case in which a Court has, in similar circumstances, set aside a conviction on account of failure of the Magistrate to examine the complainant and when the complaint was made."

It seems to me that if the learned Vakil had cited the cases to which I have referred, the decision might have been the other way. In any case sitting as a Single

(9) 18 A. 221; A. W. N. (1896) 35; 8 Ind. Dec. (N. S.) 854.
(10) 3 C. W. N. 17.
(11) 30 C. 923; 7 C. W. N. 525.

GANAPATHY CHETTY, *In re.*

Judge I am bound to follow the latest decision of this Court which is to be found in 2 Patna Law Journal, page 657 [*Jhuna Lal Sahu* v. *Emperor* (1)]. It seems to me that the Legislature has said as plainly as it knows how to say that the examination of the complainant is not a mere formality. It must be remembered that it is on the result of the examination of the complainant that the machinery of the Criminal Court is put in motion and, in my opinion, we are bound to give effect to the plain meaning of the section. I hold that the failure to examine the complainant on oath vitiated the entire proceedings.

I would, therefore, set aside the conviction of the petitioner and direct that the fine, if paid, be refunded. If having regard to the importance of the case the District Magistrate thinks it necessary to proceed further, it is open to him to proceed according to law.

Conviction set aside.

MADRAS HIGH COURT.

[CRIMINAL MISCELLANEOUS PETITION NO. 159 OF 1919.

April 15, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

In re GANAPATHY CHETTY AND ANOTHER —ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 177, 206, 526 (1), 531, 532—Enquiry by Court having no local jurisdiction--Defect, whether curable—Commitment to High Court in respect of offence over which Sessions Court has jurisdiction—High Court, original criminal jurisdiction of, territorial extent of—Power of High Court to transfer to High Court Sessions trial of offences committed outside Madras town—Convenience.

The policy of the Criminal Procedure Code, as shown by sections 531 to 538, is to uphold, in most cases, orders passed by a Criminal Court which was lacking in local jurisdiction or which had committed illegalities or irregularities, unless failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities. [p. 469, col. 1.]

Where a commitment is made to the High Court Sessions over which the Sessions Court of a Division has local jurisdiction, the High Court can, on grounds of expediency and convenience, direct the trial to proceed in the High Court itself. [p. 470, cols. 1 & 2.]

Per *Sadasiva Aiyar, J.*—The High Court, in its original criminal jurisdiction, has power to try cases committed to it by the Muffasal Magistracy, and the commitment is not void by reason of the fact that a Sessions Court in the Muffasal has local jurisdiction in respect of the offence in respect of which the committal is made. [p. 470, col. 1.]

Assistant Sessions Judge, North Arcot v. *Ramammal*, 13 Ind. Cas. 275; 36 M. 387; 22 M. L. J. 141; 10 M. L. T. 563; (1912) M. W. N. 3; 13 Cr. L. J. 35, distinguished.

Petition, under sections 215 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to quash the order of commitment passed by the Chief Presidency Magistrate, dated the 20th March 1919, in Calendar Case No. 4556 of 1919 (Sessions Case No. 8 of 1919 on the file of the High Court).

FACTS appear from the judgment.

Messrs. *K. U. Luke* and *Kunhi Raman*, for the Petitioners.—The offence of murder was committed at Avadi, which is within the jurisdiction of the Chingleput Sessions Court, though the offences of kidnapping and theft were committed within the Municipal limits of Madras. The Chingleput Sessions Court can alone try for the offence of murder.

This is a case of want of jurisdiction which is not cured by section 531, Criminal Procedure Code. See *Assistant Sessions Judge, North Arcot* v. *Ramammal* (1).

The Crown Prosecutor, for the Government.—The High Court has original jurisdiction in respect of all offences committed in the Presidency of Madras. *Vide Queen-Empress* v. *James Ingle* (2). It may be the Chingleput Sessions Court has immediate jurisdiction over the area within which the murder was committed, but that does not deprive the High Court of its jurisdiction. It is not a case of want of jurisdiction. In *Assistant Sessions Judge, North Arcot* v. *Ramammal* (1) the commitment was to a wrong Court, which had no jurisdiction over the place where the offence was committed.

(1) 13 Ind. Cas. 275; 36 M. 387; 22 M. L. J. 141; 10 M. L. T. 563; (1912) M. W. N. 3; 13 Cr. L. J. 35.

(2) 15 B. 200; 2 Ind. Dec. (N. S.) 611.

In any event there is no reason for quashing the commitment in this particular case. The offences of theft and kidnapping were committed in Madras and the murder was in completion of the original design. It will be more convenient if the case is tried at the High Court Sessions and the accused will, in no way, be prejudiced by it.

ORDER.

SADASIVA AIYAR, J.—This is an application praying to quash the order of commitment passed by the Chief Presidency Magistrate in Calendar Case No. 4556 of 1919. The commitment was made to the High Court Sessions. The application is made under sections 215 and 439 of the Criminal Procedure Code and section 107 of the Government of India Act. The offences with which the petitioners are charged relate to acts of kidnapping and theft committed in Madras and the offence of murder committed on the Avadi Poonammallee Road within the jurisdiction of the Sessions Court of Chingleput. They all formed parts of the same transaction.

So far as the objection based on the alleged want of jurisdiction of the Chief Presidency Magistrate over the offences which took place on the Avadi Poonamallee Road is concerned, that defect, assuming it to exist, is clearly cured by section 531, Criminal Procedure Code.

Then there is the more serious question, that is, the commitment having been made to this High Court Sessions as regards the offence which took place in the Chingleput District, whether the High Court has got power in the exercise of its original criminal jurisdiction to try that offence and whether, even if it has not, the defect is cured by section 531 or section 532. I think that the policy of the Criminal Procedure Code, as shown by sections 531 to 538, is to uphold, in most cases, the orders passed by the Criminal Court which was lacking in local jurisdiction or which had committed illegalities or irregularities, unless failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities. However there is a decision of this Court in *Assistant Sessions Judge, North Arcot* v. *Ramammal* (1), to which my learned brother was a party and which holds that if the Sessions Court to which a commitment was made had no local jurisdiction over the place where the offence took place, such commitment should be quashed (though, of course, after the trial had taken place to its termination, section 531 might cure the defect). It is unnecessary for me to express any final opinion whether the decision in *Queen-Empress* v. *Ram Dei* (3), which seems to be opposed to the decision in *Assistant Sessions Judge, North Arcot* v. *Ramammal* (1), does not take the better view. I shall, therefore, proceed on the footing that in the matters before us, *Assistant Sessions Judge, North Arcot* v. *Ramammal* (1) should be followed.

The next question is whether the High Court in its original criminal jurisdiction has power to try a case of murder committed in the Chingleput District. In *Queen-Empress* v. *James Ingle* (2), which was a case almost similar to the present, Mr. Robertson for the prosecution contended that under the Letters Patent the High Court had criminal jurisdiction to try cases arising throughout the Presidency. Clause 24 of the Letters Patent of this Court says that the "High Court of Judicature at Madras shall have extraordinary original criminal jurisdiction *over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said Court.*" It is objected that the High Court Sessions will then be flooded with commitments if it were held to have the original criminal jurisdiction over the whole Presidency. I think that it was to prevent that inconvenience that section 206, clause (2), was enacted prohibiting Magistrates from committing to the High Court where they could commit to a Sessions Court. In the above quoted case, *Queen-Empress* v. *James Ingle* (2), Mr. Justice Farran refused to quash the commitment made wrongly to the High Court Sessions, evidently accepting the contention of Mr. Robertson already referred to. The present case is, therefore, not a case of want of jurisdiction in the Court to which the commitment was made and can, therefore, be distinguished from the case decided in *Assistant Sessions Judge, North Arcot* v. *Ramammal* (1).

(3) 18 A. 350; A. W. N. (1896) 96; 8 Ind. Dec. (N. S.) 940.

RAJ KUMAR DAS v. EMPEROR.

Assuming again that the High Court, in its original criminal jurisdiction, has no power in the usual course to try this case, I think this is a matter in which we should exercise the power given to us by section 526, clause (1), sub-clause (1), [for reasons (*d*) and (*e*)] of the Criminal Procedure Code, and pass an order that the offences committed outside the jurisdiction of Madras be also tried in the High Court Criminal Sessions along with other offences which were committed in Madras. If that power is exercised, the trial before the Madras Sessions becomes legal and it then becomes unnecessary to decide the other questions. I would, therefore, pass that order and dismiss the petition.

SPENCER, J.—I agree. So far as the proceedings in the Presidency Magistrate's Court are concerned, section 531, Criminal Procedure Code, is sufficient for our refusing to set aside the order of commitment. This section, however, cannot be invoked as regards the proceedings in High Court Sessions, for the trial of this case has not yet been taken up in the High Court Sessions and, therefore, so far there are no proceedings in the Sessions Court requiring to be cured.

Section 177, the effect of which was considered in *Assistant Sessions Judge, North Arcot* v. *Ramammal* (1), to which I was a party, declares that "every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed." The question, therefore, now for our consideration is whether the trial can be allowed to proceed in this Court, or, whether, so far as the offence of murder is concerned, the case should be tried by the Sessions Judge of Chingleput, who appears, so far as the facts are before us, to have jurisdiction over that offence committed at Poonamallee just outside the Madras city, in the Chingleput District.

On the question of convenience, there can be no doubt that it will be convenient for the case to be tried here; the witnesses are assembled: the case is ready for trial; and the offences of kidnapping and theft have in any case, to be tried in Madras unless an order of transfer is made. I do not think it can be suggested seriously that the accused would be prejudiced by being tried by a Jury and by losing his right of appeal if convicted. Having regard to clause 24 of the Letters Patent it cannot be said that the Judge presiding over the High Court Sessions has no power to try persons brought before him on charges preferred by any Magistrate. This case in that respect differs from the case of *Assistant Sessions Judge, North Arcot* v. *Ramammal* (1), in which the Sessions Judge of North Arcot to whom the commitment was made had no power to try an offence arising out of the local limits of the Salem District. Under section 526, clause (1), sub-clause (1), the High Court is empowered to make a direction "that an offence be enquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive) but in other respects competent to enquire into or try such offence" in cases where such order is expedient for the ends of justice. I, therefore, agree with my learned brother that that is the order we should make in this case and that it will be expedient for the ends of justice that all the charges be tried together against the accused at the High Court Sessions.

M. C. P.

Petition dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 473 OF 1918.

August 13, 1918.

Present:—Mr. Justice Tudball.

RAJ KUMAR DAS AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 107—Security to keep the peace—Order requiring security in certain sum—Subsequent order requiring security in greater sum, legality of.

Once a Magistrate has directed the furnishing of security in a certain sum by the accused in proceedings under section 107 of the Criminal Procedure

Code, the proceedings come to an end and he has no jurisdiction to alter his order.

Where one month after passing an order requiring the accused to furnish security in a certain sum to keep the peace, the Magistrate directed the accused to furnish security in a larger sum:

Held, that the order was *ultra vires*.

Criminal revision from an order of the Magistrate, First Class, Gorakhpur.

Mr. *Satya Chandra Mukerji*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The applicants in this case were, by an order passed on the 25th of May 1918, bound over by a first class Magistrate to keep the peace in their own bond for Rs. 100 with two sureties in Rs. 50 each for one year. In default he directed that they should be rigorously imprisoned for one year. About a month later the Magistrate passed another order in which he said he had overlooked the fact that the applicant Raj Kumar Das had been called upon to produce much greater security than the other persons implicated in the case and that he, the Magistrate, had in error only ordered him to provide the same security as the other accused persons. By his subsequent order he, therefore, purported to correct the error he had made and he ordered Raj Kumar Das to execute a personal bond for Rs. 1,000 with two sureties of Rs. 250 each. He maintained his first order in respect to the other accused persons, but he was careful enough to correct the error regarding rigorous imprisonment in default of furnishing security. In his subsequent order he directed that the imprisonment should be simple. It is quite clear that the second order passed by the Magistrate is completely *ultra vires*. He had finished with the case on the 20th of May 1918 and it was beyond his powers to alter his order. The second order must, therefore, be set aside. In so far as the first order is concerned, I can see no reason to interfere with it except in respect to that portion which directs the accused persons to be rigorously imprisoned in default of furnishing security. It is clearly contrary to law and I, therefore, modify that order to this extent that if the security demanded be not furnished, the imprisonment to be suffered will be simple imprisonment. It is unnecessary to interfere in any other way with this order.

Order modified.

PATNA HIGH COURT.

CRIMINAL REVISION No. 436 OF 1918.

January 9, 1919.

Present:—Mr. Justice Coutts.

MAHABIR SINGH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Bihar and Orissa Excise Act (II of 1915), ss. 47, 55—Report under s. 47 (h)—Cognizance of offences under s. 47 (a) or s. 55, legality of—Removal of liquor—Presumption under s. 48, whether permissible.

In the report of an Excise Sub-Inspector prosecution was asked for only under section 47 (*h*) of the Bihar and Orissa Excise Act, but the accused was in addition tried for and convicted of offences under sections 47 (*a*) and 55 of the Act:

Held, that such a proceeding was not illegal, especially as the report disclosed facts constituting offences under the other sections. [p. 472, col. 2.]

Section 48 of the Bihar and Orissa Excise Act does not apply to a case of removal of liquor, and it is, therefore, illegal to make use of the presumption created by that section in the trial of an offence under section 47 (*h* of the Act. [p 472, col. 2.]

Criminal revision against the order of the Sessions Judge, Saran, dated the 9th November 1918, refusing to make a reference to the High Court against the order, dated the 21st October 1918, of the first class Sub-Divisional Magistrate of Gopalgunj, convicting the petitioner under sections 47 (*a*), 47 (*h*) and 55 of Act II of 1915.

FACTS appear from the judgment.

Mr. *Rajendra Prasad*, for the Petitioner.

—The report of the Sub-Inspector mentioned only an offence under section 47 (*h*), therefore, the trial Court was precluded from trying the petitioner under sections 47 (*a*) and 55. Under section 87 the Magistrate had no jurisdiction to take cognizance of an offence under sections 47 (*a*) and 55. Secondly, the conviction under section 47 (*h*) is illegal because the learned Magistrate wrongly held that under section 48 the onus is on the accused to show that he did not remove the liquor.

HARI CHAND *v.* EMPEROR.

Mr. *Manohar Lal* (Assistant Government Advocate), for the Crown.—I concede that in the case of an offence falling under section 47 (*h*) the presumption referred to in section 48 does not apply. But there is clear evidence that the accused removed the liquor from the depôt office.

It is now well settled that a Magistrate is not precluded from taking cognizance of offences which are disclosed from the facts contained in the report or in the complaint, although different sections of the Acts are stated therein. The law requires the complainant to disclose full facts in his petition or report and it is for the Court taking cognizance to apply the law to the facts of each case.

JUDGMENT.—The petitioner in this case is one Mahabir Singh, who was a clerk of the liquor warehouse or depôt at Gopalgunj. He has been convicted under sections 47 (*a*), 47 (*h*) and 55 of the Excise Act and has been sentenced to a fine of Rs. 200 or in default to undergo rigorous imprisonment for one month.

It appears that on the evening of 13th July 1918 the petitioner was seen coming out of the warehouse office with something wrapped up in cloth under his arm. He went to the water-tank which adjoins the warehouse and left this bundle there. Shortly afterwards, the petitioner handed over the bundle to one Sukat Kurmi who was a coolie working at the depôt and asked him to take it to the petitioner's house. Sukat started for the house of the accused, but was arrested by the Excise Sub-Inspector. The bundle was opened and was found to contain a bottle of liquor 64·6 over proof. On the statement of Sukat the accused was sent for but declined to say anything. The investigation was then taken up by the Excise Sub-Inspector, who submitted a report asking for the prosecution of the petitioner and Sukat under section 47 (*h*) of the Excise Act. On this report a prosecution was started by the Sub-Divisional Magistrate under sections 47 (*a*), 47 (*h*) and 55, with the result that the petitioner has been convicted and sentenced as already stated.

The first point taken in this revision is, that in the report of the Sub-Inspector prosecution was asked for only under section 47 (*h*) and that the report did not disclose any offence under section 47 (*a*) or section 55. This contention is not sustainable. It is true that in column 6 of the Sub-Inspector's report he asked only for prosecution under section 47 (*h*) for the illegal removal of the bottle of country spirit from the warehouse; but from column 8 it is clear that offences under sections 47 (*a*) and 55 were also disclosed, because in this column it is stated that the liquor was made over by the petitioner to Sukat and further that it was made over at the depôt well.

The next point urged is that the conviction under section 47 (*h*) is bad, inasmuch as the learned Sub-Divisional Magistrate has made use of the presumption created by section 48 of the Act. It is conceded, and it is obviously so, that section 48 does not apply in a case of removal of liquor. But it is clear from the evidence recorded by the Sub-Divisional Magistrate, that the accused removed the liquor from the depôt office. The depôt office is apparently the same place as the warehouse office and appears to be a part of the warehouse. The removal, therefore, was from the warehouse.

I, therefore, see no reason to interfere with the order of the Sub-Divisional Magistrate. The question of sentence has been referred to, but it does not appear to be unduly severe.

Sentence confirmed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 915 OF 1918.

November 15, 1918.

Present:—Mr. Justice Scott Smith.

HARI CHAND AND ANOTHER—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 522—Penal Code (Act XLV of 1860), s. 350—Restoration of property, order for—Criminal force, use of, whether necessary.

An order under section 522, Criminal Procedure Code, directing the restoration of immoveable pro-

perty can only be made where dispossession is effected the use of criminal force as defined in section 350 of the Penal Code.

Criminal revision from the order of the District Magistrate, Jhang, dated the 18th May 1918.

Mr. *Nand Lal* and Mehta *Bahadur Chand*, for the Petitioners.

JUDGMENT.—This is an application for revision of an order of the District Magistrate of Jhang, dismissing an appeal of the petitioners who were convicted of an offence under section 448, Indian Penal Code. The Magistrate also passed an order against them under section 522, Criminal Procedure Code, to the effect that the complainant should be put into possession of the house in which the criminal trespass was committed. I saw no reason to interfere with the conviction under section 448, but issued notice to the District Magistrate in regard to the order under section 522, Criminal Procedure Code, because there was no finding that criminal force as defined in section 350, Indian Penal Code, was used in the commission of the offence. Section 522, Criminal Procedure Code, is to the effect that whenever a person is convicted of an offence attended by criminal force, and it appears to the Court that by such force any person has been dispossessed of any immoveable property, the Court may, if it thinks fit, order such person to be restored to the possession of the same. In *Ishan Chandra Kalla* v. *Dina Nath Badhak* (1) it was held that in order to support an order under section 522, Criminal Procedure Code, there must be a finding that the dispossession was by the use of criminal force as defined in section 350 of the Penal Code. Another authority to the same effect is that reported as *Batakala Pottiavadu, In re* (2).

Now in the present case the allegation is that the trespass was committed in the absence of the complainant, and, therefore, it is clear that no criminal force was used to him, and there is no allegation that it was used to anybody who was in possession of the house on complainant's behalf. The order passed under section 522, Criminal Procedure Code, was, therefore, passed without jurisdiction and I accordingly set it aside, the revision being allowed to this extent.

Revision allowed.

(1) 27 C. 174; 4 C. W. N. 307; 14 Ind. Dec. (N. S.) 115.

(2) 26 M. 49; 2 Weir 675; 12 M. L. J. 447.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 202 OF 1919.

May 22, 1919.

Present:—Mr. Justice Rafique.

SHANKER LAL AND OTHERS—APPLICANTS

versus

EMPEROR THROUGH BIKRAM SINGH AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 125—Security for good behaviour—Jurisdiction of District Magistrate to cancel bonds, nature of—Reference to High Court—Revision.

Section 125 of the Criminal Procedure Code does not confer appellate or revisional jurisdiction upon a District Magistrate enabling him to cancel a bond executed in pursuance of an order under section 110 of the Code, upon an application made to him in this behalf. The proper course in such a case is for the District Magistrate to submit the case to the High Court with a recommendation that the bond be cancelled, if he is of opinion that this should be done.

Criminal revision against the order of the District Magistrate, Farrukhabad, dated the 12th March 1919.

Mr. *Uma Shankar Bajpai*, for the Applicants.

Mr. *Sital Prasad Ghosh*, for Opposite Party No. 1 only.

Mr. *R. Malcomson*, (Assistant Government Advocate), for the Crown.

JUDGMENT.—The facts which have given rise to this application in revision are as follows:—One Daryai Singh was the owner of certain fields. He gave a lease in respect of them to Bikram Singh and subsequently gave a mortgage in respect of the same fields to Karam Singh, the brother of Bikram Singh. After the execution of the lease and the mortgage-deed Daryai Singh sold the said fields to one Sardar Singh. There was a dispute between the vendee on the one side and the lessee and the mortgagee on the other, as to the possession of the fields. Sardar Singh was successful in the end and obtained a decree from this Court to the effect that the

lease to Bikram Singh was void and ineffectual but that the mortgage was valid. After the decree of the High Court, Sardar Singh redeemed the mortgage and obtained possession over the fields in question through the Civil Court. Sardar Singh died sometime after the redemption of the mortgage. The son of Sardar Singh let the fields in question to some of the applicants. The latter were resisted in their attempt to sow the fields by Bikram Singh and his friends, who declined to give up possession and maintained that the lease in his favour gave him the right to retain the fields. The Police, finding that there was a likelihood of a breach of the peace, sent up both parties, namely, the applicants and Bikram Singh and his friends to the Magistrate with a report that security should be taken for keeping the peace under section 107 of the Code of Criminal Procedure. The case came up before the learned Joint Magistrate, who made an order on the 19th of December 1918 directing both parties to give bonds for keeping the peace. Bikram Singh went up in revision to the Sessions Judge from the order of the 19th of December 1918 and his application was rejected on the 10th of February 1919. Before the disposel of the application by the Sessions Judge, Bikram Singh filed an application to the District Magistrate which was either by way of revision or appeal. The application was filed on the 8th of February 1919. The learned District Magistrate went into the merits of the case and considered the rights of the parties and came to the conclusion that the bonds taken from Bikram Singh and his friends should be cancelled and those taken from the applicants before this Court should be maintained and that the latter should go to the proper Court to have their rights determined.

The applicants before this Court contend that the order of the learned District Magistrate is not according to law, though it purports to have been made under section 125 of the Code of Criminal Procedure. I think that the contention for the applicants is correct. The learned District Magistrate has disposed of the order of the 19th of December 1918 as if he were sitting as an Appellate Court. The proper course open to the learned Magistrate was to have considered the application of Bikram Singh and others as an application for revision and to have recommended to this Court the cancellation of the bonds of Bikram Singh and his friends, if he thought it proper to do so. The case of *Banarsi Das* v. *Partab Singh* (1) is in point. I allow the application and set aside the order of the learned District Magistrate, dated the 12th of March 1919.

Application allowed.

(1) 18 Ind. Cas. 351; 35 A. 103; 11 A. L. J. 16; 14 Cr. L. J. 63.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 892 OF 1918.

November 7, 1918.

Present:—Mr. Justice Broadway.

BASHESHAR NATH—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Omission to name person to whom sanction granted, effect of.

A sanction to prosecute which omits to specify the person, either by name or by office to whom sanction is accorded is bad in law, and consequently a trial held under such sanction is invalid. [p. 475, col. 2.]

Revision from the order of the Sessions Judge, Karnal, dated the 8th June 1918.

Mr. *Jagan Nath*, for the Petitioner.

JUDGMENT.—The facts of the case out of which this petition for revision has arisen are detailed in the judgment of the learned Sessions Judge and need not be recapitulated here at length. Briefly, on the 14th of January 1918 the District Magistrate of Karnal visited the petroleum store of the petitioner, Basheshar Nath. The petitioner is a manager of a firm styled "Gantam Brothers." Agents of the Standard Oil Company. The petitioner had been granted a license under the Indian Petroleum Act on the 19th of February 1916. This license had been renewed for 1917, and again renewed on the 4th of January 1918 for the year ending 31st December 1918. When the original license in 1916 had been applied for, the petitioner had in paragraph 6 of his application stated that the premises where the petro-

leum would be stored fulfilled the requirements of the license in Form A, one of the conditions of which is that either the doorways and other openings of the storage shed shall be built up to a height of two feet above the level of the road or street, or the floor sunk to a depth of two feet below the level of the road or street in order to prevent any chance of the petroleum flowing out of the building into the road or street. As stated above, the District Magistrate visited the storage shed on the 14th January 1918, and after his visit recorded a note or order to the effect that the premises had been found not to comply with condition 3 of the license. The license was accordingly cancelled and the note or order proceeds: "I find that Basheshar Nath in his petition of the 11th February 1916 said: 'The petitioner's shop is situate in Chaura Bazar, Karnal, and the said premises fulfil the conditions prescribed by Form A.' The Deputy Commissioner accepted this declaration as evidence of the conformity of the shop to the conditions and on the strength of it he gave Basheshar Nath his license. This declaration was, however, false and Basheshar Nath committed an offence under section 199 of the Indian Penal Code. I direct that he be tried by Nawab Umar Daraz Ali Khan."

The petitioner moved the Sessions Judge, asking that the proceedings should be quashed as not being in conformity with law. On the 26th February 1918 the learned Sessions Judge came to the conclusion that section 199, Indian Penal Code, did not apply but expressed his opinion that the case would be more appropriately covered by section 182, Indian Penal Code. He thereupon remanded the case to the District Magistrate, asking him to pass such fresh orders as he might think fit.

The District Magistrate then recorded the following order: "I am quite indifferent whether the case is under section 182 or section 199. It appears to be for the Magistrate to decide which section applies. I give sanction under section 195 (*b*) to his prosecution under section 182 or section 199 or any other section applicable to the facts."

The petitioner was then tried by Muhammad Umar Daraz Ali Khan, Honorary Magistrate, and convicted of an offence under section 182, Indian Penal Code, and sentenced to pay a fine of Rs. 100, or in default to undergo three months' rigorous imprisonment.

Against his conviction and sentence he appealed to the learned Sessions Judge, who maintained the conviction but reduced the fine to Rs. 25 only. Before me it has been contended that the proceedings are bad for want of proper legal sanction or complaint. There can be no doubt that the trial was not commenced on a complaint. The learned District Magistrate himself came to the conclusion that the premises used by the petitioner did not comply with the provisions of his license and directed the trial to proceed on a charge under section 199, Indian Penal Code. The learned District Magistrate appears to me to have been exercising his executive functions when he inspected the premises and, therefore, he cannot be regarded as having acted under section 476, Criminal Procedure Code. Later, when the learned Sessions Judge remanded the case to him, he proceeded to accord sanction to the prosecution of the petitioner under section 195 (1) (*b*), Criminal Procedure Code. No person was specified either by name or by office to whom the sanction was accorded, and the sanction was, therefore, bad in law. In this view I am supported by *Atma Ram* v. *Emperor* (1) and *Queen-Empress* v. *Rachappa* (2) as well as by *Indar Bhan* v. *Emperor* (3) and *Ladha Singh* v. *Emperor* (4). The whole trial, therefore, is bad and I accordingly set aside the conviction and sentence. If further proceedings are considered necessary, the learned District Magistrate will be at liberty to commence them in accordance with law.

Revision accepted.

(1) 23 P. R. 1901 Cr.
(2) 13 B. 109; 7 Ind. Dec. (N. S.) 73.
(3) 30 P. R. 1905 Cr.; 105 P. L. R 1905; 2 Cr. L. J. 687.
(4) 28 Ind. Cas. 107; 13 P. R. 1915 Cr.; 20 P. W. R. 1915 Cr.; 16 Cr. L. J. 251; 184 P. L. R. 1915.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 77 OF 1919.

February 26, 1919.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

GIRISH CHANDRA DAS—PETITIONER

versus

BHUSAN DAS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 247, applicability of—Case closed and adjourned for judgment—Complainant, absence of, on adjourned date, effect of.

After a case was closed for the defence and arguments had been heard, the Magistrate adjourned it for judgment. On the adjourned date, instead of delivering judgment, the Magistrate acquitted the accused under section 247 of the Criminal Procedure Code on the ground that the complainant was absent without any reasonable excuse:

Held, that the case did not fall within the provisions of section 247 of the Code, inasmuch as the hearing of the case had already been concluded and the attendance of the complainant had not been specially directed.

Criminal revision against the order of an Honorary Magistrate, Sealdah, dated the 21st December 1918.

Mr. *Ahmed* and Babu *Bir Bhusan Dutta*, for the Petitioner.

Babus *Manmatha Nath Mukerjee* and *Satindra Nath Mukerjee*, for the Opposite Party.

JUDGMENT.—In this case the opposite party was prosecuted by the present petitioner under section 2 of Act XIII of 1859. The hearing of the case began on the 21st November 1918 and was adjourned to the 18th December when, as the order-sheet shows, the defence was closed and arguments were heard. The Magistrate then adjourned the case to the 21st December for judgment. On the 21st December the learned Magistrate, instead of delivering judgment, acquitted the opposite party under section 247 of the Code of Criminal Procedure on the ground that the complainant was absent without any reasonable excuse. Under section 247 "If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day."

The present case, in our opinion, does not fall within that provision because the hearing of the case had already been concluded. All that the Magistrate had to do was to deliver his judgment. The attendance of the complainant, the petitioner, had not been specially directed. We are accordingly of opinion that the order acquitting the opposite party is erroneous and should be set aside.

We set it aside and direct the Magistrate to dispose of the case in accordance with law.

Rule made absolute.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 468 OF 1918.

December 4, 1918.

Present :—Mr. Justice Wilberforce and Mr. Justice Martineau.

GHASITA—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 75, 379, 457, 511—Previous convict—Theft, attempt to commit—Enhanced sentence, legality of.

A previous convict entered an open thorned enclosure in which goats and sheep were kept, but on the owner being disturbed, he fled and was arrested near by. He was convicted under sections 457/75 of the Penal Code and sentenced to transportation for life:

Held, on appeal, that the only offence of which he could be convicted was one of attempted theft under sections 379/511 of the Penal Code and that as section 75 did not apply to attempted offences, an enhanced sentence could not be inflicted upon him. [p. 477, col. 1.]

Appeal from the order of the Sessions Judge, Karnal, dated the 4th May 1918.

Mr. *Mul Chand*, Public Prosecutor, for the Respondent.

JUDGMENT.—In this case the appellant, a previous convict, has been sentenced under sections 457/75, Indian Penal Code, to transportation for life. As for his guilt there can be no question. He is a resident of a different village and was arrested close to the spot and has been able to give no explanation whatever of his presence. The evidence against him is entirely independent and trustworthy.

The Sessions Judge was, however, in error in holding the appellant guilty of an offence under section 457 and applying section 75 for purposes of an enhanced sentence. The appellant made his way into an open thorned enclosure in which goats and sheep were kept. The owner was disturbed before the appellant was able to carry out his object and the appellant fled. It is plain, therefore, that the appellant cannot be convicted of criminal trespass by night in a house or building and that the only offence of which he can be convicted is one of attempted theft under sections 379/511, Indian Penal Code. It has frequently been pointed out by this Court *e.g.*, *Jhamman Lal* v. *King Emperor* (1), that section 75 has no application to attempted offences and that under such circumstances enhanced sentences cannot be inflicted.

We, therefore, accept the appeal to the extent that we alter the conviction to one under sections 379/511, Indian Penal Code, and award the maximum sentence of eighteen months' rigorous imprisonment.

Appeal partly accepted.

(1) 14 P. R. 1906 Cr.; 12 P. L. R. 1907; 15 P. W. R. 1907 Cr.; 5 Cr. L. J. 85.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCES NOS. 3, 4 AND 5 OF 1919.

February 13, 1919.

Present:—Mr. Stuart, J. C.

MUNICIPAL BOARD, RAE BARELI—PROSECUTOR

versus

MUHAMMAD MUQIM AND OTHERS—ACCUSED.

U. P. Municipalities Act (II of 1916), s. 155—Octroi duty not paid through honest mistake—Offence.

Section 155 of the U. P. Municipalities Act is applicable to a case where there has been no attempt to defraud and octroi duty has not been paid through an absolutely honest mistake. [p. 478, col. 1.]

Case reported by the Deputy Commissioner of Rae Bareli under section 438 of the Criminal Procedure Code.

FACTS.—The accused, on conviction by the Bench of Honorary Magistrates, Rae Bareli, exercising the powers of a Third Class Magistrate in the District of Rae Bareli, by an order dated the 4th July 1918, was sentenced to fine of Rs. 80 and in default to two weeks' simple imprisonment.

The Government Pleader, for the Crown.

Mr. *Fakhruddin Hasan*, for the Accused.

JUDGMENT.—These are references by the District Magistrate of Rae Bareli against the orders of the Bench of Honorary Magistrates of Rae Bareli in three cases under section 155 of the U. P. Municipalities Act, II of 1916. The facts were as follows:—

The three defendants in these cases introduced wood which was liable to the payment of octroi into Municipal limits and sold it there. The Bench of Magistrates found correctly that the defendants acted under an honest error and were unaware that the locality into which they introduced and where they sold the wood was within Municipal limits. They were perfectly ready to pay the octroi if they had known that octroi was leviable, but they did not know at that time that octroi was leviable and the Municipal authorities never informed them of the fact. The Magistrates, taking these circumstances into consideration, levied fines which came to very little more than the amount of octroi leviable. The District Magistrate has referred their order to this Court, pointing out that under section 155 the Magistrates were compelled to fine the defendants twice the amount due. The District Magistrate's contention is correct.

The section, however, appears to me to require amendment. I am unable to understand why the penalty under the section should be so much greater for petty infringements and why the section makes it so much less for greater infringements. The first point will be understood by reading its terms. If a man introduces goods leviable to octroi and the octroi duty is Rs. 5 or less he can be fined ten times the value of the octroi duty, that is Rs. 50, but if he introduces goods on which the octroi leviable is Rs. 50, he cannot be fined more than twice the amount of the octroi duty. This would appear to be a direct incentive to people wishing to defraud the Municipality to do so on a large scale and not on a small scale. I

next note that the section makes no provision at all for cases such as the present where there is no attempt to defraud and an absolutely honest mistake. In all Municipalities the octroi area can only be discovered by a careful study of maps and notifications and it is sometimes exceedingly difficult even for persons more intelligent than the defendants in these cases to know what the boundaries of the octroi area are. I think it exceedingly likely that many intelligent and well-educated people in Lucknow would find some difficulty in saying what the boundaries of the octroi area are in this city and the same difficulty must also be felt in Rae Bareli. Here is a case where people acted in good faith. They did nothing wrong. They were in absolute ignorance of the fact that there was any octroi duty leviable from them. But under the section as it stands, they must be punished. They were perfectly ready to pay the octroi duty as soon as it was found that it was leviable. Under the provisions of this section, however, one of the defendants must be charged Rs. 86-9-6, another Rs. 78-2-0 and the third Rs. 140-10-0, that is to say, exactly double. That is the law. I think it is in need of amendment. I have nothing to do in this case except to apply the law as it stands, and with considerable regret I order Fateh Khatik to pay an extra fine of Rs. 36-9-6, Sahai to pay an extra fine of Rs. 28-2-0 and Muhammad Muqim to pay an extra fine of Rs. 60-10-0, but I think the Rae Bareli Municipality will be well advised if after they have recovered this money from the defendants they return it to them. I order that a copy of this order be sent to the Local Government in the Municipal Department.

Sentence enhanced.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 471-B OF 1918.

November 2, 1918.

Present :—Mr. Justice Pratt.

EMPEROR—APPLICANT

versus

NAWAB ALI—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 435—Additional District Magistrate whether subordinate to District Magistrate—Order directing further enquiry into case disposed of by Additional District Magistrate, legality of.

An Additional District Magistrate, as such, is not subordinate to the District Magistrate in Burma nor is his Court inferior to that of the District Magistrate within the meaning of section 435 of the Criminal Procedure Code. [p. 479, col. 1.]

Where, therefore, a District Magistrate purporting to act under section 435 of the Criminal Procedure Code, called for a case in which the Additional District Magistrate had discharged the accused and ordered further inquiry before another Magistrate:

Held, that the District Magistrate was not legally competent to make such an order. [p. 479, col. 1.]

Mr. *Gaunt*, for the Applicant.

Mr. *Villa*, for the Respondent.

JUDGMENT.—The District Magistrate, Amherst, purporting to act under section 435, Criminal Procedure Code, called for a case in which the Additional District Magistrate had discharged the accused and ordered further enquiry before another Magistrate. Subsequently being doubtful whether the Additional District Magistrate could be held to be an inferior Court within the meaning of section 435, he has submitted the proceedings to this Court for orders.

The word "inferior" has been defined by the Bombay High Court as statutably incompetent to exercise equal powers. An Additional District Magistrate as such is not subordinate to the District Magistrate under section 17 of the Criminal Procedure Code, since he is appointed under section 10 and not under section 12, 13 or 14. The word "inferior" in section 435 appears to have been used designedly, because a Magistrate may be of inferior status without being subordinate. Thus Magistrates are not subordinate to the Sessions Judge but their Courts are inferior. In *Opendro Nath Ghose* v. *Dukhini Bewa* (1), a Full Bench of the Calcutta High Court held that a Magistrate of the District is competent under section 435 to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own district. The question then under reference was whether a Magistrate of the first class is a Criminal Court inferior to the Magistrate of the district, and the Bench do not appear to have been considering the relative positions of a District Magistrate and an Additional District Magistrate. In fact the terms of their answer to the reference would apply equally to an Additional

(1) 12 C. 473 (F. B.); 6 Ind. Dec. (N. S.) 321.

District Magistrate, and would justify the view that he is inferior to all other Magistrates in the district except the District Magistrate.

I am of opinion that in the present instance the Additional District Magistrate cannot be held to be an inferior Court to that of the District Magistrate. He has, I understand, been invested with all the powers of the District Magistrate, and must be taken during the tenure of his office to be on an equality with him. The District Magistrate is simply *primus inter pares*. The Additional District Magistrate is appointed to relieve the District Magistrate of a greater or less portion of his duties. I am aware that in *Crown* v. *Abdul Karim* (2) a Bench of the Punjab Chief Court took a different view, but I am not bound by their decision, and I do not agree with it. They remark "the object of the appointment is obviously not to place the Additional District Magistrate on the footing of the District Magistrate." That may not have been the object in the Punjab, but I am of opinion that it is in this province. The reason for the appointment of Additional District Magistrates with plenary powers in Burma is that District Magistrates, who are also Deputy Commissioners, are in practice so much occupied with their executive and revenue duties that they have not sufficient time to discharge their duties as District Magistrates satisfactorily. The Additional District Magistrate is, if the term is permissible, in the position of an Additional Judge of the District Magistrate's Court. He is no more inferior to him than an Additional Sessions Judge is to the Sessions Judge. Both are, so to speak, members of the same Court.

I accordingly set aside the order of the District Magistrate directing further enquiry.

Order set aside.

(2) 25 P. R. 1908 Cr.; 9 Cr. L. J. 104.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 959 OF 1918.

October 30, 1918.

Present:—Mr. Justice Broadway.

SHANKAR SAHAI—COMPLAINANT—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *s.* 250—*Penal Code* (*Act XLV of* 1860), *ss.* 406, 467, *charges under, dismissal of*—*Compensation to accused, order for, legality of.*

In discharging a person accused of offences under sections 406 and 467 of the Penal Code, the Magistrate, with powers under section 30 of the Criminal Procedure Code, directed the complainant to pay to the accused Rs. 100 as compensation:

Held, that in respect of the offence under section 467, which was triable by a Court of Session, the Magistrate had no jurisdiction to award compensation, and that in regard to the offence under section 406 the amount of compensation could not exceed Rs. 50 under section 250, Criminal Procedure Code.

Case reported by the Sessions Judge, Sahapur at Sargodha, with his No. 1219G of 12th August 1918.

Mr. *Ram Chand*, for the Petitioner.

GROUNDS.—The applicant Shankar Sahai lodged a complaint against Gian Chand under sections 406 and 467, Indian Penal Code, and the District Magistrate, having in view the fact that section 467 was triable by the Court of Session, made it over to Khan Sadullah Khan, a section 30 Magistrate. The said Magistrate held an enquiry into the case and discharged Gian Chand, holding that the charge brought by Shankar Sahai was malicious and vexatious. He called upon the latter to show cause why he should not be made to pay compensation to the former. Shankar Sahai's explanation having been considered unsatisfactory, the Magistrate ordered him to pay Rs. 100 to Gian Chand. In awarding this compensation the Magistrate has acted under section 250, Criminal Procedure Code.

Shankar Sahai has put in this application for revising the Magistrate's order. He says that on the merits his complaint was *bona fide* and that legally the Magistrate's order for compensation is defective inasmuch as he, as a section 30 Magistrate, could not have recourse to section 250, Criminal Procedure Code.

The Counsel of the parties have argued the case before me. So far as the merits are concerned, I think the Magistrate was quite justified in dismissing the complaint. But I do not see that his order for compensation of Rs. 100 is at all correct. Section 250, Criminal Procedure Code, does not provide for compensation exceeding Rs. 50. For lodging a complaint under section 467, Indian Penal Code, which is triable by a Court of Session, the Magistrate could award no compensation whatever, *vide*

GANGA CHETTY *v.* EMPEROR.

Crown v. *Hamir Chand* (1) and *Crown* v. *Qadu* (2). He was, of course, justified to take an action under section 250, Criminal Procedure Code, so far as section 406, Indian Penal Code, noted in the complaint was concerned, but in that case too the amount awarded should not have exceeded Rs. 50. This is no doubt an illegality which should be set right. Under the provisions of section 438, Criminal Procedure Code, the matter is reported to the Hon'ble Judges for such orders as they may deem fit.

The records of the case are submitted herewith.

ORDER.—Agreeing with the reference of the Sessions Judge I alter the compensation payable to the sum of Rs. 50 only.

Petition accepted.

(1) 14 P. R. 1902 Cr.
(2) 26 P. R. 1902 Cr; 139 P. L. R. 1902.

LOWER BURMA CHIEF COURT.
CRIMINAL APPEAL No. 641 OF 1918.
November 23, 1918.
Present:—Mr. Justice Pratt.
GANGA CHETTY—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *ss.* 350, 528—*Transfer of case—Case, whether should be heard* de novo.

Section 350 of the Criminal Procedure Code is not limited to cases in which Magistrates succeed one another in Court, but applies also to cases transferred from the file of one Magistrate's Court to that of another under section 528 of the Code.

In cases transferred under section 528 of the Criminal Procedure Code, it is desirable that the Magistrate who succeeds the Magistrate originally trying or enquiring into the case should commence the hearing *de novo*.

Mr. *Shaw*, Assistant Government Advocate, for the Crown.

JUDGMENT.—On the evidence the convictions were fully justified and the sentences were appropriate. The case was withdrawn from the file of the Sub-Divisional Magistrate by the District Magistrate and taken on his own file. The Magistrate, after giving the accused an opportunity of having the evidence recorded *de novo*, proceeded with the trial from the point at which the Sub-Divisinal Magistrate, had left off. Under section 528 of the Criminal Procedure Code the District Magistrate may withdraw any case from any Magistrate subordinate to him and enquire into or try it himself. The wording of the section may at first sight seem to imply that the District Magistrate should try the whole case *de novo*, when he withdraws it from a Subordinate Magistrate and transfers it to his own file.

Section 350, however, lays down that, when any Magistrate, after having heard and recorded the whole or any part of the evidence in an enquiry or trial, ceases to exercise jurisdiction, therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or may re-summon the witnesses and re-commence the enquiry or trial, but provides that the accused may claim to have the witnesses re-summoned and re-heard.

The question is whether, when the District Magistrate withdraws a case from a Subordinate Magistrate to his own file, he succeeds the Subordinate Magistrate within the meaning of section 350.

A Bench of the Calcutta High Court, after considering the authorities, came to the conclusion in *Mohesh Chandra Saha* v. *Emperor* (1) that section 350 of the Criminal Procedure Code is not limited to cases in which Magistrates succeed each other in Court, but applies also to cases transferred from the file of one Magistrate to that of another under section 528 of the Code. A similar view has been taken by the Allahabad High Court recently in *Emperor* v. *Nanhua* (2), and I see no reason to differ from it.

In the present case there is no reason to suppose the accused were prejudiced by the procedure adopted and I do not consider there is any ground for ordering a retrial, nor has the procedure been made a ground for appeal.

I would, however, point out that in cases transferred under section 528 it is usually desirable that the Magistrate who succeeds the Magistrate originally trying or enquiring into the case should commence the hearing *de novo*. The appeal is dismissed.

Appeal dismissed.

(1) 35 C. 457; 12 C. W. N. 416; 7 C. L. J. 488; 7 Cr. L. J. 220.
(2) 23 Ind. Cas. 722; 36 A. 315; 12 A. L. J. 467; 15 Cr. L. J. 354.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

July 26, 1918.

Present:—Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

KAIKHUSHRU BEZONJI NANABHOY CAPADIA—PLAINTIFF—APPELLANT

versus

SHIRNIBAI BEZONJI CAPADIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Will, construction of—Devise to widow for life, and on her death to A and on the latter's death to B if then living—Death of A during lifetime of widow, effect of.

A Parsi devised a certain house to his wife during the term of her natural life, and on her death to trustees in trust for his son *J.* for life and in the event of his death in trust for his widow and issue, and in default of such issue and subject to any appointment in favour of the widow, in trust for his son *K.* if then living. *J.* died without leaving widow or issue during the lifetime of the testator's widow:

Held, that *K.* became absolutely entitled to the house subject to the life-interest of the testator's widow. [p. 484, col. 2.]

Appeal from a judgment and decree of the Bombay High Court (Sir Basil Scott, C. J., and Heaton, J.), dated the 31st July 1916, affirming a judgment of the same High Court in its original jurisdiction.

Messrs. *P. O. Lawrence*, *K. C.*, and *Kenworthy Brown*, for the Appellant.

Mr. *E. B. Raikes*, for the Respondents.

JUDGMENT.

LORD PHILLIMORE.—The suit to which this appeal relates was brought in order to settle certain questions of construction arising on the Will of a wealthy Parsi inhabitant of Bombay, Bezonji Nanabhoy Capadia, who died on April 3, 1906, leaving his wife, two sons, and several daughters surviving him. The Will is dated April 10, 1905. It is long and elaborately drawn, and contains thirty-three paragraphs.

The testator appoints executors and trustees. He makes certain specific gifts. He directs his executors, "in the event of" the death of his wife, which must mean "on" the death of his wife [see *Penny* v. *Commissioner for Railways* (1)], to expend a certain sum of money in providing the expenses of her funeral and the customary rites and ceremonies. He makes certain provisions for a daughter on the occasion of her marriage, and he leaves annuities to be paid to the wife, the daughters, and certain other relatives during the wife's life, and he directs that the residuary income should be divided and paid during his wife's life to his two sons, with certain provisions in the event of either son's death for the latter's widow and issue. Then come gifts which are of special importance to the present purpose. He devises to his wife during the term of her natural life the house in which he was living called Capadia House, and he directs his executors during the lifetime of his wife to let another house of his, called Rutton Villa, the rent of Rutton Villa being to count as part of the residuary income.

Clauses 19, 20, 21 and 25 are those the construction of which is to be determined in this suit.

"19. I futher direct that after the decease of my said wife Shereenbai or in case she shall predecease me then forthwith after my death my executors shall stand seised and possessed of the Capadia House and the furniture therein and Rutton Villa and all my residuary property upon the several trusts in that behalf hereinafter declared that is to say:—

20. My trustees shall stand seised of the Capadia House upon trust for my said son Jehangir for life and in the event of his death upon trust for his widow and issue in such shares and proportions as the said Jehangir may by his Will direct provided that it shall not be lawful for the said Jehangir to appoint more than one-fourth part of the said premises to his widow and subject thereto and in default of any such appointment upon trust for the issue of the said Jehangir, such issue to take *per stirpes* and not *per capita* and if more than one in the same class equally between them and in default of any such issue and subject to any appointment for his widow as aforesaid upon trust for his brother the said Kaikhushru if then living and failing him upon trust for the right heirs of me the said Bezonji Nanabhoy Capadia as if I the said Bezonji Nanabhoy had died possessed thereof intestate in equal shares and proportions but the issue of any heir shall take *per stirpes* and not *per capita* and if more than one in the same

(1) (1900) A. C. 628 at p. 634; 69 L. J. P. C. 113; 83 L. T. 182.

class equally between them and excluding from such heirs and such division the widowers of my said daughters and the widows of my said sons."

Clause 21 has similar limitations with regard to Rutton Villa, the two brothers being put in inverse order.

"25. My trustees shall divide the rest residue and remainder of my property equally between my said sons Jehangir and Kaikhushru but the property or the proceeds thereof shall be held by my executors for the benefit of the said Jehangir and Kaikhushru respectively upon the trusts which are hereinbefore declared of and concerning Capadia House and Rutton Villa respectively as fully and effectually as if the share of the said residue given to my son Jehangir were part and parcel of Capadia House and the share of the said residue given to my son Kaikhushru were part and parcel of Rutton Villa"

The son Jehangir is now dead without leaving widow or issue; but the widow of the testator is still living. The other son, Kaikhushru, now claims that he has fulfilled the condition imposed in clause 20, inasmuch as at the death of his brother he was "then living", but those interested in the subsequent limitation as the right heirs of the testator in the language of clause 21 contend that Kaikhushru will not fulfil the condition in clause 21 unless he survives his mother as well as his brother.

In these circumstances, Kaikhushru, who is the present appellant, brought a suit on January 11, 1916, to have the construction of the Will determined in respect of this and some other matters not now to be considered, making the trustees and executors, his mother, his sister, and certain other parties defendants, and having filed his plaint took out a summons for the determination of certain questions, *inter alia*: "1. Whether in the events that have happened the plaintiff is not absolutely entitled to the property known as Capadia House subject to the life-interest of the 1st defendant therein and who is now entitled and for what interest therein to the said house. 2. Whether in the events that have happened the plaintiff is not entitled to the balance of the rents of Rutton Villa and the income of the residuary estate of the said testator subject to the annuities directed to be paid by clauses 16, 17, and 18 of the said Will during the lifetime of the first defendant. 3. Whether the plaintiff has not a vested interest in one-half of the residuary estate of the said testator and is not entitled to possession thereof on the death of the 1st defendant and whether the other half of the residuary estate is not subject to the same trusts as are created in respect of Rutton Villa. 4. What are the rights and interests of the plaintiff in Rutton Villa and in the residuary estate of the said testator during the lifetime of the 1st defendant and on her death?"

Macleod, J., being of opinion "that the proper time to construe the Will with regard to the trusts which are to come into operation on the death" of the widow would arrive when the widow dies, declined to answer any of the questions propounded, but gave to the plaintiff and to the defendants Nos. 2 to 8 and 9 and 10 (there is apparently an error in the print of the record describing these last as 10 and 11) their several costs out of the estate as between attorney and client.

It appears to their Lordships that it was an error on the part of Macleod, J., to consider the questions as premature and to refuse to answer them. If the construction for which the plaintiff contended was correct, he would have a vested remainder with which he could deal, and he was, therefore, entitled to the decision of the Court.

From the order of Macleod, J., an appeal was taken to the Appellate Division of the High Court at Bombay, and this Court entered upon the question of construction; but taking a view unfavourable to the plaintiff, and holding that he had no vested interest, concurred in the decision of Macleod, J., and dismissed the appeal, giving to the defendants Nos. 2 to 8 their costs out of the estate as between attorney and client, and ordering the plaintiff to pay the costs of defendants Nos. 9 and 10 as between party and party. It is from this judgment that the present appeal is brought.

The Chief Justice and Heaton, J., who formed the Court, were of opinion that this case did not fall within the rule "that where there is a gift after prior interests to persons then living, the word 'then' refers most naturally to the last ante-

cedent"; but within another class of cases, such as *Harvey* v. *Harvey* (2) and *Gill* v. *Barrett* (3), in which it was held that if the object of the testator is not to limit successive interests but to provide for personal enjoyment by the legatees by substituting for persons dying before the period of enjoyment a class of persons then living, the word "then" refers most naturally to the period of enjoyment.

If the fact that the prior gift to the wife for her life is direct and the subsequent gifts indirect through the medium of trustees be laid aside, the Will falls directly within the rule of *Archer* v. *Jegon* (4). In that case the testator gave a sum of stock interest for his sister for life, after her decease for her husband for life, and after his decease for the children of his sister "who should then be living." There were five children. The husband died first, then one of the children, then the wife; and it was held that the deceased child took a vested interest in one-fifth of the fund, because the word "then" necessarily referred to the last antecedent, the husband's decease, and the child was living at that time.

In *Milne, In re* (5) the Court of Appeal followed and approved of *Archer* v. *Jegon* (4), holding that the word "then" in the Will under discussion referred to the last antecedent. This was a very strong decision, because this construction created an intestacy. In the course of his judgment Lindley, L. J., referred to the statement of the rule in Jarman on Wills, where the result of the cases, *Archer* v. *Jegon* (4) and others is collected and summed up with approval. Counsel for the respondents relied upon the two cases quoted by the High Court, and also upon *Hoghton* v. *Whitgreave* (6) and *Wordsworth* v. *Wood* (7). Neither of these latter cases has any bearing upon the present one. In *Hoghton* v. *Whitgreave* (6), the point to be decided was, who took under a bequest to survivors upon the death of the one tenant for life. In *Wordsworth* v. *Wood* (7) there might have been a question as to whether survivorship related to the death of the testator or to the death of the tenant for life. But the Lord Chancellor held that it was not a case of substitution of a child's issue for the child, but of modification of the gift to the child, and that the child had to survive the tenant for life in order to take.

In *Harvey* v. *Harvey* (2) there was a bequest of a life interest to a daughter, and the capital was then to go to the daughter's son; but in case he should die in the lifetime of his mother the money was to be divided among his children then living, who were to take vested interests on attaining twenty-one or, in the case of a female, marriage. It was held that the period when the class was to be ascertained was the death of the daughter. This was apparently on the ground that the division could not take place till her death. No cases appear to have been cited, and the decision turned upon the particular language of the Will. In *Gill* v. *Barrett* (3), *Harvey* v. *Harvey* (2) and *Archer* v. *Jegon* (4) were cited, and the Master of the Rolls expressly gave his assent to *Archer* v. *Jegon* (4) and to the rule that "then" refers to the last antecedent. But in this case he held, as has been held in *Harvey* v. *Harvey* (2), that the time of division was the time to be looked to, and that the word "then" referred to that time. Neither of these cases is like the present one.

Counsel for the respondents submitted that, even supposing that the rule in *Archer* v. *Jegon* (4) would otherwise have applied, the particular language of this Will would take the dispositions out of the rule, because the gift to the wife of Capadia House for her life was direct, whereas the subsequent limitations were to trustees for the benefit of the subsequent beneficiaries.

In their Lordships' opinion this argument rather tends in the contrary direction. The limitations which begin with clause 19 are all after the death of the wife, and the interests which they give are necessarily in remainder after her death. If they or any of them were to be conditional on survivorship of her and not in remainder to her, this ought to have been expressed at the outset of the clause, and it would be awkward, to say the least, to

(2) (1839) 3 Jur. 919.
(3) (1860) 29 Beav. 372; 54 E. R. 671; 131 R. R. 622.
(4) (1837) 8 Sim. 446; 6 L. J. Ch. 340; 1 Jur. 792; 59 E. R. 177; 42 R. R. 218.
(5) (1888) 57 L. T. 828.
(6) (1819) 1 Jac. & W. 146; 37 E. R. 331; 20 R. R. 259.
(7) (1839) 4 My. & Cr. 641; 1 H. L. Cas. 129; 11 Jur. 593; 9 L. J. Ch. 29; 2 Beav. 25; 41 E. R. 246; 48 R. R. 191.

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express it in the middle of the limitations. The limitations to the beneficiaries in clause 20 and following may be treated as being all bracketed under the trust, being limitations ensuing upon the death of the tenant for life. They may be conditional *inter se*. They are, however, not so expressed as to be conditional upon survivorship, but as subsequent to the life-estate. If it had been intended to make the plaintiff's estate in remainder conditional upon surviving his mother instead of its being conditional upon surviving his brother, the words would have had to occur in a different collocation. If it had been intended to make it conditional upon survivorship of both, additional words would have been necessary.

Upon the whole, their Lordships are of opinion that the point is settled by authority, and that the construction of clause 20 for which the plaintiff contends is the right one; and the same construction must be applied to clause 25, which directs that half of the residue should be held upon "the trusts declared of and concerning Capadia House."

A question was asked upon Rutton Villa and the other half of the residue; but it is not apparent why it was asked, as there is no difficulty or uncertainty upon these points in the Will. It will be sufficient to make a general declaration which will give the answer to the material questions.

In the Court of first instance costs were given to the plaintiff and to defendants Nos. 2 to 8 and 9 and 10, as between attorney and client, out of the estate, and this was correct. In the Court of Appeal costs were given to defendants Nos. 2 to 8, as between attorney and client, out of the estate; this also was correct. The plaintiff was, however, ordered to pay the costs of the ninth and tenth defendants. This order can no longer stand. Their Lordships think that, this being a case of construction, and apparently one of some difficulty, and having given rise to difference of judicial opinion, it would be proper that the party and party costs of the plaintiff and the ninth and tenth defendants, who are the respondents on this appeal, should come out of the estate.

Their Lordships will, therefore, humbly recommend His Majesty that the judgment of the High Court should be reversed, except in so far as it confirmed that part of the judgment of Macleod, J., which dealt with the costs of the suit, and except in so far as it awarded to the defendants Nos. 2 to 8 their costs out of the estate, as between attorney and client, and that it be declared that in the events which have happened, the plaintiff is absolutely entitled to the property known as Capadia House and to one half of the testator's residue bequeathed upon the trusts declared of and concerning Capadia House, subject to the life interest of the 1st defendant, and that it be ordered that the plaintiff appellant and the ninth and tenth defendants and respondents should have their costs, as between party and party, in the High Court and of this appeal out of the testator's estate.

Decree reversed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Lattey & Hart.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1429 OF 1917.

January 23, 1919.

Present:—Mr. Justice Scott-Smith.

PARMAN—DEFENDANT—APPELLANT

versus

GHANTHU—PLAINTIFF—RESPONDENT.

Punjab Tenancy Act (XVI of 1887), s. 8—Occupancy rights, acquisition of—Agreement not to eject, proof of—Long occupation—Presumption—Basiku opahus, *position of.*

One of the cases in which occupancy rights may be decreed under section 8 of the Punjab Tenancy Act is where there has been a promise by the landlord never to eject the tenant. A promise of this character need not necessarily be explicit. It may be implied, and may be established by evidence of the intention of the parties as shown by their actions. [p. 485, col. 2.]

A promise not to eject, however, does not mean a promise not to eject under all circumstances whatsoever, but a promise not to eject *'ta qasur'* that is, till commission of a fault against the tenure. [p. 485, col. 2.]

Where certain tenants and their predecessors had occupied certain land as *basiku opahus* for 100 years and for three full generations and had built houses on the land occupied by them:

Held, that under all the circumstances it must be inferred that there was an implied promise on behalf of the owners of the land not to eject the tenants *ta qasur*. [p. 486, col. 1.]

Second appeal from the decree of the Additional Judge, Kangra at Dharmsala, dated the 10th February 1917.

PARMAN v. GHANTHU.

Bakhshi *Tek Chand*, for the Appellant.

Mr. *Fakir Chand*, for the Respondent.

JUDGMENT.—The facts of the case out of which the present appeal arises are given in the previous order of this Court dated the 8th of April 1918*. The question whether a Civil Court has jurisdiction to try this suit has now been decided in the affirmative by the order of the Division Bench in Civil Miscellaneous No. 241 of 1918 decided on the 3rd of August 1918 [*Parman* v. *Lhassu* (1)]. The only question remaining for decision is whether the plaintiffs respondents in this and in the connected appeal, No 1428 of 1917, had a right of occupancy under section 8 of the Punjab Tenancy Act. The parties belong to the Kangra District and the plaintiffs are what are called *basiku opahus* or tenants who have been induced to settle down on the land and build themselves a *basi* or homestead on or near it for the purpose. The full description of this class of tenure is given in paragraphs 54 *et seq.* of Lyall's Settlement Report of the Kangra District, 1865-72. Mr. Lyall says in paragraph 54: "There is no deed or express verbal agreement, but the implied contract is that the tenant shall hold so long as he farms well and pays his rent; or, in other words, *ta qasur*, that is, till commission of fault against his tenure." Mr. Lyall after fully discussing the tenure gave it as his opinion that these tenants were not tenant with a right of occupancy in the land held by them. The matter was, however, fully considered by Sir Michael Fenton, Financial Commissioner, in the Revenue Revision No. 204 of 1911-12, *Chowdhri* v. *Jassa*, which is printed as an appendix to P. R. No. 5 of 1918 (Rev.).† The following extracts may be taken from this judgment:

"A very full account of the *basiku opahu* tenure is given in Mr. (Sir James) Lyall's Settlement Report (paragraphs 54—56). From it I gather that the following are distinctive incidents of the tenure:—

(*a*) The tenant was induced to settle down on the holding by the landlord;

(*b*) He was required to live on or near the land, building the farm houses thereon. In this respect he differed from the *opahu* who lived in the village and was not a *basiku*;

(*c*) Though there was no deed or express verbal agreement there was an implied contract that the tenant should hold so long as he farmed well and paid the rent, 'or in other words *ta qasur*, that is, till commission of a fault against his tenure.' Now it is difficult to undertsand why there should be any hesitation in holding that tenants of the above class are entitled to any occupancy status. The vague and undefined liability to eviction for a fault against tenure is nothing more than the liability which has since been brought under statutory definition and regulation in sections 38 and 39 of the Punjab Tenancy Act, 1887. That this liability was not in 1865 regarded as inconsistent with an occupancy status is, I think, sufficiently attested by the fact that at a meeting of Hamirpur proprietors convoked by Mr. Lyall in that year the response to the inquiry, whether by the custom of the country 'any class of tenants was entitled to the status of hereditary cultivator, was that *basiku opahus* were so entitled."

In conclusion Sir Michael Fenton held that a *basiku opahu* tenant was entitled to be regarded as occupancy tenant under section 8 of the Tenancy Act, 1887. I agree fully with his reasoning. In *Kirpa* v. *Tirhu* (2) the Financial Commissioner draws attention to *Khairati* v. *Maunu Khan* (3), wherein Sir Lewis Tupper, after a full examination of previous published authorities, instanced four classes of cases in which a claim to an occupancy right under section 8 may properly be decreed. One of the four classes consisted of the cases in which there had been a promise never to eject. A promise of this character need not necessarily be explicit. It may be implied, and may be established by evidence of the intentions of the parties as shown by their actions. And a promise not to eject does not mean a promise not to eject under all circumstances whatsoever, but a promise not to eject "*ta qasur*," using that expression as it has been defined in

(1) 51 Ind Cas. 413; 49 P. R. 1919.

(2) 46 Ind. Cas. 571; 5 P. R. 1918 Rev.; 4 P. W. R. 1918 (Rev.).

(3) 6 P. R. 1909 Rev.

*See *Parman* v. *Ghanthu*, 46 Ind. Cas. 811.—*Ed.*

†See *Kirpa* v. *Tirhu*, 46 Ind. Cas. 571; 5 P. R. 1918 Rev.; 4 P. W. R. 1918 Rev.—*Ed.*

Sir Michael Fenton's judgment. Now in the cases before me it is admitted that the tenants and their predecessors have occupied the land as *basiku opahus* for 100 years and for three full generations, the present occupants apparently belonging to the fourth generation. They have built houses on the land occupied by them and under all the circumstances I think it must certainly be inferred that there was an implied promise on behalf of the owners of the land not to eject them *ta qasur*. It is urged on behalf of the respondents that the facts in *Kirpa* v. *Tirha* (2) were different from those in the present cases, the distinguishing feature being that in that case the tenant cultivated on very favourable terms as regards rent, whereas in the present case the tenants pay half the produce as rent. I do not, however, see that this makes any difference. The main point in favour of the tenants is that there was an implied promise on behalf of the landlords not to eject them. I consider that it would be extremely inequitable that such tenants after having been allowed to occupy the land for 100 years should now, when the land has become more valuable, be turned out by the landlords.

I consider that the decision of the lower Courts is in accordance with law and I dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 586 OF 1918.

May 27, 1918.

Present :—Mr. Justice Greaves.

RUSTOMJEE DHUNJIBHAI SETHNA — PLAINTIFF

versus

FREDERIC GAEBELE AND ANOTHER— DEFENDANTS.

Receiver, suit by or against, without leave of Court —Leave subsequently obtained, whether can validate proceedings—Civil Procedure Code (Act V of 1908), O. XL, r. 1.

If an action is commenced by or against a Receiver without any leave obtained from the Court, the defect can be cured by subsequent leave obtained from the Court to continue the action, and if a proper case is made out the Court will, if so satisfied, subsequently allow the suit to continue and will not dismiss it. [p. 488, col. 2.]

Where a Receiver commenced an action without first having obtained leave from the Court appointing him and subsequently took permission to continue the action:

Held, that as it was open to the Court at any time to validate the proceedings in the suit by subsequent leave, the original defect was cured by the leave which the Receiver subsequently obtained from the Court. [p. 489, col. 1.]

Mr. *Jackson* (with him Mr. *B. L. Mitter*), for the Plaintiff.

Mr. *Langford James*, for the Defendants.

JUDGMENT.—On the 9th May last, I granted a Rule at the instance of the plaintiff, who is the Official Receiver of the Bombay High Court, calling on the defendants to show cause why the plaintiff should not take possession of a schooner called the "Rabia Khatoon" at present lying in the Hooghly within the jurisdiction of this Court and why the defendant Krishna Shelly Bonnerjee, the Official Receiver of this Court, should not give up possession of the said vessel. The defendants now appear to show cause against this Rule.

On the 17th April 1918 a firm of Benoderam Balchand commenced a suit on the Original Side of the High Court of Bombay against J. A. Grant and Co., asking (*inter alia*) for a declaration that two sums of Rs. 1,71,644·10·6 and Rs. 1,36,763 4·9 were due to them from the defendants, for payment to them of these sums and interest thereon at 9 per cent. per annum from the date of the suit until payment, and for a declaration that the repayment of these sums was validly charged on the "Rabia Khatoon." They also asked for the appointment of a Receiver.

They claim a charge on the said vessel by virtue of a document of charge dated the 21st February 1918 executed in their favour by J. A. Grant and Co.

On the 30th April 1918 the plaintiff before me was appointed in the Bombay suit Receiver to take charge of the sailing ship "Rabia Khatoon" and otherwise to recover the freight and other profits to be earned by the employment of the "Rabia Khatoon"; the order directs the Receiver to pass his accounts but does not directly authorise him to sue. It appears that the attorneys of Messrs. Benoderam Balchand

telegraphed to the Captain of the "Rabia Khatoon" at Spence's Hotel, Calcutta, on the 1st May informing him of the appointment of Mr. Sethna as Receiver in the Bombay suit.

It appears from the affidavit of one Ali Muhammad Rajabali Lakhdhir, filed in this suit on the 9th May, that he came to Calcutta under Mr. Sethna's order on the 4th May and took formal charge of the vessel on that day.

Upon the 3rd May in Suit No. 519 of 1918 instituted in this Court on the 28th of April, by one Frederic Gaebele, who is described as ordinarily residing in Pondicherry but then residing at Spence's Hotel, Calcutta, carrying on business at Pondicherry, under the style of Frederic Gaebele and Co., against J. A. Grant and Co. carrying on business in Bombay. I, at the instance of the plaintiff in Suit No. 519 of 1918, appointed the Official Receiver of this Court *interim* Receiver of the "Rabia Khatoon," and on the 10th May the appointment was continued until the hearing of that suit.

Counsel for the plaintiff in the suit now before me desired to raise the question of my jurisdiction to make the order and as to whether the defendants J. A. Grant and Co. had been served with the Rule upon which the Receiver was appointed, but I declined to go into those questions in this suit. The plaintiff in Suit No. 519 of 1918 claims from the defendants a sum of Rs. 50,000 and interest and claims to be entitled to a charge in respect thereof on the "Rabia Khatoon," by virtue of a clause in a charter party dated the 6th March 1918 and entered into in Bombay between the plaintiff and the defendants in respect of the "Rabia Khatoon." The charter party provides that the chaterers (that is the plaintiff in Suit No. 519 of 1918) are to have a lien on the vessel for all moneys paid in advance. The charter party was put an end to by mutual consent, but the plaintiff claims to have advanced to the defendants Rs. 10,000 upon the execution thereof and to have a lien on the vessel for this sum by virtue of the provision in the charter party to which I have referred. He applied for a Receiver as the owners were trying to sell the vessel.

It appears that in pursuance of my order of the 3rd May made in Suit No. 519 of 1918 a representative of the Official Receiver went on board the "Rabia Khatoon" on the 3rd May and informed the captain that he had taken charge of the vessel. The captain states that he informed him prior to this of the order of the Bombay High Court which had been intimated to him by telegram. Under these circumstances Mr. Sethna applied to this Court for leave to proceed against the Receiver of the "Rabia Khatoon" appointed by this Court, and leave being given he obtained this Rule.

The Rule should have come on for hearing on the 10th May, but it was not reached on that day and Monday the 13th May was fixed for the hearing. A preliminary objection was taken on that day on behalf of the defendant Gaebele that Mr. Sethna had not obtained leave from the Court appointing him before instituting this suit and it was urged that this was a fatal defect which could not be cured by any leave subsequently obtained from the Bombay Court. No copy of the order appointing Mr. Sethna being available, I directed the Rule to stand over until the 17th May for production of (*a*) the order appointing Mr. Sethna, (*b*) any order subsequently obtained prior to the institution of the suit. On the 17th May the Rule again stood over as the orders had not been received from Bombay, and on the 20th May I heard the Rule. On that day the order appointing Mr. Sethna, to the contents of which I have already referred, was produced, and also an order obtained by Mr. Sethna in the Bombay Suit No 549 of 1918, dated the 15th May 1918, authorising him to continue the present suit.

Two questions accordingly arise on the present Rule, namely:—

(1) Whether Mr. Sethna, having commenced this suit without the leave of the Bombay Court which appointed him, can continue the suit and these proceedings by virtue of the leave obtained by him to continue the proceedings by the order of the 15th May or whether I should decline to entertain the application and should ultimately dismiss the suit.

(2) Whether, under the circumstances, if I decide that Mr Sethna can continue the

proceedings, I should allow him to take possession of the "Rabia Khatoon."

So far as the first question is concerned, I am asked to say by Counsel for the defendant Gaebele that the matter is concluded by authority, namely, by the decision of Mr. Justice Bodilly in *Pramatha Nath Gangooly* v. *Khetra Nath Banerjee* (1), where, in a suit brought against a Receiver, he decided that the consent of the Court to sue a Receiver is a condition precedent to the right to sue and cannot be rectified by a subsequent application for permission to continue the action if it has been instituted without permission. That, of course, is a converse case to the present; but it is said that the same principle applies here.

In *Miller* v. *Ram Ranjan Chakravarti* (2) a decree passed against a Receiver was set aside on appeal, no leave having been obtained to sue him, the Court holding that he could not be sued without the leave of the Court. In *Dunne* v. *Kumar Chandra Kisore* (3) the decision in *Miller* v. *Ram Ranjan Chakravarti* (2) is cited with approval, and it is stated that a Receiver can neither sue nor be sued without the leave of the Court.

In three cases decided on the Appellate Side of this Court, to all of which decisions Mr. Justice Mookerjee was a party, the Court has refused to follow the decision of Mr. Justice Bodilly in *Pramatha Nath Gangooly* v. *Khetra Nath Banerjee* (1). In *Banku Behary Dey* v. *Harendra Nath Mukherjee* (4) the Appellate Court stated that the lower Court, instead of dismissing the suit against the Receiver, should have stayed the proceedings to allow leave to be obtained to sue the Receiver. In *Sarat Chandra* v. *Apurba Krishna Roy* (5) the Appellate Court held that after execution proceedings had been commenced leave could be subsequently obtained to execute against a Receiver. The third case of *Maharaja of Burdwan* v. *Apurba Krishna Roy* (6) is to the same effect.

(1) 32 C. 270; 9 C. W. N. 247.
(2) 10 C. 1014; 5 Ind. Dec. (N. S.) 677.
(3) 30 C. 593; 7 C. W. N. 390.
(4) 8 Ind. Cas. 1; 15 C. W. N. 54.
(5) 11 Ind. Cas. 187; 15 C. W. N. 925; 14 C. L. J. 55.
(6) 10 Ind. Cas. 527; 15 C. W. N. 872; 14 C. L J. 50.

In this state of the authorities I do not think I should be bound by the decision of Mr. Justice Bodilly if I do not agree with it, assuming that it covers the point which I have to decide, and I think I am free to express my own view. This being so, I must say respectfully that I do not think that that decision is correct and I agree with the views expressed in the three cases reported in 15 Calcutta Weekly Notes, namely, that it is open to the Court at any time, even if leave has not first been obtained, to subsequently give leave to sue the Receiver. There is no doubt that the Court will always jealously protect its officer in pursuance of its duties and punish any interference with him by staying proceedings commenced against him without leave and by other appropriate penalties; but I think that even so, a Court, if a proper case is made out to its satisfaction, will subsequently allow the suit to continue and will not dismiss it.

I think, so far as I can ascertain, that this is in accordance with the English authorities, see *Aston* v. *Heron* (7) and *Gowar* v. *Bennett* (8), which I quote as an authority from the statements of the case made in Kerr on Receivers, 5th Edition, page 181, page 204 of the 6th Edition, and Halsbury's Laws of England, Volume XXIV, page 382, as I have not been able myself to see the case.

So far as the present case is concerned, I have found no authority in point where the action has been commenced by a Receiver without first having obtained leave from the Court appointing him. Of course the powers of a Receiver are derived from the Court which appoints him, and there certainly seems considerable force in the argument addressed to me that if when he commences the suit he is not empowered to do so by the appointing Court, it is beyond his powers and the defect cannot be cured by leave subsequently obtained; but on the whole I have come to the conclusion that it is open to the appointing Court under these circumstances to consider subsequently whether the suit is for the benefit of the

(7) (1834) 2 My. & K. 390 at pp. 393, 397; 39 E. R. 993; 3 L. J. Ch. 194.
(8) (1847) 9 L. T. (o. s.) 310.

estate, and if it is so satisfied, to validate the proceedings by subsequent leave. The result is that I think the original defect has been cured by the leave which Mr. Sethna obtained from the Bombay Court on the 15th May. On the 13th May the suit was incompetent, and if I had dealt with the present application on that day I should have stayed all proceedings in the suit, but I should not have dismissed the suit. The first point, therefore, made against this application fails.

So far as the second point is concerned, there is no doubt that Mr. Sethna's appointment was prior in date and he acted with due diligence in endeavouring to take possession of the "Rabia Khatoon"—the Bombay suit in which he was appointed is also prior in date to the suit in this Court in which the Official Receiver of this Court was appointed Receiver. It is manifestly undesirable that two Receivers should remain in possession; at the same time I think it is right that the defendant Gaebele's interest should be protected, and the order I propose to make is, that if Mr. Sethna will undertake not to part with the vessel or the sale-proceeds, if he sells it, for one month from to day, the Official Receiver of this Court is to withdraw from possession. This will enable the defendant Gaebele to apply to be added as a party in the Bombay suit and get such order as he may be advised in that suit to protect his interests, or to apply to have Mr. Sethna appointed as Receiver in Suit No. 519 of 1918 of this Court. I think, however, that the Bombay Court is the proper tribunal to deal with the questions which arise between the parties.

Order accordingly.

MADRAS HIGH COURT.

CIVIL APPEAL No. 64 OF 1917.

March 20, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Aiyar.

MUNNAVARU BEGAM SAHIBU—PLAINTIFF No. 3—APPELLANT

versus

MIR MAHAPALLI SAHIB AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Woman, competency of, to officiate as head mujavar of an astana—Right of females to hold religious offices, doctrine of, limitations of.

Under Muhammadan Law it is not incompetent for a woman to be a head *mujavar* of an *astana*. [p. 493, col. 2; p .494, col. 2.]

Per *Abdur Rahim, J.*—Excepting for local usages and customs to the contrary, there is no general provision of Muhammadan Law against a woman specializing in any form of religious teaching and propagating any doctrines of Muhammadan religion, either of orthodox Muhammadan religion or of Sufiism. The disability of women to hold a religious office arises from certain local usages and customs and not by any absolute injunction of Muhammadan Law. [p. 492, col. 1.]

A religious office can be held by a woman unless there are duties of a religious nature which she cannot perform in person or by deputy, the burden of establishing which is on those who plead the exclusion, and, in the absence of anything in the rules by the founder, the usage of the institution governs the case. [p. 493, col. 1.]

Per *Seshagiri Aiyar, J.*—Except in cases of grants given for the express purpose of performing religious duties which are dependent on personal or sex capacity, there is no reason why a female, whether Hindu or Muhammadan, should be disentitled to perform those duties. Wherever there are profits which are payable to an heir in the discharge of duties appertaining to a religious office, it must be taken as a general rule, subject to some exceptions, that women are competent to inherit these offices and to perform the duties appertaining to them. [p. 493, col. 2; p. 494, col. 1.]

Appeal against the decree of the Temporary Subordinate Judge, Masulipatam, in Original Suit No. 71 of 1908, dated 11th August 1916.

Mr. *T. Ramachandra Rao*, for the Appellant.

Mr. *P. Nagabushanam*, for Respondent No. 1.

JUDGMENT.

ABDUR RAHIM, J.—The appeal is by the 3rd plaintiff, daughter of the 1st plaintiff who died since the institution of the suit. The suit was to recover certain lands which are attached to what is described in the plaint as the Astana Bara Imam at Inuguduru, a suburb of Masulipatam, from the defendants who are in possession. The 3rd plaintiff's case is that she is entitled to the office of Head Mujavar of the Astana in succession to her mother, the 1st plaintiff. What is the nature of the institution is one of the important questions we have to consider in the appeal.

There was a grant made by Nizam ul-Mulk, Nizam of Hyderabad, in 1725, which

is the root of the title of the parties, and one of the questions for consideration is as to the true interpretation of that document. The grant is in Persian, and when properly translated the material portions of it are to this effect. It purports to confirm previous grants by ancient rulers made by way of Madad-Mash, or (literally translated) subsistence allowance of Mir Ali Akbar and others, sons of Mir Syed Mahomed Madani, who are to recite Darood or blessings on the Prophet and Fatiha in the name of the Imams and the Martyrs, the descendants of the Prophet. Then it goes on to say, "It is necessary that the said lands should be left in the possession of the aforesaid persons so that they should utilize the incomes thereof towards their maintenance and along with their descendants, literally, children and grand-children (*aulad* and *ahfad*), should engage themselves in offering prayers for the perpetuity of the State." If the matter stood merely upon the interpretation of this document, it might be contended that the grant was in absolute terms to the persons mentioned therein, Mir Ali Akbar and others, sons of Mir Syed Mahomed Madani, who were expected to perform certain religious ceremonies. Upon such an interpretation the grant would be of an absolute estate to the persons named in the Sanad. But the evidence clearly shows that the parties concerned have put their own interpretation upon the document and the practice and usage has been in accordance with that interpretation. That is to say, they have treated the grant as creating a public religious trust for the performance of Fatiha and certain other ceremonies during the Muharram, and though it might be possible to hold that the grant was of an absolute estate to Mir Ali Akbar and others, sons of Mir Syed Mahomed Madani, I am not prepared to say that the parties' interpretation of the Sanad as creating a Waqf is unreasonable. In any case, so far as this appeal is concerned we must proceed upon that interpretation, for it is upon it that the parties base their claim.

Both the parties are descendants of Mir Syed Mahomed Madani's sons and they are, according to the interpretation placed by themselves on the grant, entitled to allowances for maintenance, provided they keep up and perform the religious duties mentioned in the Sanad. There has been previous litigation with respect to the rights of the parties, some time in 1896, when a suit was instituted by the father of defendants Nos. 1 and 2 in the present suit against the 1st plaintiff and another lady. That suit was compromised and a decree passed in the terms of the Rajinama marked Exhibit B. By that compromise it was provided that "the 2nd defendant (that is, the mother of the appellant) should be Head Mujavar henceforward, the plaintiff should give up the remaining lands for which he had brought the suit in excess heretofore and the part produce, etc., ...business should be carried on from generation to generation (not lineally as wrongly translated in the paper book) according to the terms of this agreement." There cannot be any doubt that if this Rajinama is binding on the parties, the appellant is entitled to the office of Head Mujavar. This is what has been held by the lower Courts and is undoubtedly in accordance with the correct interpretation of Exhibit B. The lower Court, however, is of opinion that Exhibit B is in violation of, or contrary to, the provisions of the Sanad already referred to (Exhibit VI) and cannot bind the parties; and that we have, therefore, to fall back on the terms of the Sanad and in the light of the general Muhammadan Law to ascertain whether the plaintiff or the defendant is entitled to the office of Head Mujavar.

The use of the words Astana and Mujavar *prima facie* indicates as if there was a shrine or tomb of some holy person which had to be kept up by the endowment. But the evidence shows that these words are used merely to indicate a sort of place in the form of a raised platform where a "Panja" and a "Peer" (staffs which are carried about in a Muharram procession) is planted and where certain ceremonies in connexion with the Muharram are performed. There is no evidence to show that there is any tomb of any well known Sufi or Fakir where any initiation of Fakirs takes place, as may be the case in some Khankah or Astanad. If we look to the pleadings of the parties, there can be no doubt that all the religious ceremonies which are performed at the place called Astana Bara Imam are in connexion

with Muharram, and the defendants in their written statement never alleged that any Sufi or other doctrines are propagated at this place or any Fakirs are initiated into any particular order or brotherhood. It was by the words Astana or Mujavar that the Subordinate Judge who originally tried the case as well as the learned Judge against whose judgment this appeal has been preferred, were misled into thinking that there were some particular religious teachings associated with this so called Astana. Then unfortunately when the matter came up on a previous occasion before this Court, arguments were addressed on the assumption that there might possibly be certain ceremonies connected with this institution which a woman was not capable of performing. In order to ascertain if this was so, the appeal was remanded to the lower Court for enquiry into this matter. As was to be expected, some of the defendants have now put forward some sort of evidence suggesting that initiation of Fakirs actually takes place in this institution, in order to make out that the appellant is not fit to be at its head. The evidence, however, is that by "Fakirs" all that is meant is some persons, Hindus or Muhammadans, who are engaged to carry in the procession the "Panja" and the "Peer" during the ten days of the Muharram. That is to say, these so-called Fakirs are no more than persons taking part in a Muharram procession. It is not suggested, nor could it well be, that these men have to be initiated into any particular doctrines or they have to perform any ceremonies requiring particular religious status. To describe such a state of things as equivalent to initiation into a religious brotherhood is absolute misuse of words. So is the use of the words Astana and Head Mujavar in this case, for these terms properly used are connected with institutions for the up-keep of a shrine of a reputed saint or for the teaching of certain doctrines connected with Sufi-ism. The evidence amply makes out that the parties are absolutely illiterate and know nothing about any religious order or any religious teaching connected with any brotherhood of Fakirs, properly so called. The duties connected with this Astana are nothing more than the organizing and carrying out of certain processions in which the Hindus, according to the evidence, participate equally with the Muhammadan, of the locality.

Many authorities have been quoted to us in connexion with the question whether a woman can properly be a Head Mujavar of an Astana or not. None of those cases or authorities call for any serious consideration, having regard to the fact that there is no Astana in the proper sense of the word and the Mujavar's duties are only purely of a secular character so far as the evidence shows. We can take it to be the law, as laid down by the Privy Council in the case of *Shahoo Banoo* v. *Aga Mahomed Jaffer Bindaneem* (1), that if the religious duties connected with a religious office are such that a woman cannot properly discharge in person or by deputy, then she cannot be appointed to that office. The well-known cases referred to relate to the office of Sajjadanashins of certain Khankahs and also of Mujavars of certain shrines. The word 'Mujavar' literally means a sweeper or the person who cleans the place, but it is conventionally used to denote a person who is looking after a shrine or tomb of a holy person, generally called Astana. 'Astana' is a word which is often used to denote a place inspiring respect and reverence. It need not necessarily indicate a tomb or shrine, though in popular use it indicates a shrine or tomb of a holy person. The term Sajjadanashin or Gaddinashin is conventionally used to denote the person in charge of a Khankah or an institution where religious enthusiasts and Fakirs congregate and where the superior or the head of the institution has certain doctrines of Sufi-ism to teach. But there is absolutely nothing in connexion with Astana Bara Imam which has anything in common either with a Khankah or an Astana properly so called. That a woman cannot be a Sajjadanashin may, for the present case, be taken to be sound law, if the duties involve the teaching of certain doctrines to Fakirs, necessitating her coming into daily contact with them. It is not, however, the fact that a woman cannot be a Sufi or that she is not competent to teach the tenets of Sufi-ism. Sufi-ism, as a

(1) 34 [illegible]; 1 A. L. J. 30 (P. C.); 11 C. W. N. 297; [illegible]; 5 C. L. J. 134; 2 M. L. T. 40; 17 [illegible]; 4 L. B. R. 66; 34 I. A. 46.

school of Muhammadan religion is equally open to men and women. But having regard to the custom and usage of the country by which women observe seclusion, it is not ordinarily to be expected that women could satisfactorily perform the duties connected with the head of an institution like Khankah which would bring her into contact with Fakirs and other men not being her own close relations. Excepting for this local usage and custom, I am not aware of any general provision of Muhammadan Law against a woman specializing in any form of religious teaching and propagating any doctrines of the Muhammadan religion, either of orthodox Muhammadan religion or of Sufi-ism. The rule prohibiting women from being appointed to such offices is not confined to the office of Sajjanadashin but there may be other offices which she may not be able to perform, for instance, that of an Imam in a mosque where she would have to lead the congregation. At any rate in practice women are not known to have officiated as Imams in mosques any more than Christian women are known to have officiated as priests or clergy in Christain churches.

It is not necessary for us to consider in this case the extent of the application of the rule precluding the appointment of women to an office like that of Sajjadanashin and the limitations of such a rule. So far as I have been able to trace the history of the question, it had its origin in certain passages in Macnaghten's Principles and Precedents of Muhammadan Law, page 332. It is stated there:—

"Females are not competent to assume the office of superior of an endowment and such an act is at variance with the usages of the country, because it is the duty of the superior to instruct and guide his disciples, to teach his scholars, and to keep their company continually, in private and in public, and this cannot be done with propriety by a woman, whose duty it is to live retired and secluded."

I think that seems to be a perfectly reasonable proposition so long as it is understood that the prohibition or the disability arises from certain local usages and customs and not by any absolute injunction of Muhammadan religion or law. Mr. Ameer Ali in stating the law on the subject at page 443, IV Edition, Volume I, of his Muhammadan Law, states it in similar terms. He also bases it on custom and not on any rule of Muhammadan theology or canonical law, which has in fact very little to do with Sufi-ism, Khankahs and Astanas. One of the earliest decisions on the subject is to be found in *Shah Imam Bukhsh* v. *Musammat Beebee Shahee* (2). There the learned Judges of the Sadder Diwany Adawlut rely upon the passage in Macnaghten already recited as authority for the proposition in question. There are also some rulings of the Madras High Court on the point: *Hussain Beebee* v. *Hussain Sherif* (3), *Mujavar Ibrambibi* v. *Mujavar Hussain Sheriff* (4) In *Mujavar Ibrambibi* v. *Mujavar Hussain Sheriff* (4) what is laid down is that a woman is not competent to perform the duties of Mujavar of a Durga which are not of a secular nature. What the learned Judges say is that it was established by evidence that the office of Mujavar entailed the discharge of duties of a spiritual character, such as reading the Fatiha, offering prayers and incense, etc., which could not conveniently be performed by a woman, and that there was no satisfactory evidence that the office had ever been held by a woman. Apart from what the special evidence in that case was, I do not think the learned Judges meant to lay down a general proposition that any religious office which entails the performance of Fatiha and other prayers or the offering of incense could not be performed by women, for I do not think they could have meant that Fatiha, which consists in reciting certain Suras of the Koran, could not be said by women and that a woman could not say prayers according to the Muhammadan religion. Such a proposition would be incorrect, and apart from the special facts of that particular case, I cannot accept the decision as laying down any such general rule of law as contended for. In *Hussain Beebee* v. *Hussain Sherif* (3) it was held that according to Muhammadan Law a woman may manage the temporal affairs of a mosque, but not the spiritual affairs connected with it, the management of the latter requiring peculiar personal qualifications. There the institution to which the office in dispute related was called

(2) 6 Sel. Rep. 24; 7 Ind. Dec. (o. s.) 634.
(3) 4 M. H. C. R. 23.
(4) 3 M. 95; 5 Ind. Jur. 19); 1 Ind. Dec. (N. s.) 623.

Shakh Fareed Shukkurgunj Mosque. If it was a mosque in its proper and ordinary sense of the word, that is, a place where prayers are said by Muhammadans, then there are no duties connected with it which a woman could not perform, at least through a deputy. But from the evidence in this case and from what we have noticed in other cases, we know that the word 'mosque' or 'Musjid' is applied to all sorts of places, may be a mere tomb or an Imam Bara. The learned Judges in dealing with the law in *Hussain Beebee* v. *Hussain Sherif* (3) cite cases connected with the office of Guddeenishin. If that was the real nature of the institution, as probably it was from the name, it might have been a replica of the tomb or a shrine containing some relics of that well-known saint. In that case it would perhaps properly be called a Durga. The report does not give what the actual duties were in connexion with the office then in question, and if the office required any peculiar personal qualifications which might be wanting in a woman, that is to say, duties which could not be performed by her either personally or through a proxy, then undoubtedly the decision was right. The facts do not appear sufficiently fully to enable me to say what the exact scope of that decision is. On the other hand, I entirely agree with a recent decision of this Court in *Imam Bee* v. *Molla Khasim Sahib* (5), that a religious office can be held by a woman unless there are duties of a religious nature which she cannot perform in person or by deputy and the burden of establishing that a woman is precluded from holding a particular office is on those who plead the exclusion and in the absence of anything in the rules by the founder, the usage of the institution governs the case. In that case the office was that of a Mujavar in a mosque. I believe the duties attached to the office were simply those of a Muttawalli, though the word used there is Mujavar. In this Presidency the word 'Mujavar' is not seldom used in the sense of Muttawalli of an ordinary religious trust.

Here the appellant, as a member of the family of the descendants of Mir Ali Akbar and his brother, is admittedly entitled to certain allowance by way of maintenance, and she does not dispute that the defendants are also entitled to similar allowance. The dispute is solely about the office of Head Mujavar in virtue of which she claims to be entitled to possession of the property in dispute, that is, the lands of the institution concerned. As Head Mujavar she would also be entitled to an additional share of the income. The Subordinate Judge, in my opinion, was entirely wrong in holding that the compromise was in violation of the terms of the Sanad and, therefore, could not be given effect to. He has also gone wrong in thinking that the appellant is disqualified to hold the office she claims. The evidence clearly shows that this was never the consciousness of the parties, in fact the consciousness of the parties themselves was just the other way. Before the appellant her mother held the office and the written statement never raised any doubt as to the competency of the appellant to hold the office on the ground of sex, if she was not precluded from holding it, as alleged, by the terms of the Sanad. I reverse the decree of the Subordinate Judge and there will be a decree in favour of the third plaintiff giving her possession of the property in dispute. The Subordinate Judge will enquire into the mesne profits she is entitled to from the date of suit to the date when she obtains possession under the decree. The respondents will pay the third plaintiff's costs in this and the lower Court and they will also pay the Court-fee payable to Government.

SESHAGIRI AIYAR, J.—I entirely agree. In a very recent reference to the Full Bench which I made in conjunction with Napier, J., I went fully into the question of the capacity of a Hindu female to succeed to religious offices and to discharge the duties of those offices. I am glad to find that my learned brother's exposition of the Muhammadan Law is in complete accordance with my views with regard to the position of Hindu women. Except in cases of grants given for the express purpose of performing religious duties which are dependent on personal or sex capacity, I fail to see why a female, whether Hindu or Muhammadan, should be disentitled to perform those duties. In the language of the Judicial Committee in *Shahzadi Bunoo* v. *Aga*

(5) 37 Ind. Cas 889; 5 L. W. 226.

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Mahomed Jaffer Bindaneem (1), a woman holding an office of a religious trust, which by its nature involves no spiritual duties such as a woman could never properly discharge in person or by deputy, is competent to hold such an office. Or it may be, as in the case in *Mohan Lalaji* v. *Madhsudan Lala* (6), that the peculiar doctrines of a sect may preclude women married into a different sect from performing the duties of the temple or religious institution belonging to the former sect. Except in these two classes of cases, in my opinion, there is no warrant for holding that women are incompetent to inherit a religious office connected with a religious institution. It has always been held that, in the case of secular duties pertaining to a religious trust, women are competent to perform them. For example, as my learned brother has pointed out, the Muttawallishiip in a Muhammadan mosque can be held by women. So also it has been held in the *Dhuncooverbai* v. *Advocate-General* (7) that a Mohuntship can be held by a female. Wherever there are profits which are payable to an heir in the discharge of duties appertaining to a religious office, it must be taken as a general rule, subject to some exceptions, that women are competent to inherit those offices and to perform the duties pertaining to them.

In the present case, the course of devolution and the way in which the parties have been enjoying show that women have been held competent to discharge the duties pertaining to this particular Astana. As my learned brother has pointed out, the original grant confers an absolute right in the property. I am inclined to think that its dedication as a Waqf must have been by the successors of the original grantee. Anyway there can be no doubt that the duties connected with the Astana were mostly secular. As has just been pointed out, the way in which Hindus and Muhammadans have been initiated into Fakirship during the Muharram shows that there are really no religious duties to be performed by the Head Mujavar. And further, in my opinion, the parties are bound by the compromise, as the matter had been litigated in a competent Court and the parties agreed that the 1st plaintiff and her descendants are entitled from generation to generation to the Head Mujavarship. The Subordinate Judge seems to think that this compromise is not consistent with the original Sanad. I fail to see how there is any inconsistency between the Sanad and the compromise. Even if there were any inconsistencies, I am not prepared to say that the compromise is not binding upon the parties and upon those who claim under the parties to the compromise.

And lastly, I would say that the fact that in the written statement no objection is taken to the 3rd plaintiff succeeding to the Head Mujavarship on the ground of her being a female is clear evidence that in the opinion of the litigants and of their co religionists women are not incompetent to perform the duties of Head Mujavarship. For these reasons, I entirely agree with the conclusion arrived at by my learned brother.

M. C. P.

Appeal allowed.

(6) 6 Ind. Cas. 77; 32 A. 461; 7 A. L. J. 430.
(7) 1 Bom. L. R. 743.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 1955 OF 1917.
March 13, 1919.
Present:—Justice Sir Ernest Fletcher, Kt., and Mr. Justice Cuming.
ABDUL HAKIM MIA AND OTHERS—PLAINTIFFS—APPELLANTS
versus
PANA MIA MIAJI AND OTHERS—RESPONDENTS.

Landlord and tenant—Estoppel—Tenant inducted into possession, whether can deny landlord's title—Rent, payment of, to third person, effect of.

A tenant inducted into possession of land by one person cannot alter the character of his possession and make it adverse to the landlord by going over to another person and paying rent to him. [p. 495, col. 2.]

Appeal against the decree of the District Judge, Noakhali, dated the 22nd June 1917, reversing that of the Munsif, Additional Court at Lakhipur, dated the 29th April 1916.

ABDUL HAKIM *v.* PANA MIA.

FACTS appear from the judgment.

Babu *Dwarkanath Chuckerbutty* (with him Babu *Romesh Chandra Sen*), for the Appellants.—The plaintiff is the appellant. The appeal arises out of a suit for possession on declaration of title. Three persons, Rafi and two others, were owners of a *houla* to the extent of $11\frac{1}{2}$ annas which they sold to *T.*, the predecessor in title of the plaintiff, by a conveyance dated 6th January 1881. On the same date, Rafi executed a *kabuliyat* in favour of *T.* with reference to plots Nos. 1—6 in the suit. On 20th July 1884 Rafi executed another *kabuliyat* with respect to plots Nos. 7—15 of the lands sold in 1881 in favour of *T.* On the same day another lease was executed in favour of *T.* by *K.* in respect of plots Nos. 16 – 24. *K.* was one of the former co owners with Rafi. The predecessor in-interest of the plaintiff was declared to be the owner in a series of litigation. Plaintiff brought three rent suits against the tenants Rafi and *K.* In one of the suits Rafi denied my title and pleaded that the conveyance of 1881 was really a *benami* transaction and that Pana Mia, defendant No. 13, was the real owner. In all the three suits plaintiff's title was found, but the suit in respect of plots Nos. 1—6 only was decreed. The other two suits were dismissed on the ground that previous realisation of rent was not proved. Hence the present suit for recovery of possession on declaration of title is brought.

The sole question is on the point of limitation, *viz.*, whether the tenancy expired by denial of the landlord's title. Upon the facts admitted Article 139 of the Limitation Act is applicable to the case. Possession in my behalf has been proved. The defendant could not make out the allegation of *benami* The case ought to go down for the finding whether *T.* was the real owner.

Babu *Jitendra Kumar Sen Gupta*, for the Respondent.—I appear for defendant No. 13. Possession has been found with me. I am no tenant. Repudiation of tenancy to the knowledge of the plaintiff and payment of rent to a third person works forfeiture.

Babu *Dwarkanath Chuckerbutty*, in reply.—Defendant No. 13 admitted that my tenant was on the land in his written statement. As regards plots Nos. 1—6 the defendant has no answer. There is no finding that there was an unqualified denial of my title. There has been no forfeiture. See *Srinivasa Ayyar* v. *Muthusami Pillai* (1), per White, J.

JUDGMENT.

FLETCHER, J.—This appeal has been preferred by the plaintiffs against the decision of the learned District Judge of Noakhali reversing the decision of the Additional Munsif of Lakshipur. The plaintiffs brought the suit to recover possession. The point turns on this. First of all, there are various plots of land sought to be recovered. We can dispose of shortly plots Nos. 7 to 24, because the finding of fact is conclusive with regard to them. The difficulty is occasioned by endeavouring to discover what was really determined and what was the finding of fact with reference to plots Nos. 1 to 6. As to those plots, the learned Judge remarks thus: "As to the other plots," that is plots Nos. 1 to 6, "no rent was paid to them," that is, the plaintiffs, "from 1288 to 1312 and I cannot believe that they did not know that their title was denied and that rents were being paid to Pana Mia. I believe that they fully knew all this and still they took no steps for over 25 years." The case of the plaintiffs is—and I am not sure that it is really denied—that they inducted their tenants into possession of these plots Nos. 1 to 6 but that subsequently these tenants went over to Pana Mia, the defendant No. 13, and paid the rents to him which was brought to the knowledge of the plaintiffs. The learned Judge seems to have considered from these facts that the possession would be adverse as against the plaintiffs and that the plaintiffs would be out of possession from the date on which the tenants paid their rent to the defendant No. 13 and when that fact came to the knowledge of the plaintiffs. Obviously, that is not so. The lessees cannot alter the character of their possession, if in fact they were inducted into possession of the property by the plaintiffs, by saying that they are going to pay their rents to the defendant No. 13. If the plaintiffs inducted the tenants into possession, obviously the character of the possession could not be altered without their consent and the findings, as they stand, clearly are not sufficient to cover the whole case. Then

(1) 24 M. 246.

the learned Vakil, who appears for the defendant No. 13, says that there has been a forfeiture of the tenancy by reason of an absolute and unqualified denial by the tenants of the plaintiffs' title. That may be so. But that rests on, if the plaintiffs are the landlord, as to whether they are going to accept the forfeiture for the purpose of evicting the tenants or whether they are going to allow the tenants to remain on the land. I think that with regard to plots Nos. 1 to 6, the case must go back to the Court of Appeal below to have the appeal re-heard and a proper conclusion arrived at. Costs will be dealt with by the learned Judge of the lower Appellate Court. As far as I can see, there are no materials on which we can apportion the costs between plots Nos. 1 to 6 and plots Nos. 7 to 24.

CUMING, J.—I agree.

Case sent back.

PATNA HIGH COURT.
FIRST CIVIL APPEAL No. 239 OF 1917.
May 23, 1919.
Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.
KAMLA PRASAD—PLAINTIFF—APPELLANT
versus
Pandey RAM CHANDRA PRASAD NARAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 16, 74—Interest, compound—Undue influence—Penalty—Court, power of, to interfere.

The Courts in India are precluded from relieving a debtor with regard to interest, unless the case comes within the purview of section 16 or section 74 of the Contract Act. [p. 500, col. 2.]

Where a bond provides for payment of interest at a certain rate with yearly rests and does not stipulate for payment of an increased rate from the date of default in payment nor does it in any way vary the rate of interest on account of such default, section 74 of the Contract Act has no application to the case. [p. 498, col. 2.]

Appeal from a decision of the Subordinate Judge, Muzaffarpore.

Messrs. *B. C. Sinha* and *Murari Prasad*, for the Appellant.

Messrs. *L. N. Singh*, *G. C. Pal*, *Sant Prasad*, Rai *T. N. Sahay* and *L. K. Jha*, for the Respondents

JUDGMENT.

JWALA PRASAD, J.—This appeal arises out of a suit brought by the plaintiff, Kamla Prasad, for recovery of Rs. 61,452 on foot of a mortgage bond, dated the 31st August 1903, executed by one Jamuna Prasad in favour of the plaintiff's father, Pokhar Mal, who died in Jaith 1319 (1912) leaving the plaintiff as his sole surviving heir.

The bond purports to have been signed and executed by Jamuna Prasad for himself and as guardian of his brother defendant No. 2, who was then a minor, hypothecating the entire joint family property. The consideration of the bond is said to be to pay off Rs. 174-4-0 due to the plaintiff's father Pokhar Mal under two hand notes Rs. 1,182 8-3 due to him on *Bahi Khata* account, Rs. 753-7-3 in cash to Jamuna Prasad to meet the house-hold expenses of the joint family and Rs. 1,886-12-6 to be deposited by the mortgagee in Court in satisfaction of a decree of one Gajadhar Prasad Sahu in execution of which the family property was advertised for sale on 1st September 1903. The total amount of consideration thus came to Rs 4,000, for which the bond in question was executed. The due date for the payment of the money secured was 30th Baisakh 1311 and the interest stipulated for in the bond was at the rate of 24 per cent. per annum and compound interest with yearly rests. The original debt of Rs. 4,000 with interest and compound interest came to Rs. 61,452 on the date of the suit, 28th April 1916. The plaintiff seeks to recover the said amount by sale of the mortgaged property.

Jamuna Prasad, the executant of the bonds, is dead. The defendant No. 1 is his son and the defendant No. 2 is his brother. The defendant No. 3 is the mother and the defendant No. 4 is the widow of Jamuna Prasad. The defendants Nos. 3 and 4 hold some of the mortgaged property in lieu of their maintenance. The defendants 3rd party (Nos. 5 to 16) are the subsequent purchasers of some of the property in suit and the defendants 4th party, Nos. 17 to 28, are puisne mortgagees in respect of some of the property. Defendants Nos. 1, 5, 7, 13,

15, 18 and 23 filed separate written statements. Out of these defendants, only Nos. 1, 4, 5 and 18 appear to have contested the suit in the Court below. The other defendants did not enter appearance in the Court below. The respondents-defendants Nos. 1, 4, 5, 7, 17 and 18 filed Vakalatnamas in this Court but only defendants Nos. 5 and 18 contested the appeal at the time of its hearing.

The defendant No. 1, son of the original mortgagor Jamuna Prasad, denied execution of the bond and payment of the consideration. He alleged that Jamuna Prasad owed no money to Pokhar Mal on hand-notes and *bahi khatas* and that no money was due to Gajadhar Prasad under a mortgage-decree, that there was no family necessity for borrowing money, that Jamuna Prasad was a man of vicious habits and the debt was contracted for immoral purposes. He also stated that the plaintiff was a minor and an idiot and could not maintain the suit without a next friend and without impleading Sri Ram, Thakur Das, Kishen Lal and Moti Lal, who were joint with his father Pokhar Mal, as party to the action. He also pleaded limitation.

The pleas taken by the other defendants in the written statements are more or less the same as those taken by the defendant No. 1. In addition, some of the defendants (Nos. 5, 7, 13, 15 and 18) asserted that, even if the debt contracted by Jamuna Prasad be good and valid, the properties purchased or held in mortgage by the defendants could not be made liable for the claim of the plaintiff.

It would thus appear that the defendants in their written statements resisted the plaintiff's claim on all conceivable grounds. The pleas taken by them gave rise to 8 issues. All these issues, except issue No. 4, were decided by the Subordinate Judge against the defendants. The learned Subordinate Judge held that the bond was duly executed by Jamuna Prasad for self and as guardian of his minor brother defendant No. 2 for valuable consideration and for the legitimate purposes of the joint family of which he was the *karta*, and that the debt was not contracted for any illegal or immoral purposes. He further held that there was no substance in the defendants' pleas in bar of the suit, namely, that the plaintiff was not entitled to institute the suit, being a minor and an idiot, or that the Court-fee paid was not sufficient, or that there was any non-joinder of parties, or that the suit was barred by limitation.

The Court, however, decided issue No. 4, which related to the rate of interest claimed by the plaintiff, against him and reduced his claim from Rs. 61,452 to Rs. 10,636-11-6. The plaintiff has, therefore, appealed to this Court and contends that he is entitled to the entire sum claimed by him as the amount arrived at by calculating interest at the rate and in the manner stipulated for in the bond. The defendants have not appealed to this Court against the decision of the Subordinate Judge upon the other issues, nor is there any cross objection by them attacking the findings of the Subordinate Judge on those issues. This appeal is, therefore, directed solely against the decision of the Subordinate Judge on issue No. 4, which runs as follows:—

"Is the interest mentioned in the bond excessive and by way of penalty?"

The finding recorded by the Court below is rather summary and runs as follows:—

"In the present case Jamuna Prasad was entirely at the mercy of his creditors. There was pressing demand for him to borrow money to save the joint family property from auction sale. The lender was in a position to dictate terms to him which led to this hard and unconscionable bargain."

Upon this finding the Court below has held that the stipulation for interest was by way of penalty and applying section 74 of the Indian Contract Act has reduced the bond rate and allowed the plaintiff only simple interest at 12 per cent. per annum as an adequate and reasonable compensation.

The aforesaid finding of the Court below is, to my mind, vague and insufficient for applying section 16 or 74 of the Indian Contract Act. The Court below has assumed, without giving any reason, that the terms in the bond relating to interest were hard or unconscionable. There is nothing on the record to show that the rate of interest and compound interest was unusual or was in any way exorbitant. The defendants have adduced no evidence on the point. On the other hand, it would appear from

the previous dealings between the parties, as proved by Exhibits 2, 2A, 3 to 3C, 4 to 4Q, that the rate of interest of, 2 per cent. per mensem, was the usual rate paid by the mortgagor Sarju Prasad to the plaintiff's father Pokhar Mal. In the bond, Exhibit A, dated the 26th June 1917, executed by defendant No. 2 in favour of Gouri Dutt, defendant No. 18, the stipulation as to the interest is exactly in terms similar to those in the bond in suit; namely, interest at 24 per cent. per annum and compound interest with yearly rests. Gouri Dutt in his evidence says that he has taken another bond also from Sarju Prasad. The rate of interst in the bond, far from being improvident, hard or unconscionable, appears to be the usual market rate.

Again, there is a vague suggestion, though there is no definite finding, that the lender took unfair advantage of the pressing need of the debtor and his own position as a lender in extorting from him the terms in the bond regarding interest. There is absolutely no room for such a suggestion upon the evidence on the record. It may be that there was pressing necessity for the debtor to incur the debt in question for which the mortgage bond was executed, or that the lender was in a position to dominate the will of the debtor, but there is nothing to show that he used that position to obtain an unfair advantage over the debtor. The question of undue influence was not seriously raised by any of the defendants except defendant No. 23, who in his written statement said that the plaintiff and his predecessor-in-interest used undue influence on the debtor and finding the debtor in a helpless and needy condition insisted on the hard and unconscionable interest and compound interest, and that the bargain struck by the plaintiff was hard, exorbitant and inequitable and as such not fit to be enforced in a Court of law or justice. This defendant, except filing the written statement, does not appear to have contested the suit in the Court below and, as a matter of fact, no issue in terms of the written statement was raised. This defendant has not entered appearance even in this Court, though impleaded as a respondent. The issue in this case as to the interest mentioned in the bond being excessive and by way of penalty was raised upon the written statement of the other defendants. No evidence was offered by the defendants as to the stipulation about interest having been inserted in the bond on account of any undue influence or coercion on the part of the lender. On the other hand, the plaintiff has definitely proved that the stipulation regarding "interest and compound interest was not inserted in the bond under any undue influence" (*vide* P. W. No. 1, a marginal witness to the bond). This evidence is not controverted and there is no reason why it should not be accepted. In fact, the Court does not definitely find that the contract as to interest was brought about by undue influence or pressure, and, even if it meant to do so, its finding would be without any evidence on the record. The result is that the finding of the Court below that the interest was hard and unconscionable, or that the lender took advantage of his position and dictated terms to the borrower, must be set aside and with it the foundation upon which the learned Subordinate Judge has applied section 74 of the Indian Contract Act, for holding that the stipulation regarding interest was by way of penalty.

Now, as to the terms of the bond. The stipulation in the bond itself does not in any way show that it was by way of penalty. The bond provides that interest and compound interest at 2 per cent. per mensem would be payable upon the principal sum of Rs. 4,000 from the date of the bond to the due date, 30th Baisakh 1311, and on default of the payment of the loan on the due date the interest and compound interest at the aforesaid rate would continue to be payable up to the date of realisation, and that on the 24th Assin 1311, each year, interest and compound interest then accruing would be added to the principal and will carry interest and compound interest. In other words, the bond provides for payment of interest and compound interest at the rate of 24 per cent. per annum with yearly rests. The bond does not stipulate for the payment of increased rate from the date of default in payment, nor does it in any way vary the rate of interest on account of such default. Section 74 has, therefore, no application to the aforesaid stipulation for interest in the present case. The Court below, as well as the learned Vakil on behalf of the respondents, has relied on certain judgments of

the Calcutta High Court in the cases of *Khagaram Das* v. *Ram Sankar* (1) and *Sanat Kumar Das* v. *Indra Nath Barman* (2). In the former case section 74 was applied where the entire sum payable in 10 instalments without interest was, in default of payment of one or two instalments, not only made repayable in one lump sum but was also made to carry interest at an unusual rate. This does not apply to the present case. Similarly, in the latter case section 74 applied to the facts and circumstances of that case, as is obvious from the following observation made by the learned Chief Justice:—"But I wish to make it quite clear that this agreement is a stipulation by way of penalty, having regard to the circumstances of this case only, because it may well be that in other cases 75 per cent. is a perfectly proper rate. At any rate, it may not be a stipulation by way of penalty." The principle enunciated in *Satish Chunder Giri* v. *Hem Chunder Mookhopadhya* (3) seems to apply to the present case. This Court in several cases has held that it is not competent to rip up a contract merely because it considers the rate of interest hard and unconscionable and that a debtor cannot be relieved except by showing that he comes within the four corners of section 16 of the Indian Contract Act: *Nathuni Sahu* v. *Baijnath Prasad* (4) and *Lakhi Chand Sahu* v. *Pear Chand Sahu* (5). The Court below has declined to follow the authorities of this Court, saying that they are in conflict with those of the Calcutta High Court. This appears to be unjustifiable on the part of the learned Subordinate Judge. He was bound to follow the decisions of this Court whether they were right or wrong, or whether they were in conflict with the decisions of the other High Courts in India. On the other hand, the aforesaid authorities of this Court are supported by the principle enunciated by their Lordships of the Judicial Committee in several cases, and notably in the two recent cases, *Aziz Khan* v. *Duni Chand* (6) and *Lala Balla Mal* v. *Ahad Shah* (7). In these cases the stipulations for interest and compound interest were similar to those in the present case and the principal sum had swollen up to considerable amounts. Their Lordships observed that the transaction was unduly improvident but, in the absence of any evidence to show that the money-lender had undoubtedly taken advantage of his position, it is difficult for a Court of Justice to give relief on grounds of simple hardship. In the case of *Auseri Lal* v. *Raja Maneshar Bakhsh Singh* (8), relied on by the Court below, their Lordships of the Judicial Committee lay down that, under the amended section 16 of the Indian Contract Act, it has to be seen whether a person in a position to dominate the will of the debtor "used that position to obtain an unfair advantage over the debtor." Of course, in that case it was found as a fact that undue influence was used in bringing about the terms of the contract. It has already been shown that in the present case the interest in the bond was not at all hard or unconscionable but that it was the usual and market rate of interest, and that the transaction was in the ordinary course of business and that the contract was not induced by undue influence. Even if the interest was unusual, hard or unconscionable, upon the principle of the aforesaid cases the lower Court was not competent to disallow the contract rate.

Another reason given by the lower Court to reduce the interest is that the stipulated rate of interest, if allowed, will prove ruinous to the minor defendant No. 1. The view taken appears to be unsound. The ruling relied upon by the Court below, *Ganga Das Bhattar* v. *Jogendranath Mitra* (9), has obviously no application to the present case, inasmuch as the ground stated in that case for reducing the interest, namely, that there is nothing to show that there was any necessity to borrow money at the unusual rate of interest, does not exist in the present case. The rate of interest in the present case is not unusual at all,

(1) 27 Ind. Cas. 815; 42 C. 652; 19 C. W. N. 775; 21 C. L. J. 79.

(2) 34 Ind. Cas. 609; 21 C. W. N. 740; 25 C. L. J. 24; 44 C. 162.

(3) 29 C. 823.

(4) 39 Ind. Cas. 352; 2 P. L. J. 212; 1 P. L. W. 300.

(5) 39 Ind. Cas. 106; 2 P. L. J. 283.

(6) 48 Ind. Cas. 933; 23 C. W. N. 130; 101 P. R. 1918; 165 P. W. R. 1918 (P. C.).

(7) 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. 25; 21 Bom. L. R. 558 (P. C.).

(8) 10 C. W. N. 849; 8 Bom. L. R. 491; 3 A. L. J. 495; 9 C. C. 188; 28 A. 570; 4 C. L. J. 1; 16 M. L. J. 292; 33 I. A. 118; 1 M. L. T. 205 (P. C.).

(9) 5 C. L. J. 315; 11 C. W. N. 403.

The debt was contracted by the *karta* of the family, to save the family property advertised for sale in which the minor was interested, at the usual rate of interest. There is no reason why the defendant No. 1, who was then a minor, should not be bound by the agreement entered into by his father, the *karta* of the family.

The plaintiff is, therefore, entitled to the interest and compound interest calculated according to the rate stipulated for in the bond, namely, 24 per cent. per annum, with compound interest and yearly rests. The lower Court has held that one Bhagwat Rai, who has purchased property No. 3 of Schedule II, subsequent to the present mortgage, has not been made a party and that the value of that property Rs. 96 should, therefore, be deducted from the principal sum. In this view the Court below appears to be right. The interest will, therefore, be calculated upon Rs. 3,904 as found by the Court below.

The result is that the appeal is decreed with costs. A decree will be prepared by this Court for a sum of Rs. 3,904 as principal plus the amount of interest and compound interest, calculated at the rate of 24 per cent. per annum from the date of the bond till six months from this date as the date fixed for the payment of the money. In the event of non-payment of the decretal amount within six months from this date, the plaintiff will be entitled to sell the mortgaged properties mentioned in Schedule I. The rate of interest from the date fixed for payment will be at 6 per cent. per annum. The order of the Court below regarding the order in which the mortgaged properties are to be sold will stand good.

MULLICK, J.—I agree. In my opinion the case is concluded by the judgment of their Lordships of the Privy Council in *Lala Bulla Mal* v. *Ahad Shah* (7). In my opinion the creditor was not in a position to dominate the will of the debtor within the meaning of section 16 of the Indian Contract Act, as amended. Even if he was in a position to do so, by reason of the pecuniary distress of the debtor, it has not been shown that he used his position to obtain an unfair advantage over him. If the contract were hard and unconscionable, then, the onus under sub-clause (3) of section 16 would lie on the creditor to show that the contract was not induced by undue influence. But there is nothing in the circumstances of this case to justify such a view of the nature of the contract. And, apart from any question of onus, I think the evidence clearly shows that the creditor did not obtain any unfair advantage over the debtor. Section 16, therefore, does not assist the debtor.

As to section 74 the debtor would be entitled to relief if he could show that the stipulation for compound interest in this case was in the nature of a penalty. Upon the authorities, it is quite clear that an exorbitant rate of interest is not in itself a penalty. Nor is the stipulation to pay compound interest from the date of default such a stipulation. The Court, therefore, had no power to give relief under section 74 of the Act. In my opinion, the Courts in India are precluded from relieving the debtor with regard to interest unless the case comes within the purview of section 16 or section 74 of the Contract Act.

With regard to the minor I agree with the observations of my learned brother. The terms of the contract were such that the debt must be considered to have been contracted for legal necessity.

With regard to the property purchased by Bhagwat Rai, I agree that his non-joinder is not a sufficient ground for the dismissal of the suit. By his action the plaintiff must be held to have split up the mortgage and to have released the defendants from liability for that part of the debt, namely Rs. 96, which represents the price of the property sold to Bhagwat. A decree, therefore, for the capital sum after deduction of this sum of Rs. 96 against the present defendants is, in my opinion, correct.

Appeal accepted.

SECRETARY OF STATE FOR INDIA *v.* QAMAR ALI.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 213 OF 1916.

May 17, 1918.

Present:—Mr. Justice Tudball and Mr. Justice Abdur Raoof.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Munshi QAMAR ALI—PLAINTIFF—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 6, 9, 12, 18, 48—*Acquisition proceedings—Land required for Municipality—Municipality, whether can withdraw from proceedings—Investment of capital by owner, after notification, effect of—Delay in acquisition, whether affects validity of proceedings—Notice, failure to give, effect of—Award, nature of—Suit for declaration that proceedings are null and void, maintainability of.*

Where proceedings under the Land Acquisition Act are taken on behalf of a Municipal Board, the Board has no power to withdraw from the acquisition. It is the Government alone that can withdraw from the proceedings. [p. 504, col. 2.]

Where after the publication of a notification for acquisition of certain land the owner of the land invests more capital in it, he does so at his own risk. [p. 505, col. 1.]

Mere delay in completing the acquisition of a piece of land does not invalidate the proceedings. [p. 505, col. 2.]

Where in acquisition proceedings the Collector wilfully and perversely abstains from giving the necessary notice to the owner of the land under section 9 (3) of the Land Acquisition Act, his proceedings cannot be considered *bona fide* and are inoperative in vesting the land in Government: but where, through mere inadvertence or mistake, a person interested has not had notice served upon him, the proceedings are not thereby invalidated. [p. 506, col. 1.]

Proceedings under the Land Acquisition Act resulting in an award are administrative and not judicial, and the award in which the enquiry results is merely a decision, binding only on the Collector, as to what sum shall be tendered to the owner of the lands, and if a judicial ascertainment of the value is desired by the owner, he can obtain it by requiring the matter to be referred by the Collector to the Court under section 18 of the Act. [p. 506, col. 1.]

The plaintiff, who was the owner of a plot of land, was not entered in the *khewat* as such. Proceedings having been taken under the Land Acquisition Act for the acquisition of the plot, the Collector gave the notice required by section 9 (3) of the Act to the persons entered in the *khewat* as the owners of the plot, but no notice was given to the plaintiff. When the award was made, however, the plaintiff filed a petition of objection that the compensation should be paid to him and not to the recorded owners of the plot and the amount of the compensation was, consequently, put to his credit in the Treasury. No notice had been given to him under section 12 (2) of the Act, and he made no application under section 18 for a reference to the Court. He subsequently brought a suit for a declaration that the acquisition proceedings were null and void for want of proper notices, etc.:

Held, that the suit was not maintainable and that the plaintiff should have availed himself of the procedure laid down in section 18 of the Land Acquisition Act. [p. 506, col. 2.]

First appeal from a decree of the Subordinate Judge, Bareilly.

Mr. *A. E. Ryves*, for the Appellants.

Dr. *S. M. Sulaiman*, for the Respondent.

JUDGMENT.—The facts of the present case are hardly in dispute, and are as follows:—In Mauza Udaipur Khas, Pargana and Tahsil of Bareilly, there were three plots of land recorded as Nos. 42/1, 42/2 and 43 (paragraph 1 of the plaint). These belonged to two persons, Imdad Husain and Altaf Husain.

In 1907 these persons sold these plots to the plaintiff Qamar Ali, a practising Lawyer, living at Bareilly. It may be as well to point out here that Udaipur Khas is on the outskirts of Bareilly city.

Qamar Ali, though a Lawyer, and presumably well aware of the existence of Revenue Records and the duty imposed on a transferee of having his name duly recorded as the owner, did not apply for mutation of names at once.

Subsequently, Imdad Husain sold his share, together with other property, to his wife Ahmadi Begam.

She applied for and obtained mutation of names as against a half share.

After this Qamar Ali applied for mutation of names in respect to the whole, as against his transferors. As their names then stood recorded against part only of the property, the Revenue Court directed his name to be recorded in the Record of Rights as against that half only.

The result was that in the public records two Khatas were recorded.—

No. 22 against the name of Ahmadi Begam.

No. 23 against the name of Qamar Ali.

Qamar Ali seems to have remained in possession and to have planted some trees. It may also be accepted that the boundary marks between the plots were obliterated.

It also appears that some scheme was proposed for the extension and improvement of Bareilly city, for which purpose it was necessary to take up and

SECRETARY OF STATE FOR INDIA v. QAMAR ALI.

acquire a large area of land. The Local Government for this purpose notified a large area, under the Land Acquisition Act for compulsory acquisition. This was done in 1910 and in this area was included the land mentioned above, which is the subject-matter of the present suit.

The area was large and the owners numerous and the actual acquisition and making of awards under the Act was spread over a considerable time, and the turn of the plots mentioned above did not come until 1912.

Their acquisition was carried out in two parts. Action was first taken in respect to Khata No. 22.

Here it is necessary to state another fact. Many owners of lands were prepared to build houses upon them so as to further the object of the Municipal Board and carry out the scheme. The Land Acquisition Officer, who was acting on behalf of Government in the Acquisition proceedings, consulted the Board and took action in respect to those plots (within the area notified) which the Board settled to be necessary for their scheme and which had, therefore, to be acquired. In respect to the lands of those owners who agreed to build and help in the scheme, the Board asked the officer not to acquire them and in regard to them, apparently, no action was taken.

In regard to Khata No. 22 action was taken under section 9 by issue of notice to those persons whose names were in the Khewat. Special notices were issued to them by order dated 22nd February 1912.

Whether the public notice in respect thereto, as required by section 9 (1) of the Act, was ever issued it is impossible to say.

Apparently, no trace of it can be found.

It is admitted that no notice was issued to Qamar Ali as his name was not in the Khewat.

The 9th March 1912 was the date fixed in the special notices and on that date an award was made by the Special Officer. Here we note that it was very positively alleged on behalf of the plaintiff that no award had been made, but it was found after some trouble upon the Acquisition record. The notices issued did not give fifteen days' clear time to the persons concerned, but no objection was raised by any of them and the award was made. It was, perhaps, incomplete in that it did not apportion the total sum awarded amongst those to whom it was deemed payable.

Another point may be noted here. A copy of the village Khasra has been filed showing that certain persons were entered therein as tenants, but no notice was issued to them. In the column of remarks there is a note to the effect that Qamar Ali is in possession.

The only person who made any objection was Qamar Ali himself. On the 9th March 1912 he filed a petition before the Special Officer, in which he said that he had heard that compensation was about to be paid to other persons, that this should not be done as he was the owner and, therefore, the money should not be paid to others but to him.

He took no further steps, in spite of the knowledge that he had of the proceedings. He made no application under section 18 for a reference to the Court, though, as a person interested, he had every right to claim one.

No notice under section 12, clause (2), was given to him. He had appeared in person on the date of the award and had filed his petition of objection. The compensation awarded was put in deposit in the Treasury to the credit of Qamar Ali and is still there.

One further point must be noted. The amount awarded did not include anything on account of the value of trees, and there appear to be no boundary marks actually in existence marking off the land appertaining to Khata No. 22 from that appertaining to Khata No. 23.

In respect to this latter Khata (23) steps were taken in July 1912. The public notice and special notice were issued, the latter to Qamar Ali and his recorded tenants for August 2nd, 1912. The notice did not allow the full fifteen days mentioned in section 9 (2), the time being short by five days.

Qamar Ali appeared and filed his objections. An award was made. He did not accept it but applied for a reference under section 18 to the Court, and the reference was duly made and is pending. His objections were filed on August 2nd, 1912; and he therein made reference to his petition of the 9th March 1912. He was informed of the amount of compensation that stood to his credit in the Treasury, in respect to Khata No. 22, on 26th October, and he filed a petition saying that,

for the first time, he had come to know "*that day*" that compensation had been awarded for a portion of his property (which was clearly untrue).

We note here that in July 1912, Qamar Ali became a member of the Municipal Board, having been nominated as a member by Government.

The second award (*in re* Khata No. 23) was made on November 14th.

Formal possession of Khata No. 22 was taken by Government on 16th April 1912, and of Khata No. 23 on 20th June 1914.

Five days after the last award, Qamar Ali sent a letter to the Chairman of the Municipal Board praying, for certain reasons, that the Board would not take up his land on condition of his building two bungalows on it.

On January 10th, 1913, the Board by a resolution resolved that it would not take up his land. On 24th February 1913, the Chairman informed the Special Officer of this resolution. The latter through the Collector informed the Commissioner, who addressed the Board pointing out that the land had already been acquired and the Board could not divest itself of property by a mere resolution. The Municipal Board subsequently met and cancelled its resolution of 10th January 1913. Another fact may be noted. While these proceedings were taking place, Qamar Ali sank a well on the land and he did it in the teeth of a protest by the Board (*vide* the evidence of the Chairman).

Qamar Ali brought the suit out of which this appeal has arisen on 1st August 1914, for a declaration that all the proceedings taken for the acquisition of these plots of lands are null and void against him. He withdrew his claim for an injunction. He sued the Secretary of State and the Board.

The case in his plaint was—

(1) that there was no necessity to acquire his land,

(2) that as the land was notified in 1910, it was the duty of the Collector to *at once* take it up under the Act,

(3) that the Collector, the Acquisition Officer and the Municipal Board gave the plaintiff to understand that his land would be exempt from acquisition as he was a proprietor who could build houses upon it;

(4) that no steps were taken to acquire the land until July 1912, and this delay, and also the holding out of the hope that the land would not be taken, estopped the Secretary of State from acquiring it under the original notification;

(5) that the Board was only taking up the land to be able to sell it at a profit to the Rohilkhand and Kumaon Railway;

(6) that various irregularities, set out in paragraph 8 of the plaint, had taken place in the Acquisition proceedings which rendered them null and void and of no force against him;

(7) that the Compensation Officer had induced him, by holding out hopes of the non-acquisition of the land, to build a well and collect materials for the building of a house and had then through enmity reported that it should be taken up and, therefore, the Secretary of State was estopped.

It will be observed that in his plaint the plaintiff ignored the proceedings taken in respect to Khata No. 22.

The defendants contested the suit. The Court below has held—

(1) that representations generally were made by both the defendants to owners of sites that their lands would not be acquired in cases where the owners could build upon them, and that these representations, combined with the Board's resolution of 10th January 1913, operated as an estoppel and barred the defendants from acquiring the land in suit on the notification issued in 1910;

(2) that the delay in the Acquisition proceedings did not debar the defendants from acquiring the land;

(3) that in respect to Khata No. 22 the irregularities in procedure of the Acquisition Officer and the fact that the plaintiff was no party to them, resulted in their being void and ineffectual as against him and the plaintiff was still the owner of the land thereof;

(4) that the fact that a reference before the District Judge was pending was no bar to the present suit.

It has, therefore, granted the declaration that the Acquisition proceedings are null and void.

The defendants have appealed.

It is urged before us that, though there

may have been some errors in procedure in the course of the Acquisition proceedings, there has been nothing fraudulent or corrupt; that the plaintiff had full knowledge of them; that in the case of Khata No. 22 he could and ought to have applied for a reference to the District Court where all his objections could have been made and he could have had a judicial decision; that all the proceedings up to the making of the awards are purely administrative and not judicial, and that errors therein, which do not prejudice the plaintiff or prevent him obtaining a judicial determination, are not sufficient to enable the Court to declare them null and void; that in respect to Khata No. 23 a judicial proceeding is now pending where all the plaintiff's pleas will be heard and decided; that compensation for all the trees has actually been awarded to him in the acquisition of this Khata and the plaintiff has, therefore, no valid grievance; that there has been no withdrawal by Government from the acquisition and that Government alone can so withdraw; that the plaintiff has failed to prove that Government or the Board held out any hopes to him prior to the acquisition that the land would not be acquired, that it was not until after the awards had been made that the plaintiff approached the Board and the latter passed its resolution of 10th January 1913, that that resolution was subsequently cancelled and that the Board had no power to withdraw from the acquisition and its resolution had no legal effect.

Reliance is placed upon the decisions in *Ezra* v. *Secretary of State* (1) and *Ganga Ram Marwari* v. *Secretary of State for India* (2) and the decision of this Court in F. A. No. 67 of 1915, decided on 10th May 1916 [*Musammat Shahjahan Begum* v. *Secretary of State for India* (3)].

In regard to the question of estoppel we cannot agree with the Court below. We may assume that the Acquisition Officer did abstain from taking proceedings, at the request of the Board, in the cases of some owners who were willing and able to further the Extension scheme by building on their lands. It is nowhere shown that in the case of the plaintiff any such hope of non acquisition was held out as a consequence of which he abstained from protecting his rights in the Acquisition proceedings or in consequence of which he spent further sums in sinking his well or improving the property.

We have the evidence of the Chairman of the Board to show that the plaintiff was warned not to build his well and that he persisted in it in spite of warnings. Moreover, it was not until the second award had been made that the plaintiff approached the Board on the 19th November 1912. He was then, and had been a member of the Board himself since July 1912. He may have had hopes in his own mind, but he has utterly failed to prove that any such hopes were held out to him individually.

Under the terms of the Act itself, it is Government which was acquiring the land, and Government alone under the Act could withdraw from the acquisition. As a Lawyer the plaintiff must have been well aware of this.

When the Board's resolution of 10th January 1913 was passed, the Acquisition proceedings were ended and there remained only the judicial proceeding before the District Court on the reference made at the plaintiff's own request. The Board had no power to withdraw and the Commissioner of the division at once called the Board's attention to this and the Board rescinded its resolution. It has not been shown that the plaintiff, subsequently to 10th January 1913, so changed his position as to make it inequitable to allow the acquisition of the land without the issue of any fresh notification by Government under the Act. He was not prevented from putting forward his case in full in the District Court. He has not withdrawn from the reference made at his own request to the District Judge in the case of Khata No. 23, and it is not shown by any evidence at all that he abstained in the case of Khata No. 22 from applying for a reference by reason of any action on the part of the Board or the Secretary of State. The acquisition of that Khata took place early in 1912. We fail to see that the appellants have been estopped

(1) 32 C. 605; 9 C. W. N. 454; 1 C. L. J. 227; 7 Bom. L. R. 422; 2 A. L. J. 771 (P. C.).
(2) 30 C. 576.
(3) 36 Ind. Cas. 265.

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from acquiring the land in pursuance of the original notification of 1910.

Mere delay in the proceedings based on that notification is no ground for holding that there is an estoppel. The proceedings, no doubt, were spread over a long period of time, but there were many owners of different plots to be dealt with. The plaintiff was in possession and enjoyment of the land. He had planted trees upon it and had leased it to tenants, who presumably paid him rent for it. He may have incurred the cost of upkeep, as he would have had to do in any case. If, with knowledge of the notification, he invested more capital in it (which is not shown by any evidence) he did so at his own peril. He was warned not to do so, and he actually did not approach the Board until after both awards had been made and formal possession taken in the case of the first one. The lower Court seems to think that it will be hard on the plaintiff as he had invested money in planting his trees before the notification and that they have so far given him no return, but this is a point which the District Judge, no doubt, will consider when he, in the judicial proceeding, comes to assess the compensation and work out the market-value. The question of the compensation for *all* the trees is now before that Court, the award of the Acquisition Officer having included the value of them *all* in the case of Khata No. 23. We cannot agree with the Court below that there was a substantial withdrawal from the acquisition by both or either of the defendants, nor does the fact that the Board at one time considered the advisability of making over this land to the Railway Company for the purposes of a Station, act as an estoppel. It may well have been a part of the extension scheme to have a Station at this spot for the convenience of the public. It is not for the plaintiff to say to what use the Board should or should not put the land in carrying out their scheme.

The Board was not competent to withdraw from the acquisition, and it is not shown that, between the 10th January 1913, and the rescinding of the resolution of that date, the plaintiff materially altered his position. In fact, he was warned not to do so. On the question of estoppel we, therefore, cannot agree with the Court below.

The next question is as to the effect of the errors of procedure which took place in the course of the acquisition.

We have detailed those errors above and they need not be repeated.

With the necessity for the acquisition the plaintiff has no concern.

The delay in the acquisition does not invalidate the proceedings.

The survey was made at the very beginning of the proceedings.

The chief complaint, and in fact the only one of any substance is that the two Khatas are divisions only on paper and that the acquisition was carried out in two parts, and that in respect to Khata No. 22 no notice was issued to the plaintiff under section 9, and no public notice apparently at all, and that in case of neither of the two Khatas was the full fifteen days' notice given to anybody. In the case of Khata No. 23, the plaintiff received ten days' notice.

The question is whether these errors so vitiate the proceedings that the Court ought to declare them null and void.

The plaintiff himself is not free from blame when he purchased the property he did not apply at once for mutation of names. This gave the opportunity to Imdad Husain to execute the second sale, with the result that, when the Acquisition proceedings commenced, one-half of the property only stood in the plaintiff's name and the other half in the names of other persons. The Acquisition Officer dealt first with the latter half and acted on the Khewat entry. He issued notice to the recorded owners whose names were in the Khewat and they had no objection. But the plaintiff was well aware of the Acquisition proceedings. Other lands of his were acquired under the notification in 1911, and he contested that matter also. It was referred to the District Court and he came up on appeal to this Court. Moreover, he had actual knowledge himself of the proceedings regarding Khata No. 22 for on 9th March 1912, the date fixed for the making of the award, he entered the Court and filed his petition to the officer asking that the compensation should be paid to him and not to anybody else, and the sum awarded was actually credited to him in the Treasury. As a person interested he,

under section 18 of the Act, could have applied for a reference to the District Court. Though he is a Lawyer and had had a similar case of his own in 1911, he took no steps under section 18. In the case of Khata No. 23 he received notice, though only ten days before the date fixed. He appeared and objected and applied under section 18 and a reference was made to the District Court. As their Lordships of the Privy Council have said in *Ezra* v. *Secretary of State* (1): "When the sections relating to this matter are read together, it will be found that the proceedings resulting in this award are administrative and not judicial, that the award in which the enquiry results is merely a decision (binding only on the Collector) as to what sum shall be tendered to the owner of the lands, and that, if a judicial ascertainment of value is desired by the owner, he can obtain it by requiring the matter to be referred by the Collector to the Court."

The ultimate duty of the officer is, not to conclude the owner by his so called award, but to fix the sum which, in his best judgment, is the value that should be offered.

If the proceedings are taken in such a manner that the true owner is barred from obtaining a judicial pronouncement on the matter, then there may, perchance, be good ground for complaint. But, as pointed out in *Ganga Ram* v. *Secretary of State for India* (2), the very provisions of section 9 show that persons interested, who are not known or believed to be interested, may not have notice and yet the proceedings may go on validly. If the Collector wilfully and perversely abstains from giving notice, then his proceedings cannot be considered *bona fide* and should be held inoperative in vesting the land in Government, but where, through mere inadvertence or mistake, a person interested has not had notice served upon him, the reason of the non-service is rather allied to ignorance of the fact of his being interested than to wilful perversity. In the present case there is nothing to show that the proceedings were fraudulent or corrupt.

Now, in the case of Khata No. 22 the plaintiff was not recorded as an owner. In the Khasra, no doubt, there was a note by the Patwari of his possession, but the Acquisition Officer worked on the Khewat. There, no doubt, was a mistake. The plaintiff has alleged malice and enmity, but his allegation is not supported by any evidence and in the end he did receive actual information, though not legal notice, and he did enter the officer's Court-room and actually filed his petition on the date fixed for the award. He had every right to apply for a reference and could have done so. He preferred to abstain from seeking the judicial pronouncement to which he was entitled and to bring the present suit and to take his stand on the fact that no notice had issued to him. He was not prevented from obtaining the remedy which the law gave him. There is, therefore, no sufficient reason for holding that the vesting of the land in Government did not take place. There can be no sympathy with a litigious person who has acted as the plaintiff has done. The ruling in *Ganga Ram's case* (2) has received the approval of this Court in First Appeal No. 67 of 1915 [*Musammat Shahjahan Begum* v. *Secretary of State for India* (3)] which we have mentioned, and we fully approve of it also. If the plaintiff had been debarred from seeking and obtaining a reference to the District Court we might, perhaps, have held otherwise, for every person interested has the right given to him by section 18, which, in certain circumstances, allows a period of six months from the date of the award. In the present case the proceedings in regard to Khata No. 23 were taken within six months of the award of 9th March 1912, of which the plaintiff had actual knowledge though legal notice had not been served upon him. He was well aware of the award and deliberately abstained from exercising his right under section 18 of the Act.

In the case of Khata No. 23 he has still less right to complain, for notice was issued to him, though only ten days before the date fixed, and the reference to the District Court is actually pending and all his grievances can be aired there and full compensation awarded. Nor do we think that the fact that the two Khatas were treated separately (though there are no division marks upon the land itself) is sufficient cause for invalidating the proceedings. That is a matter of really very little concern when full compensation can be granted under a reference to the District Court.

We, therefore, hold, on the above findings, that the plaintiff is not entitled, in the circum-

stances of this case, to the declaration granted by the Court below.

We, therefore, allow the appeal, set aside the decree of the lower Court and dismiss the plaintiff's suit with costs of both Courts, including, in this Court, fees on the higher scale.

We notice with deep disapproval that the Court below did not deliver judgment until eight months after the evidence was concluded. Delays of this description are greatly to be deprecated and may in some cases amount to a scandal and a denial of justice.

Appeal allowed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 186 OF 1917.

September 30, 1918.

Present:—Mr. Justice Abdur Rahim, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

KANDASAMI PILLAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMASAMI MANNADI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 105, 108 (b), (c)—Lease, agricultural—Failure of lessee to pay premium stipulated—Right of lessor to withhold possession—Right to possession under lease—Implied covenant—Contract Act (IX of 1872), s. 39.

The definition of 'lease' in section 105 of the Transfer of Property Act applies to agricultural leases in India. [p. 508, col. 2.]

A lease is not a mere contract but the transfer of an interest in immoveable property and the lessor is not entitled to withhold possession from the lessee merely because the latter has failed to pay the stipulated premium, unless the document provides that the lessee is not to have possession until the fulfilment of a certain condition. [p. 509, col. 1.]

Velayutha Chetty v. *Govindasami Naicker*, 8 Ind. Cas. 364; 34 M. 543; 9 M. L. T. 108; (1910 M. W. N. 637, *Velayutha Chetty* v. *Govindaswami Naiken*, 30 M. 524; 3 M. L. T. 10; 17 M. L. J. 450 and *Govindammal* v. *Gopalachariar*, 16 M. L. J. 524, applied.

Chhotku Rai v. *Baldeo Shukul*, 17 Ind. Cas. 340; 34 A. 659; 10 A. L. J. 330, not approved.

Subba Rao v. *Devu Shetti*, 18 M. 126; 6 Ind. Dec. (N. S.) 437, explained.

Per *Coutts Trotter, J.*—Section 39 of the Contract Act applies only to a state of things where there is a series of executory promises on both sides, and so soon as one part of the obligation has been performed by a complete transfer of the property in question, that section ceases to have any application. [p. 511, col. 2.]

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Kumaraswami Sastri, in Appeal Suit No. 64 of 1916, preferred against the decree of the Court of the Temporary Subordinate Judge, Madura, in Original Suit No. 10 of 1914.

FACTS appear from the judgment.

Mr. *S. Parthasarathy Aiyar*, for the Appellants.—The right of the lessee to possession is, under the implied covenant in the instrument of lease, to convey and it is a right at law. It cannot be defeated by equitable grounds, such as the lessee's failure to pay the premium or any other obligation he has undertaken. The lease is an agricultural lease and the provisions of the Transfer of Property Act relating to leases are applicable to it. So, it is a transfer of a right in immoveable property and not a mere contract.

If the document mentioned any condition precedent which had to be fulfilled before the lessee could take possession, the non-fulfilment of that condition would be a sufficient answer to the claim. See *Secretary of State* v. *Pemmaraju Venkayya Garu* (1).

With regard to sales, the law is that a vendee is entitled to possession even though he has not paid the consideration, which can only be recovered by a suit. *Velayutha Chetty* v. *Govindasami Naicker* (2), *Velayutha Chetty* v. *Govindasvami Naiken* (3) and *Govindammal* v. *Gopalachariar* (4). The same principle should be applied to leases.

The peculiar doctrines of English Law as to lease being a chattel interest should not be applied to India.

Mr. *K. Rajah Aiyar*, for the Respondents.—The instrument in question is not, strictly, a lease but a contract with respect to the future produce of certain trees. What was conveyed was the coffee, jack and plantain produce.

This must be treated as a case of mutual contracts. The lessor has to put the lessee in possession only on the latter paying the premium. See section 39 of the Contract Act. By the lessee's breach of the covenant in not paying a subsequent mortgage, the lessor had to make other arrangements.

The rule applicable to sales should not be extended to leases. Under English Law,

(1) 35 Ind. Cas. 254; 40 M. 910; 19 M. L. T. 318; 3 L. W. 443; (1916) 1 M. W. N. 342; 30 M. L. J. 575.

(2) 8 Ind. Cas. 364; 34 M. 543; 9 M. L. T. 108; (1910) M. W. N. 637.

(3) 30 M. 524; 3 M. L. T. 10; 17 M. L. J. 450.

(4) 16 M. L. J. 524.

a lease is only a chattel interest and a lease for a term is no better than a contract.

It is only equitable that possession should be decreed to the lessee on his performing his part of the contract. The lessor is entitled to rescind the contract on the analogy of section 35 of the Specific Relief Act. See *Chhotku Rai* v. *Baldeo Shukul* (5) and *Subba Rau* v. *Devu Shetti* (6). In the former case the Judges allowed redemption before the expiry of the term, because an essential part of the contract was not performed.

JUDGMENT.

ABDUR RAHIM, J.—I entirely agree with the judgment of the learned Chief Justice and will only shortly give my reasons for the conclusion I have arrived at. The plaintiffs obtained a lease for 17 years of a certain garden from the owner of the property, the 1st defendant in the suit. The document provides that the plaintiffs are to discharge a prior encumbrance to the extent of Rs. 2,805 besides making two other small payments. They failed to discharge the encumbrance, and the mortgagee, whose debt they had bound themselves to discharge, brought a suit to enforce the mortgage and obtained a decree. In the meantime, while the suit was pending, the 1st defendant granted a usufructuary mortgage to defendants Nos. 4 to 7 and with the money so realised the mortgage decree was paid off. The Subordinate Judge in the Court of trial held that, since the plaintiffs failed to pay the amount stipulated for in the document, they were not entitled to possession of the properties, which was their chief prayer in the plaint. On appeal to this Court, the learned Chief Justice was of opinion that the fact that the plaintiffs had not paid the amount mentioned in the lease, was no answer to their suit for possession; while Kumaraswami Sastri, J., the other learned Judge who heard the appeal, disagreed and confirmed the decree of the Subordinate Judge.

On behalf of the respondents Mr. K. Rajah Aiyar sought first of all to argue that the document in question, Exhibit L, was not a lease at all, but a mere contract with respect to the future produce of certain trees. In the first place, this was not their case, up till now, and the written statement itself proceeds on the assumption that Exhibit L is a lease. No doubt it is called a contract relating to coffee and plantain produce. But that description is not *ipso facto* conclusive. We find that the document goes on to state "I have granted to you on lease the coffee, plantain, and jack produce belonging to me." Further it says, "you shall enjoy according to your choice the coffee, plantain and jack produce * * * * * for 17 years from this date, and, on the expiry of the term, surrender the lands to me without any objection whatsoever. The assessment due for this land shall be paid by me;" then it gives the boundaries of the land. There can be no doubt whatever that what the parties contemplated was a lease. We have got all the apt words of a conveyance by way of a lease. There would be no sense in talking about surrendering the lands, if it was only the future produce of certain trees apart from any interest in the land that was meant to be granted. Proceeding on that basis, there cannot be any doubt to my mind upon the authorities that the lessee is entitled to possession of the land demised to him, even though he has not paid the premium he bound himself to pay. This is an agricultural lease and, therefore, the Transfer of Property Act in its terms does not apply. But the Transfer of Property Act, when it defines a lease of immoveable property by section 105, gives a definition which is undoubtedly applicable to agricultural leases as well in this country. Mr Rajah Aiyar did not attempt to argue that the definition of a lease as contained in section 105 is not applicable to agricultural leases. Section 105 says: "A lease of immoveable property is a transfer of a right to enjoy such property, etc." Now section 108 lays down the rights and liabilities of the lessor and the lessee. Clause (*b*) of that section provides that "the lessor is bound on the lessee's request to put him in possession of the property," and clause (*l*) says that "the lessee is bound to pay, or tender at the proper time and place, the premium

(5) 17 Ind. Cas. 330; 34 A. 659; 10 A. L. J. 330.
(6) 18 M. 126; 6 Ind. Dec. (N. S.) 437.

or rent to the lessor or his agent in this behalf." And it is argued that this is a case of reciprocal contracts, and that the lessor is only bound to put the lessee in possession after the lessee has paid or is prepared to pay the premium that is agreed upon. This, to my mind, proceeds entirely on a misconception of the true nature of a lease and of the rights of the parties arising from such a transaction. It is not a mere contract, it is a transfer of a right to enjoy the property. That means it is a transfer of an interest in immoveable property, and section 108 assumes it is a transfer of such an interest. The right of the lessee to be put into possession arises from the words of the demise which imply that the right to possession is granted to the lessee, and the lessor is not entitled to refuse to give possession to the lessee unless the document provides that the latter is not to have possession until the fulfilment of a certain condition. It is found by both the Courts that no such condition exists in this case. No doubt there are also other rights and liabilities, both of the lessor and the lessee, which are set out in section 108, Transfer of Property Act, and which arise out of the general law governing the relations of landlord and tenant. The liability of the lessor to put the lessee in possession may be said to arise out of the implied covenant applying to leases, as put by my learned brother, Coutts Trotter, J., in *Secretary of State* v. *Pemmaraju Venkayya Garu* (1). The distinction between executory and executed contracts is well known, as pointed out in *Wolverhampton and Walshall Railway* v. *L. & N. W. Ry.* (7). A lease is an executed contract, it is a transfer of property or of an interest in property; and all the considerations which apply to the enforcement of mere contracts do not necessarily apply to a transfer.

We have been referred to a number of cases, both of this Court and other Courts, in which it is laid down that a vendee of immoveable property is entitled to possession of the property even though he has not paid the consideration mentioned in the deed of sale [see for instance *Veluyutha Chetty* v. *Govindasami Naicker* (2), *Velayutha Chetty* v. *Govindaswami Naiken* (3) and *Govindammal* v. *Gopalachariar* (4)], and this proposition Mr. Rajah Aiyar has not contested before us. But he says there is a distinction between a sale and a lease. His argument is that a lease for a term stands on no higher footing than a mere contract, and he has referred us for this position to the English Law. In English Law no doubt a lease for a term is a mere chattel interest and has been treated as such in some of the cases, for instance, by Justice Chitty in *Wallis* v. *Hands* (8). But he has not been able to cite any Indian cases to show that these technical distinctions of English Law between real and chattel interest in land obtain in India. Speaking for myself, I am not aware that the peculiarities of English Law as regards leases for a term have ever been adopted in this country. The law regarding real property in India is, in many respects, very different from that of England, and it is especially so regarding leases; for instance Indian law recognises leases in perpetuity which are unknown to the English Law, though it recognises leases for such terms as for 99 years or 999 years. And I do not think I should be justified in importing the technicalities of English Law relating to leases for terms into this country.

Mr. Rajah Aiyar's main argument has been that there is some sort of equity in his clients' favour and, therefore, we ought to deny the plaintiffs the remedy which they seek, *viz.*, recovery of possession. What the plaintiffs seek is a remedy in law, and their right to possession cannot be defeated by pleading laches or any other considerations of that kind, which might be effective if the suit was one for some relief in equity. Reliance was placed on section 39 of the Indian Contract Act, IX of 1872. But this is not a case for enforcement of a contract. The plaintiffs' right to possession arises out of the interest which they have acquired in the land and the doctrine regarding mutual promises has, therefore, no application. Then we have also been referred to section 35, Specific Relief Act, which deals with recission of contracts on grounds of misrepresentation, fraud and the like. Our attention was specially drawn to the illustrations

(7) (1873) 16 Eq. 433; 43 L. J. Ch. 131.

(8) (1883) 2 Ch. 75; 52 L. J. Ch. 586; 3 R. 351; 68 L. T. 428; 11 W. R. 471.

which speak of rescission of sale and other transfers on the ground mentioned in the section. But the section deals with cases in which the contract is vitiated by reason of misrepresentation or fraud, and, if the contract which led to the transfer is voidable, that is, liable to be set aside, the transfer based upon it necessarily fails. But the plea of the respondents in this case is based, not upon anything which would make the contract relating to the lease liable to be set aside, but on something which happened after the grant of the lease, *viz.*, non payment of a certain sum of money mentioned in the lease. Section 35, Specific Relief Act, has no application

Reliance has been placed on two decisions, one of the Allahabad High Court in *Chhetku Rai* v. *Baldeo Shukul* (5) and another of this Court, in *Subba Rau* v. *Devu Shetti* (6), the former is referred to by Kumaraswami Sastri, J. in his judgment. In the Allahabad case, certain property was mortgaged and only a portion of the mortgage amount was paid. The mortgagor sold the mortgaged property and his assignees sued for redemption of the mortgage before the expiry of the term of the mortgage, and it was held on equitable grounds that the plaintiffs should be allowed to redeem before the expiry of the specified term. The learned Judges do not, however, lay down any general principles of law which I should feel justified in adopting and applying to this case; all that they say is, that "the defendants not having performed what we deem to be a most essential part of the contract so far as they are concerned, the plaintiffs ought to be allowed to redeem the property before the expiration of 10 years." They cite no authority and do not enunciate any general and well-recognised principle of equity by which the case could be said to be governed. With all respect to the learned Judges, it is not open to us to proceed on some sort of vague equitable grounds, especially in a case like this, where the plaintiffs are seeking a remedy in law. As regards *Subba Rau* v. *Devu Shetti* (6) one of the learned Judges, Muthuswami Aiyar, J., says in his judgment, "upon the facts found the Subordinate Judge obviously considered the original mortgage as lawfully cancelled." The facts of that case are not to be found in the report and it is not clear how the instrument came to be cancelled. I do not think that the judgment can be said to lay down any general proposition that can be applied to the present case.

I am of opinion that the judgment of the learned Chief Justice is right. It was noticed during the course of the argument that the learned Chief Justice gave a decree to the plaintiffs on condition of their paying the prior mortgage and that respondents Nos. 4 to 7 were entitled to retain possession until they have been repaid. But the form of the decree has not been challenged before us by the learned Pleader for the appellants.

The result, therefore, will be that the judgment of Kumaraswami Sastri, J., is set aside and there will be a decree in favour of the plaintiffs to the effect that they will be entitled to possession of the property on paying the money due under the mortgage decree in Original Suit No. 87 of 1912, and until then respondents Nos. 4 to 7 will remain in possession. The appellants are entitled to their costs throughout.

OLDFIELD, J.—I agree.

COUTTS TROTTER, J.—I agree and wish to add only a few words. The appellants (plaintiffs) were lessees under a deed of lease and I have no doubt that the deed of lease was a present demise and nothing else. As long ago as the case of *Holder* v. *Taylor* (9), which was decided in the beginning of the 17th century, 'it was laid down that the word 'demise' in a lease involves by necessary implication a covenant or contract or call it what you will on behalf of the lessor to give instantaneous and complete possession to the lessee. In this case, the lessor was under an obligation to give possession to the lessees. Certain other obligations were cast on the lessees by the instrument of lease, and among them was an obligation to discharge an existing encumbrance by the payment of certain sums of money. The plaintiffs failed to do that. They broke their obligation to pay off this encumbrance and the result was that respondents Nos. 4 to 7 in this case stepped into the breach, paid off the old encumbrancer and took from the owners of the land an usufructuary mortgage. The mortgage paid off was not an usufructuary mortgage but a simple

(9) (1613) Hobert 12; 80 E. R. 163.

hypothecation without rights of possession. The question is whether the respondents Nos. 4 to 7 can be allowed to plead their usufructuary mortgage in derogation of the right claimed by the plaintiffs.

Now, as I understand it, you can defeat the right to possession under a lease in various ways. If it is only an agreement for a lease all sorts of equitable pleas are open by way of reply to an action for specific performance, and any breach of contract by the person seeking to enforce the contract, and any breach by him of any of the provisions of the contract, might be a very excellent answer to his suit for specific performance. If it is a demise, you can show that there was a condition precedent to its taking effect as such. That is just what was attempted to be done in this case. That defence broke down and it was held that the obligations of the lessees were not conditions precedent, but were merely mutual concurrent contracts or covenants between lessor and lessee. Or you can show that the whole thing is void, because the making of the contract was vitiated by fraud, coercion or misapprehension. That is not this case, and no such ground is suggested. What is the result? The result is that the respondents are seeking to destroy the right to possession given by the instrument by setting up a breach of contract which arose subsequent to the obligation to give possession. That seems to be an obviously impossible defence. It is for the safeguarding of those rights of a lessor that covenants of re entry are inserted in leases, whereby a breach of contract by the lessee subsequent to the lease may entitle the lessor to re-enter and get back possession of the land. But, in my opinion, that must be under a specific covenant of re entry in the lease. If there is no such clause, there can be no right to get back possession of the land. If section 39 of the Contract Act applies, this document is not a transfer of property or of any interest in the land, but is a mere bundle of mutual obligations under a contract. I think much confusion has arisen from the fact that the English Law of real property makes a very sharp distinction between those rights over property which are termed "real" rights and "chattel" interests in property which are mere personal rights. I think that is a peculiar incident of the English Law of property with its very curious history, and it seems to me that it is not necessary to complicate Indian Law by seeking to import such technicalities of English Law into India. In the case reported as *Secretary of State* v. *Pemmaraju Venkkayya Garu* (1), I took very great care in deciding the question of the leasehold interest which then came up, not to base my judgment on technicalities peculiar to English real property law but on general principles which seemed to me to apply. I think that the introduction of the English conception of chattel interests in land might lead to the conclusion that nothing had passed by way of transfer, that there was a mere bundle of rights and that section 39 of the Contract Act applied. To my mind that could be arrived at only by importing the English doctrine and, speaking for myself, I must decline to adopt that course. That being so, I regard this instrument not as a mere executory contract but as a transfer of an estate. Section 39 of the Contract Act, in my opinion, applies only to a state of things where there is a series of executory promises on both sides ; and so soon as one part of the obligation has been performed by a complete transfer of the property in question, that section ceases to have any application.

As regards the decision reported as *Chhotku Rai* v. *Baldeo Shukul* (5), all I can say is that I do not understand it as reported, nor do I gather upon what principle the learned Judges proceeded. With regard to the case in *Subba Rau* v. *Devu Shetti* (6), I have no hesitation in saying that unless it can be explained by an omission in the report as to the existence of an express power of cancellation, it must be regarded as contrary to the trend of authority.

I think that the order of the learned Chief Justice is right. It may be that the appellants might have got further relief. But they have contented themselves with the Chief Justice's judgment.

M. C. P.

Appeal allowed,

VENKATRARAMA CHETTY, *In re.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 74 OF 1918.

February 15, 1918.

Present:—Mr. Justice Krishnan.

In re K. VENKATARAMA CHETTY—DEFENDANT—PETITIONER.

Presidency Small Cause Courts Act (XV of 1882), s. 41—Ejectment from part of house, suit for—Rent of portion sued for not exceeding Rs. 1,000—Jurisdiction of Small Cause Court—Question of title, decision of—Revision—High Court, interference by.

A suit to eject a tenant of a portion of a house, the rent of which is less than Rs. 1,000 per annum, is cognizable by a Presidency Small Cause Court, though the annual rent of the whole building exceeds Rs. 1,000.

In such a suit, where the Court goes into the question of title to enable it to exercise jurisdiction, its order cannot be set aside by the High Court as being without jurisdiction.

Petition, under section 115 of Act V of 1903 and section 107 of the Government of India Act, 1915, praying the High Court to revise the order of the Court of Small Causes, Madras, in Ejectment Suit No. 36 of 1918.

FACTS.—The plaintiff claiming as reversioner to a deceased Hindu widow's estate brought this suit in the Small Cause Court, Madras, for ejecting the defendant from a portion of a house which formed part of the estate of the said widow and to which the plaintiff alleged he had succeeded as such reversioner. The defendant pleaded that the Small Cause Court had no jurisdiction to try the suit inasmuch as the annual rent of the entire house exceeded Rs. 1,000, denied that the plaintiff was the next reversioner, denied payment of rent to the plaintiff and tenancy under him and put the plaintiff to proof of his title as next reversioner. The trial Judge found that the plaintiff was a reversioner and that he succeeded to all the properties of the widow including the suit house and that the defendant paid rent to the plaintiff, and in the result gave a decree for possession. The defendant thereupon preferred this civil revision petition to the High Court. The petition came on before his Lordship Krishnan, J., for issue of notice to the respondent.

Mr. *V. C. Seshachariar* (with him Mr. *M. Raghavachariar*), for the Petitioner.—The suit was not cognizable by the Small Cause Court. Under section 41 of Act XV of 1882, a suit for ejectment can be filed in the Small Cause Court only if the annual value of the house at rack rent exceeds Rs. 1,000. The annual rental should be taken into consideration in determining the question of jurisdiction.

The Small Cause Court has exceeded its jurisdiction in adjudicating on the title of plaintiff as reversioner.

JUDGMENT.—The first point taken is that the learned Judge has not found that plaintiff is the next reversioner. There is no suggestion that there are any other reversioners and I take the finding of the lower Court that plaintiff is the reversioner to mean that he is the next reversioner.

It is argued that though the rent payable by the defendant is only Rs. 6 a month, the annual rent of the whole building of which defendant is occupying a part should be taken into consideration for deciding the jurisdiction of the Small Cause Court under section 41 of the Act. Defendant having become a tenant of only one or two rooms, this suit has reference only to those rooms and it seems to me that as the rent payable by him annually is much less than Rs. 1,000, the suit comes within the cognizance of the Presidency Small Cause Court.

It is also argued that the Small Cause Court should not have gone into any question of title but where the Court goes into the question to enable it to exercise its jurisdiction, its order cannot be set aside as being without jurisdiction.

There is no ground for interference under section 115, Civil Procedure Code, nor under section 107 of the Government of India Act.

The civil revision petition is dismissed.

M.C.P.

Petition dismissed.

MAHOMED HAJI ABU *v.* KHATUBAI.

BOMBAY HIGH COURT.

APPEAL FROM ORIGINAL CIVIL SUIT No. 1136 OF 1915.

September 21, 1918.

Present :—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Macleod.

MAHOMED HAJI ABU—APPELLANT

versus

KHATUBAI AND OTHERS—RESPONDENTS.

Halai Memons *of Porebunder, law applicable to—Succession—Hindu or Muhammadan Law—Custom—Domicile, change of, effect of.*

Halai Memons of Porebunder are governed by Hindu Law in matters of succession and inheritance. [p. 523, col. 2; p. 527, col. 2; p. 528, col. 1.]

A *Halai Memon* of Porebunder residing and carrying on business in Bombay who has not severed his connection with Porebunder, would be governed by the law applicable to *Halai Memons* of Porebunder and not by that governing Bombay *Memons*. [p. 524, col. 1; p. 526, col. 2.]

Per *Scott, C. J.*—Permanent residence in Bombay does not necessarily import the Muhammadan Law of succession for one whose ancestors were converted from Hinduism. Severance from the domicile of origin and permanent residence in Bombay would, in the case of persons falling within the purview of the Indian Succession Act, effect change of domicile and with it a change of law, *e. g.*, from French to Anglo-Indian or Portuguese to Anglo-Indian, but it would not change the law of succession for Hindus or Muhammadans. [p. 524, col. 1.]

Appeal from the decision of Marten, J., reported as 45 Ind. Cas. 619, in Original Suit No. 1136 of 1915.

Mr. *Setalvad* (with him Mr. *Desai*), for the Appellant.

The Hon'ble Mr. *Jinnah*, for Respondent No. 1.

Mr. *Campbell*, for Respondents Nos. 2 and 3.

JUDGMENT.

SCOTT, C. J.—This suit relates to the succession to the estate of Haji Abu Haji Habib, who died at Bombay on the 30th November 1914 intestate. He left him surviving a widow, the 2nd defendant, two married daughters, one of whom has since died, the survivor being the plaintiff, and one son, the 1st defendant.

The plaintiff claims to be entitled as a daughter to 7/32, her share on the footing that Muhammadan Law is applicable: she is supported by the representatives of the deceased daughter who would under Muhammadan Law be entitled also to 7/32.

The 1st defendant contends that Hindu Law applies and under that law he is entitled to the whole estate subject to the maintenance of the deceased's widow. In the lower Court the widow, his step-mother, supported his contention though under Muhammadan Law she would be entitled to 4/32 of the estate. She has not appeared in this appeal.

The estate is valued at $2\frac{1}{4}$ lacs and consists of five immoveable properties in Bombay valued at Rs. 1,40,000, a ten annas share in a cutlery business in Bombay valued at Rs. 60,000, and a house and land at Porebunder valued at Rs. 25,000.

The deceased was a native of Kathiawad belonging to the group of converts to Islam from Hinduism known as Memons (Muamins, believers). Memons are in Bombay popularly classed in two categories, Cutchi Memons from Cutch, and Halai Memons from the Halar District of Kathiawad. Porebunder, Bantwa and Kutania are Native States in Kathiawad near the borders of the Halar Prant and there is evidence that Memons in these places are regarded in Kathiawad as Halai Memons.

The customs governing succession among the Cutchi Memons have often been the subject of investigation in this High Court and in every case the Hindu Law of inheritance applicable to the point in controversy has been applied.

The first recorded case is that tried by Sir Erskine Perry in the Supreme Court in 1847 and preserved in Perry's Oriental Cases, page 110. It was there laid down that if a custom as to succession is found to prevail amongst a sect of Muhammadans and is valid in other respects the Court will give effect to it, even though it does not accord with the rule of the Koran. The actual decision was limited to this that the custom pleaded, that females are not entitled to any share of their father's property but only to maintenance and the expenses of marriage, if any, was satisfactorily proved.

It was remarked in that case that the Halai Memons follow the Koran in matters of succession, but the remark was *obiter* and so far as appears from the evidence of immigrants from Cutch recorded by Sir Erskine Perry (see Exhibit P), those spoken of as Halai Memons were Memons who had been in Bombay for many years (one witness said 150 years) and were also known as Bombay Memons. There has never been any contest in the Bombay Courts as to the law applicable in matters of succession and inheritance to those calling themselves Halai Memons in Bombay. It has

always been accepted that the Muhammadan Law applies.

In Exhibit A41, the summary of between thirty and forty Probate and Administration grants in Bombay in the matters of the estates of Halai Memons from 1857 to the date of this suit, all except three relate to Bombay residents and Bombay estates. In the case of the exceptions in two cases the deceased left houses at Veraval in Junagadh State, Sorath Prant as well as in Bombay and in one case in Kutiana as well as in Bombay.

In Exhibits A 45 and A 46, summaries of pleadings in 32 suits for administration in Bombay of Halai Memons' estates, none states that the deceased left property in Kathiawad though according to some the deceased left properties in either Surat, Ghogha, Bangkot or Madras as well as Bombay.

In the present case an entirely novel question is raised, namely, what is the customary law governing succession to a non-Cutchi Memon of Porebunder who, though residing for a considerable time in Bombay and acquiring property there, has clearly indicated his intention to keep up and not to sever his connection with Porebunder?

Speaking generally, the evidence which will later be referred to with more particularity, establishes that the Memons of Kathiawad, of whatever group or sect, follow the Hindu rule of succession, and this conclusion is supported as to Porebunder Memons particularly by a large number of instances in which widows and daughters have been excluded from succession, sons have divided the property with their father in his lifetime or equally with each other after his death and the right of predeceased brothers' sons to share with their uncles has been repeatedly recognised. All these results are incidental to the Hindu and not to the Muhammadan system.

The husband of the plaintiff, who is a Porebunder man and had the fullest opportunity of countering the evidence adduced in Court by the first defendant, has not been able to produce any Porebunder evidence to support the contention that the Muhammadan Law applies.

The plaintiff relies upon the evidence of Bombay Memons, which does not necessarily help us to decide what is the Customary Law of Porebunder—in only very few of these cases does it appear that there was any continuous connection with Kathiawad and in none does there clearly appear to have been, as in the case of Haji Abu, an intention of retiring permanently to Kathiawad.

A priori there is nothing astonishing in the result of the Porebunder evidence.

That the Memons of Kathiawad are converts to Islam from Hinduism is undoubted. It would be surprising if in Kathiawad they had divested themselves of the social system of their forefathers. Such a result has not followed in the case of other Hindu converts to Islam in Western India, for example, the Khojas, the Cutchi Memons, the Sunni Borahs of North Gujarat [see *Bai Baiji* v. *Bai Santok* (1)], the Molesalam Girasias of Amod [see *Maharana Shri Fatesangji Jasvatsangji* v. *Kuvar Harisangji Fatesangji* (2)] and the Nassaporia Memons of Sind [see *Abdurahim Haji Ismail Mithu* v. *Halimabai* (3)]. It may indeed be said that the habit of the Bombay Memons (other than the Cutchis) to follow the Muhammadan Law of succession is rather the anomaly. It may perhaps be explained by the fact that, as testified in 1847 before Sir Erskine Perry, they had been settled for a long time in the city. There they would be open to the influence of professional lawyers at a time when the exclusion of the law of the religion by the Customary Law anterior to the conversion was not established as a legal possibility, or it may be that the influence of some religious teacher in the city operated to enforce the adherence of the Bombay Memons to the rule of the Koran. Whatever the cause the result has been that the Bombay lawyers sweep into the category of pure Muhammadans not merely the Memons settled in Bombay with no Kathiawad connections but also occasionally Memons who have not given up their Kathiawad connections.

The general Bombay assumption, that every Memon who is not a Cutchi is governed by the Muhammadan Law of succession, is well illustrated by the notice of the

(1) 20 B. 53; 10 Ind. Dec. (N. S.) 594.
(2) 20 B. 181; 10 Ind. Dec. (N. S.) 679.
(3) 32 Ind. Cas. 413; 43 I. A. 35; 18 Bom. L. R. 635; 30 M. L. J. 227; 20 C. W. N. 362; (1916) 1 M. W. N 176.

Bombay Government (Exhibit L) of the year 1897 described as a "Public notice to the Memon community by the Government of Bombay at the desire of the Government of India," in which it is stated: "The Memon community in India is divided into two sects, the Halai Memons and the Cutchi Memons. The former without exception follow the Muhammadan Law in all respects." This notice appeared in the Porebunder Gazette (Exhibit M) with a view to elicit the wishes of the Memon community there. The result must have been a surprise to the Bombay Government, for the leaders of the Porebunder Memons (not Cutchis) went to the Administrator and informed him that the Jamat had approved of the Hindu Law of inheritance by which they were governed.

I will now consider the evidence in detail.

First as to the general evidence regarding Kathiawad Memons.

Many of the witnesses examined on commission at Porebunder on behalf of the 1st defendant depose that in matters of succession and inheritance Memons follow the Hindu customs, that all Kathiawad Memons are Halais and all Cutch Memons are Cutchies, that Memons residing in other Kathiawad towns such as Dhoraji, Upleta, Kutiana, Bantwa, Gondal, Rajkot, Vantli and Vasavad (some of them being under Muhammadan jurisdiction) follow similar customs: that all Memons were originally Lohanas in Sind before their conversion. These witnesses are Haji Cassum (Com. 1); Haji Dada (Com. 2); Sakur Haji Ahmed (Com. 3); Mahomed Haji Dada (Com. 4); Haji Umar (Com. 5); Haji Jusab Haji Dada (Com. 6); Haji Jusab Haji Issack (Com. 7); Haji Sakur Haji Habib (Com. 8); Abdul Karim (Com. 9); Haji Ismail (Com. 10); Haji Ibrahim (Com. 11); Haji Essa (Com. 13); Haji Sulleman (Com. 14); Alli Muhammad Khamisa (Com. 17); Noor Mahomed Abdul Karim (Com. 18); Umar Haji Dada (Com. 20); Karim Beg Mahomed (Com. 21); Umar Noor Mahomed (Com. 23).

Eleven judgments of Judicial Assistants to the Agent to the Governor in Kathiawad sitting in appeal from the Courts of the Nyayadhish of Bantwa or the Sorath Prant establish that the Hindu Law of succession, maintenance and partition is applied to Memons of Bantwa. In a Vasavad case between Memons it was decided by the Court of the Judicial Assistant that a widow's rights are superior to those of her husband's mother, the latter only being entitled to maintenance.

In none of these cases was there any contest as to the applicability of the Hindu Law of succession and inheritance, though the right to partition as among Hindus was disputed more than once.

In a case between Memons of Veraval which went through three Courts in the Muhammadan State of Junagadh, it was held that among Memons the Hindu Law applied and ancestral property was divided equally between three brothers to the exclusion of their sister.

I come now to the Porebunder evidence.

In dealing with that evidence I do not treat the decisions of the Porebunder Courts as proof of foreign law, for our inquiry is not concerned with the law of the Porebunder State as created by any local legislative authority or with a Porebunder custom affecting subjects of the State as such. We are inquiring as to the custom in fact followed by a certain community in Porebunder, a custom peculiar to the community and not resulting from residence in the State. I shall refer to some of the Porebunder judgments incidentally only, and would not put them higher than instances in which the custom alleged has been recognised and which are thus admissible under section 13 of the Indian Evidence Act.

In the family of the plaintiff's husband (see Pedigree, Exhibit 13A) four instances are adduced which, it is contended, indicate that Hindu Law governed the parties. Haji Kassum Khanu left a Will (Exhibit 23), dated the 20th August 1892.

He begins by directing that if he does not make another Will his heirs and representives shall give effect to this Wil according to its terms.

His property is described as consisting of (1) a house worth Rs. 6,000, next to his brother Adam's house also worth Rs. 6,000, the title deed of which stands in the name of his father Khanu: also two houses at Mozambique.

(*b*) Rs. 60,000, being the balance to credit in his shop account at Mozambique and invested in business.

(*c*) Rs. 8,000, the value of his boat, Ganje Bere Zum Zum. As to the house next to his brother's, his widow is to reside in it but she cannot sell it.

The boat is left to his sons Sulleman and Tyeb as his heirs, subject to a charge of Rs. 100 out of its profits for his widow's maintenance. The rent of the two houses at Mozambique is also allotted towards his widow's maintenance.

Subject to religious trusts to the extent of Rs. 4,000, Rs. 60,000 invested in the Mozambique business is to be taken according to Muhammadan Law. This direction, however, is subsequently explained thus: His three sons are to decide whether the business should be stopped or continued. If his widow bears a son, that son is to inherit everything since the testator has on different occasions paid his sons their respective shares and "kept them separate from him." If another son is not born, "the heirs shall divide and take according to Muhammadan Law, that is to say that my cash (Punji, assets) shall be divided into four equal parts, three parts going to my present sons and one part to their stepmother," and she may deposit her share at any place she likes. Lastly, his sisters, if entitled to a share according to Muhammadan Law, are to be given it or if not entitled, they are to be given presents at the time of the obsequial ceremonies.

In spite of the reference to the Muhammadan Law, the Will is the Will of a man following Hindu customs. The whole property is dealt with: an earlier separation with his sons is referred to and in default of a posthumous son the commercial assets are to be partitioned equally between the sons and the widow, and maintenance and residence is provided for her.

Zuleikha, the widow, was not paid the maintenance provided by the Will nor her share on partition of the trade assets. She received only Rs. 30 as maintenance for nine or ten years. She, therefore, sued the representatives of her three stepsons and got a decree (see Exhibit 10A) for Rs. 17,205, being maintenance for ten years, and Rs. 14,000 (one fourth of Rs. 60,000, *minus* 4,000). To enforce the decree after her death her son, by her marriage prior to her marriage with Kassum Khanu, proceeded separately against the sons of Tyeb Kassum and Abu, the son of Sulleman (who is also the present plaintiff's husband). The proceeding against Tyeb's sons failed finally on the 27th March 1912, see the judgment (Exhibit 10H) of the highest (Huzur) Court in Porebunder, which decided that Zuleikha's rights under the decree passed not to her son by her first husband but to her heirs according to Hindu Law, the grandsons of her second husband, following the decision in *Moosa Haji* v. *Haji Abdul* (4).

The same result was eventually arrived at on the 24th September 1916 by the Huzur Court in the proceeding against Abu Sulleman, after some difference of judicial opinion. (See Exhibits 10B, 10C and 10D).

The disputes relating to Zuleikha thus form the subject of five of the Porebunder judgments in evidence in this case.

The case of Kassum Khanu above analysed is instance 13 among the instances adduced for the 1st defendant. It shows that the grandsons as heirs according to Hindu Law succeeded to the property of their stepmother and the Will of Kassum indicates how deeply he was impregnated with Hindu ideas of succession.

The brother of Kassum Khanu, Adam Khanu, the uncle of the father of the present plaintiff's husband, is instance 14 among the defendant's instances.

Adam had two sons, Joosub and Habib, and one daughter. Habib predeceased his father leaving a son, Ahmed. Of the three witnesses examined in regard to this instance one is the brother-in-law of Habib. He says Ahmed and his uncle Joosub divided Adam's property, which included a house in Porebunder and a house in Mozambique. Adam's daughter is living but got no share.

The plaintiff, whose husband's grandfather was brother to Adam, calls no witness to contradict this story, nor does the cross-examination of the witnesses indicate that the story is untrue. If it is true, the division by Joosub with his brother's son was consistent only with the application of

(4) 7 Bom. L. R. 447; 30 B. 197.

the Hindu Law of the joint family as is also the daughter's exclusion.

The third son of Khanu was Latiff. He is instance 15 for the defendant. His son-in-law, Haji Sulleman Abba, says his wife, Latiff's daughter, got no share but he does not say that there was any property. The evidence that there was a house in Porebunder is that of Haji Kassum Haji Ahmed—not an accurate witness—but the statement is not disputed by the plaintiff whose husband should have had means of knowledge.

Instance No. 1 is the last one from this family. It is the case of the father of the plaintiff's husband. All witnesses agree that he was worth several lacs when he died and his daughters got nothing. The witness Karim Haji Beg Mahomed says one of the daughters married his nephew, Ahmed, another his sister's son, and a third the son of his brother-in-law. If they had got any inheritance he would have known of it. Abdul Latiff Haji Habib says two other daughters married two sons of his sister and he would have known if they had got a share.

All the witnesses agree that Sulleman's sons never divided their father's property. The learned Judge thinks this was because the estate was lost before it was divided, but the facts appear to be that the sons were living jointly with their father who died in June 1895 or earlier, leaving businesses in Bombay and Africa and property in Porebunder. In the Bombay business a share of six annas stood in the name of Sulleman and his brother Tyeb. Tyeb died in 1897-98 and then Ibrahim son of Sulleman sued the other partners on behalf of Sulleman's and Tyeb's families (see Exhabit F, plaint in Suit No. 646 of 1898) in the Bombay High Court. He recovered under a release in that suit Rs. 34,000 from the other partners on the 31st December 1898 (see Exhibit G), which was paid by Havala or draft on Tyeb Sakoor & Co. of Beira. The plaint recited that Kassum Khanu till his retirement in 1889 was head of a joint family whereof the other members were Sulleman, Tyeb and Ibrahim Sulleman. In 1889 Kassum separated from the other members of the joint family. Ibrahim then started business in Bombay in the name of Ibrahim Haji Sulleman & Co. This Bombay business failed in 1905 and Ibrahim Sulleman went through the Bombay Insolvency Court. The African business, Tyeb Sulleman & Co., failed about 1911. We have the evidence of the plaintiff's husband, who survived his brothers Ibrahim and Moosa, that till 1911 or 1912 he and his cousins Tyeb's sons were interested in that business. He had from the time of Sulleman's death jointly with his cousin Abdulla Tyeb family ships of which two have been sold. His father also left a house and a *vanchi* or cart in Porebunder which were attached by Haji Kassum Ghadialli (Com. Wit. No. 1), for a debt of Rs. 6,000 upon which Hurbai, Sulleman's widow, in 1911, unsuccessfully tried to establish a claim for maintenance (see judgment of Porebunder Nyayadish, Exhibit 29). He says he gave no part of the ships to his sisters or his mother and says he cannot mention any instance of a daughter getting a share in his family. The judgment of the Nyayadhish (Exhibit 29) records that Hurbai deposed that a partition was effected between her and her surviving sons whereby Abu got the Vadi, Moosa, the house and Hurbai, Rs. 10,000, but Abu does not confirm this and says she only got Rs. 700. There is thus ample evidence that Sulleman's sons enjoyed his property for years after his death to the exclusion of his daughters as a Hindu's sons would enjoy it.

All these instances have been rejected by the learned Judge, as it seems to me, without a sufficient cause. If it stood alone, the instance of Latiff (No. 15) would not be of much value, but taken with the other instances Nos. 14 and 1 in the same family it points to a continuous adoption of the rule of Hindu succession by which daughters are excluded from inheritance when there are sons. The succession of grandsons is also well established, which would only occur where Hindu Law was followed. The instances of Kassum Khanu and Sulleman Kassum are also of importance, in that they show that Porebunder Memons trading in Bombay without cutting themselves off from Porebunder follow the customs of Hindus.

Instance No. 2, Ismail Mohamad, died in 1903, as is deposed to by his widow's cousin Haji Dada and his daughter-in-law's

uncle Haji Umar. His grandson, Mahomed Sakoor, married the 3rd defendant, who sides with the plaintiff. The evidence of several witnesses is that he left four sons and two daughters and property of considerable value in Porebunder and Africa. The daughters got no share. The sons did not partition the property until after the present suit was filed, twelve or thirteen years after their father's death. The partition is said to have taken place in Africa. The learned Judge rejects this instance, as the partition was not till after this suit had begun, it was made in Africa, and rests on hearsay evidence. If the evidence had been false, it would have been easy for the 3rd defendant's husband to disprove it but he has not done so. If we hold that this partition is not proved, the position seems to be that the four sons have enjoyed the property and the daughters have got nothing. The instance cannot, therefore, be rejected.

Instance No. 3 is that of Haji Dada Tar Mahomed who went with the other leaders in 1897 to the Administrator and declared for Hindu Law. Witness No. 21, Karim, is his son-in-law and says the daughters, one of whom was his wife, got no share. The learned Judge rejects his evidence on the ground that he had repeated an untrue story of the cause of a daughter of another (instance) receiving a share in Bombay. I do not think this is a sufficient ground for discarding the evidence of the witness about his own wife.

Instance No. 4, Ahmed Haji Habib, is a very well-established case of sons taking the whole estate and providing in a separation deed with one of them that the two widows should be maintained and the marriage expenses of the sisters and of the unmarried brother should be charged on the family property. The daughters got no share. There were two widows of whom one Hanifa was mother of all the children while Zuleikha was the stepmother: Hanifa was to get Rs. 100 for maintenance of herself and her daughters and Zuleikha Rs. 50. This is evidenced by the documents executed on the 27th April 1902 (Exhibits 10A and 10B). Zuleikha objected and sued for her share under Muhammadan Law. The sons also sued her apparently for a house in her occupation and its contents including Rs. 16,000 in cash, contending they were entitled under Hindu Law. An arbitrator's award gave to Zuleikha the house valued at Rs. 11,000 for residence for life (with remainder to the stepsons) together with all the contents in lieu of maintenance. The arbitrator says he had Hindu Law in mind in making his award. The value of the instance for the present case is that it shows the sons took the property and the daughters got no share. The learned Judge rejects the instance because Zuleikha's claim, which was compromised, was based on Muhammadan Law. This does not affect the instance as regards the other widow Hanifa and her daughters.

Instance No. 5, Haji Kassum Tar Mahomed, (one of the leaders who declared for Hindu Law in 1897) which the learned Judge accepted as established, is one which shows a partition deed (Exhibit 5A) between four brothers and the sons of their deceased brother of a business in Bombay and of properties at Porebunder and Natal on the footing of Hindu custom. There were two daughters of Kassum who got no share from their brothers, yet their husbands attested the partition deed. It is a case where Memons trading in Bombay retained property and connections with Porebunder and acted according to Hindu custom.

Instance No. 6, Cassum Haji Abu, is rejected by the lower Court. It should be considered with those of Moti Haji Abu, instance No. 10, and of Haji Abu Jiva, the father of these men.

Haji Abu had three sons, Moti, Sulleman and Cassum, and two daughters, Hurbai and Hawabai, by his first wife who died in Porebunder. He married again a Memon of Bantwa and having separated from the sons of his first wife went and settled in Bombay where he acquired a house. He had a family of sons by his second wife also who were born, married and resided in Bombay. He died in Bombay in 1893. His surviving daughter by his first wife was paid Rs. 925 in April 1893 by her step-brothers in Bombay in consideration of the transfer to them of her right, title and interest in her father's estate, see Exhibit A 1. This was a Bombay transaction arranged for Hawabai by a Bombay Solicitor, Mr. K. D. Shroff, and in the release the deceased Haji Abu is described as of Bombay. One of Hawabai's

three stepbrothers, Essa Haji Abu, died in Bombay in 1909 and in an administration suit in the High Court filed by his full brother Tar Mahomed Haji Abu the estate of Essa was divided between Essa's widow and his posthumous son according to Muhammadan Law (see Exhibit A36). Thus in the case of settlers in Bombay Muhammadan Law was applied. It was otherwise, however, with the children of Haji Abu's first marriage who remained in Porebunder. Kassum Haji Abu died at Porebunder in 1910 leaving seven sons and the grandson of a predeceased son, Ismail. In 1915 (see Exhibit A) Ismail's son and his mother passed a release to Kassum's surviving sons and became separated from what is styled the joint family receiving Rs. 4,000 in respect of "whatever right Jusub Ismail the releasor might have in getting the releasees' joint property or Kassum Abu's property divided and with regard to whatever right the (releasor's) mother Hawabai might have against the releasee's property or against Kassum Abu's property." Ismail had been acting as Moonim in Bombay of Kassum Abu. The release mentions that Kassum Abu's daughter was to be married as well as three unmarried sons and the calculation of Joosub's share was arrived at on that basis after the accounts of Kassum's estate had been shown to Ismail's father-in-law.

Moti Haji Abu left four sons and three daughters. The father-in-law of one of Moti's sons says Moti's property was inherited by his sons to the exclusion of his daughters.

I do not think these instances were rightly rejected by the lower Court. The release, Exhibit A, is said to be too recent since the present suit had already been started. I am not able to agree with the apparent suggestion that the release had any connection with the parties to this suit, nor with the learned Judge's opinion that the statement of the witness Com. 2 concerning his own son-in-law should be disbelieved because at different times he had given self-contradictory evidence on a wholly different matter and biassed evidence regarding Hawabai's release (Exhibit A1).

Instance No. 7, Beg Mahomed Tar Mahomed, is held established by the lower Court. Beg Mahomed was a resident of Porebunder and traded first in Africa and afterwards in Bombay in partnership with Abu Jiva with whose estate this suit is concerned. Beg Mahomed left two daughters and a grandson, son of his predeceased son Moosa. The grandson inherited the property to the exclusion of the daughters and his sister the daughter of Moosa also got no share.

Instance No. 8, Beg Mahomed Hassnu, is also held established by the lower Court. His wife was sister of Jiwa Haji Abu's father. He left a son and three daughters and two houses in Porebunder, the son inherited and the daughters got no share.

Instance No. 9 is Khanu Hassam, one of the leaders who declared for Hindu Law before the Adminidistrator in 1897. This instance is rejected by the lower Court as the evidence is unsatisfactory. I agree that it is of no value.

Instance No. 11, Haji Beg Mahomed Haji Jiwa, was one of the leaders who appeared before the Administrator in 1897 and declared for Hindu Law. He left three sons and two daughters and the son of a predeceased son. He had a shop at Bombay and his family lived at Porebunder. The Bombay shop was subsequently closed. The sons and the grandson inherited the property and the daughters got no share. The lower Court holds this instance established: in this conclusion I agree.

Instances Nos. 16 and 17, Haji Alli Janu and Haji Joosub Janu, were brothers, residents of Porebunder, who both had property in Africa also. Their sons inherited to the exclusion of their daughters. I agree with the lower Court that these instances are established.

Instances Nos. 18 and 19 are Haji Umar Habib and Haji Sakoor Habib, brothers of witness Com. 2, Haji Dada Habib. He says that after their deaths his brothers' sons were joint and the females (widows in Haji Umar's case) and (daughters in Haji Sakoor's) got no share. The learned Judge here—and I think rightly—accepts the evidence of Haji Dada as establishing these instances.

Instances Nos. 21, 22 and 23 are the father, paternal grandfather and maternal grandfather of Haji Kassum Ahmed, Com. witness No. 1. Owing to his distrust of this witness the learned Judge rejects the instances. There was, however, no cross examination. Moreover, Haji Cassum was a

man of some property since he attached the property of the plaintiff's husband for a debt of Rs. 6,000 (see the judgment, Exhibit. 29). I doubt if there is sufficient reason for rejecting these instances. This is a convenient place to consider whether Haji Cassum should be considered as a false witness unless corroborated. He is, as a matter of fact, corroborated as regards all the instances he speaks to, except instances Nos. 21, 22 and 23 in his own family. The charge aginst him is that he is a bought witness and told a false story to conceal the fact. He was the person employed by the 1st defendant to collect evidence as to custom at Porebunder and not unnaturally received remuneration for his labours. Equally naturally having regard to the inveterate practice of such witnesses in India he was unwilling to tell the truth as to his remuneration. He appears to have worked hard for the 1st defendant. I am not prepared to hold that because he told a false story as to his remuneration he is in other respects a false witness. I would accept these instances.

Instance No. 25, Haji Abba Hassum, is a very well established case of a partition in 1890 (see Exhibit 3A) of the property in Porebunder and Africa of Haji Abba according to Hindu Law. The sons divided the property in equal shares providing for their mother but their sisters got no share. The lower Court with good reason holds this established.

Instance No. 26 is Haji Adam Sale Mahomed, who died about 1864 leaving Rs. 5,000 to 7,000. His son says that after he and his brother had made money in Africa about ten years later they gave Rs. 700 or 800 each to their sisters. As this would be about the amount of the daughter's share under Muhammadan Law, I agree with the learned Judge that the instance is too doubtful to be relied on.

Instance No. 32 Haji Dada, is one in which five sons got the property, which consisted of a house and a few thousand rupees, in Porebunder to the exclusion of the daughters. The learned Judge has, I think, rightly held this instance established.

Instance No. 36, Haji Ayub Hassum, is accepted by the lower Court on very clear evidence.

Instance No. 37, Valli Mahomed Khamissa. The brother of the instance deposes to litigation in the Supreme Court at Pretoria, in which he held a power-of-attorney for Valli Mahomed's adult sons who contested the right of their sister to share. The witness says the Court decided against the sister but the decree is not produced. The proof is, therefore, defective. On this ground it must be rejected as it was rejected by the lower Court.

Instance Nos. 38 and 39 are accepted by the learned Judge while instance No. 40 is rejected. The learned Judge rejects No. 40 as it is deposed to only by Com. witness No. 19, who wouldnot admit having joined in valuing the estate of Sale Mahomed in Bombay for the purpose of assessing the widow's one-eighth share. I doubt if this is a good ground for rejecting the witness' evidence as regards his own family, particularly as he was not cross-examined as to this part of his evidence. The evidence as to each is that the daughters got no share. In none of them is the property which the sons got indicated. It seems to me that either all should be rejected on the ground that there is not sufficient evidence of the property or all should be accepted. If accepted the number of the defendant's instance, is increased; if rejected the case for the application of Muhammadan Law is in no way strengthened.

I think all should be rejected as the existence of property is not clearly established.

Instances Nos. 44 and 45 are also instances of exclusion of daughters. The learned Judge, I think, rightly accepts them as established.

I now come to the evidence in support of the plaintiff's case.

Plaintiff's instance No. 1, Ebrahim Noor Mahomed Daina, was a case of an arbitration in Bombay in which the witness says a widow and daughters claimed according to Muhammadan, while the sons claimed according to Hindu, Law. He cannot say if the widow got nothing by the award, the married daughter certainly got nothing. The witness merely speaks from his recollection as a clerk to whom the award was dictated. This instance must be rejected.

Plaintiff's witnesses Nos. 2, 2A and 5 will be referred to later.

Plaintiff's instance No. 3, Mahomed Jumma Chaya.

Joosub Haji Valli speaking from hearsay says the instance, who was once his servant, died leaving female relations only and his property at Ranavav was distributed according to Muhammadan Law. The other witness Haji Moosa Haji Oosman tells an entirely different story and says there were sons of the deceased who traded and died in Bombay and left property in Bombay. He says the sons separated from their father in his lifetime and does not know if he left any property in Porebunder.

It is clearly a Bombay case but not so clearly a case in which Muhammadan Law was applied and is of no value as evidence of the custom followed in Porebunder. It is rejected by the lower Court.

Plaintiff's instance No. 4, Mahomed Joosub Patel, is spoken to by a witness who has no personal knowledge of it. According to his account there was no son to compete with the daughters. It is rightly rejected by the lower Court.

Plaintiff's instance No. 6, Sulleman Haji Adam.

This is a Bombay case and, therefore, rightly rejected.

The same must be said of plaintiff's instance No. 7, Ayoob Noor Mahomed, and No. 8, Haji Ahmed Pir Mahomed.

Plaintiff's instance No. 10, Hasham Haji Hassum, is the case of one who was described in his widow's application in 1904, for Letters of Administration U2, as of Bombay. Two years after the grant of letters the Bombay estate was divided according to Muhammadan Law between the widow and the heirs of the son and daughter who survived their father. The document evidencing this division mentions two houses in Porebunder which were not included in the settlement, but the witness Haji Cassum Ahmed said he was about to distribute the sale proceeds of these houses according to Muhammadan Law. The deceased is said to have visited Porebunder from time to time till his death. There is, therefore, a similarity between the circumstances of the deceased and Haji Abu, though there is no clear evidence that Hassam intended to retire to Porebunder. No objection was raised to the estate being treated as that of a Bombay Memon governed by Muhammadan Law. It was indeed to the interest of the deceased's male collaterals that it should be so treated.

Plaintiff's instance No. 11, Mahomed Adam, is one of Memons who came originally from Bhavnagar settling permanently in Bombay and having no property in Bhavnagar. It is, therefore, of no assistance.

Plaintiff's instances Nos. 12, 14, 15, 17, 18, 19 and 21 are all cases of Bombay Memons who had no property elsewhere.

Plaintiff's instance No. 20 is one of a Memon settled in Madura. The only witness is not very clear in his account of what happened to the estate of the deceased which was entirely in the Madras Presidency. It is of no value for either side.

Plaintiff's instance No. 13 was a case of two Memon brothers from Kutiana who settled in Bombay and acquired a small property there. On their deaths the widow of one bought out the widow of the other (see Exhibit A16), and the sister got nothing. The same result would have followed under Hindu Law.

There are three instances deposed to for the plaintiff which the learned Judge has considered were established as being cases of Muhammadan succession amongst Halai Memons domiciled in Porebunder.

(1) Saleh Mahomed Haji Vali.

He came to Bombay from Ranavav in Porebunder State with his father and brothers thirty five years ago. He seems to have carried on business in Bombay and South Africa and died at Ranavav in November 1910 leaving properties in Porebunder, Ranavav, Bombay and South Africa. He left him surviving a widow, Zuleikabai, a daughter, three brothers, Abdulla, Karim and Yusuf, and three sisters. His estate remained in the possession of Karim. Until 1915, the widow was maintained by Yusuf. In that year one Jusub Tyab, witness Com. A for the plaintiff, wrote a letter to Yusuf Haji Vali. According to the writer, as no maintenance had been received for three or four months he asked Yusuf not to stop the maintenance. Yusuf asked him to come to Bombay. He went and asked Yusuf to pay up the maintenance account, Yusuf said he was unwilling to pay it any longer and wanted to settle. On the other

hand Yusuf says that Joosub Tyab asked by letter for Zuleikabai's share according to Muhammadan Law. However that may be, Saleh Mahomed's estate was valued by five persons and Yusuf purchased the widow's share for Rs. 5,567-4-11, which she received partly by retaining ornaments belonging to the estate and partly in cash. See Exhibit O which was signed by Yusuf Tyab as her constituted attorney on the 5th July 1915. Prior to that, on the 12th June 1912, the three brothers and three sisters of Saleh Mahomed had executed at Ranavav a curious document (Exhibit Q), whereby they declared that they relinquished their shares in the estate of the deceased according to Muhammadan Law on condition that their shares should be used for any charitable or religious purpose or purposes which Abdulla might select, provided the money was spent in India. The estate seems to be still in the hands of Karim and nothing was done to give effect to Exhibit Q except that, if Yusuf is to be believed, a payment of Rs. 200 has been made in charity. It seems to me that whether Saleh Mahomed may be said to have retained his Porebunder domicile or not, his estate came into the hands of his brothers who had become Bombay Memons and were, therefore, permeated with the ideas of Bombay Memons.

(2) Sulleman Hassan Kali.

He died about 1900 leaving a widow, a father, a sister and a maternal uncle. Yusuf Haji Vali, a nephew of the widow, said that Sulleman had a business in Bombay but kept up his connection with Ranavav. The widow got a share according to Muhammadan Law. Her constituted attorney, Tar Mahomed Abba Sheriff, signed Exhibit A17, together with the father of Sulleman and the maternal grandfather who was stated to be the executor of Sulleman's Will. That document was a release in favour of the partners of the deceased of his share in the business for Rs. 3,205-2-6. Out of this sum the father got Rs. 1,600 and the widow Rs. 800. Though Yusuf says the deceased left property at Ranavav this is contradicted by Tar Mahomed. It may be taken, therefore, that Sulleman carried on business in Bombay in partnership. His share in that business was the only property left by him. He seems to have left a Will which has not been produced, but his executor was a party to Exhibit A17 and must have taken a part in the distribution of the money received from the partners of the deceased. How that money was distributed is by no means clear. If the father got Rs. 1,600 and the widow Rs. 800, that would not be a distribution according to Muhammadan Law. In any event the distribution took place in Bombay and it is not certain that Sulleman remained a Porebunder man.

(3) Oosman Hamid.

This instance is deposed to by Haji Cassum Haji Ahmed who said: "Oosman Hamid was a Porebunder man and came to Bombay for a short time. He left immoveable property at Porebunder. He died in 1887 leaving a widow Yemnabai, two sons, Cassum and Hasham, and a daughter Safoorabai. Oosman's estate was administered privately by his heirs. A release was passed in favour of my son-in-law Hasham by his other heirs. It is dated 24th December 1889. Oosman dealt in Porebunder stone and so far as I know exclusively. He sent stone from Porebunder for sale in Bombay. His place of business was in Porebunder."

The release (Exhibit U). on which so much reliance has been placed by the plaintiff, puts a very different aspect on this story. In the first place it recites that Oosman Hamid died in 1877. The witness, who gave his age as forty-nine, could only then have been a boy of ten. It further recites that Oosman left moveable and immoveable property in Bombay and at Porebunder; that on his death Cassum took charge of it as eldest male member of the family and continued to carry on the business of tailoring for and on behalf of the parties interested therein until he died in 1888; and that Letters of Administration to the estate of Cassum were granted to his brother Hasham. Therefore, it is clear that some time before 1877 Oosman came to Bombay and started a tailoring business. He may before that have had a stone business in Porebunder, but if he had, the witness could scarcely have had any personal knowledge of it. He could have known nothing more about Oosman Hamid beyond what he heard owing to his daughter having married Hasham. The release then recites

that Yemnabai and Safoorabai and another Yemnabai, the widow of Cassum, had agreed to receive certain sums fixed and ascertained as their shares in full satisfaction of their claim and demand in the property mentioned in the schedule as the heirs of Oosman Hamid and Cassum Oosman, and in consideration of the said sums the said parties released Hasham from all claims against the tailoring business and the property mentioned in the schedule, which included two houses at Porebunder valued at Rs. 3,000. Now the witness was a Bombay Memon and even if Oosman died a Porebunder Memon, which is not certain, his sons became Bombay Memons. Exhibit U was drawn up and executed in Bombay as a release to the administrator under letters granted in Bombay to the estate of Cassum. It is true that there were two houses at Porebunder belonging to that estate, but there is nothing unusual in Bombay Memons owing property in Kathiawad. It is difficult, therefore, to see how this can be considered as an instance of the estate of a Porebunber Memon being divided according to Muhammadan Law. Oosman's estate was never really administered; it was only after the death of Cassum that the family property with its accretions since the death of Oosman was divided by Hasham, a Bombay Memon.

On a consideration of all the cases above mentioned, the evidence seems to me to be all one way. Twenty-five cases are proved which indicate that Hindu Law was applied and not Muhammadan Law, and there is no clear case of the application of Muhammadan Law among Memons settled at Porebunder. It is natural that there should be frequent proof of such cases occurring in recent years and but few witnesses as to cases more than twenty years old, but there is evidence of a case dating from 1884.

The suggestion of the learned Judge that the bulk of the cases took place after 1897, perhaps in consequence of the action of the leaders in that year, does not explain that action and does not explain away the fact that in a suit of 1892 in which final judgment was given in 1896, the leaders of both branches of the Memon community in Porebunder gave evidence that sons excluded daughters (see Exhibit 8). The learned Judge trying that case remarked that from fifteen instances given by the witnesses it seemed clear that the Memons of Porebunder did not follow the Muhammadan Law of succession.

In this state of the evidence we are, I think, justified in holding that the conditions of a valid custom have been established. The custom is certain in its operation excluding daughters in favour of sons. It is invariable, inasmuch as no case of variation in Porebunder has been proved. It is ancient, because it is the custom which must certainly have prevailed in the community before the conversion to Islam, for Muhammadans do not discard when once adopted, though they do not always on conversion adopt, the rule of the Koran relating to succession.

The suit as filed relates to property in Bombay alone and the deceased Haji Abu died in Bombay intestate. But he was a Porebunder man. Neither circumstance implies severance from Porebunder. The evidence is strong that the deceased had retired to Porebunder, where he had a house, with the intention of ending his days there and he only came to Bombay to consult a doctor during his last illness. Since then there was no severance from Porebunder, the customary law of Porebunder Memons must govern the distribution of the estate.

We do not think it is open to us in our view of the evidence to follow the course taken by the lower Court and hold that the defendant has not made out the custom alleged. Nor can we hold that custom has established a *lex loci* peculiar to Bombay property, namely, the Muhammadan Law, and another *lex loci* peculiar to Porebunder property, namely, the Hindu Law. There is no principle recognised by the law administered in this country upon which a Hindu's or Muhammadan's possessions may be distributed partly by one law and partly by another according to the locality of the possession. They must all fall under either the law of the religion or the customary law of the community. There is no *lex loci* for the purpose of distribution. If it were possible on the evidence to infer an election by the deceased—a severance of his connection with the Hindu Kathiawad environment and a permanent settling in Bombay where

non-Cutchi Memons have long adopted the Muhammadan Law for distribution, the analogy of the law of domicile could be applied as in the Mombassa case of *Abdurahim Haji Ismail Mithu* v. *Halimabai* (3). It would not be the law of domicile, for permanent residence in Bombay does not necessarily import the Muhammadan Law of succession for one whose ancestors were converted from Hinduism. Severance from the domicile of origin and permanent residence in Bombay would, in the case of persons falling within the purview of the Indian Succession Act, effect change of domicile and with it a change of law, *e. g.*, from French to Anglo-Indian or Portuguese to Anglo-Indian, but it would not change the law of succession for Hindus or Muhammadans.

Therefore, since we are of opinion that the deceased died as he was born a Porebunder Memon, we must hold that according to the custom established by the evidence his son succeeds to all his property, his daughters are not entitled to share in his estate and his widow is entitled only to maintenance. We set aside the decree of the lower Court and dismiss the suit. The plaintiff must pay the costs of the 1st defendant throughout.

The order as to costs is that the plaintiff must pay the costs of the 1st defendant throughout including costs reserved, except that the defendant No. 1 must pay his own and the plaintiff's costs mentioned in the supplementary judgment as to costs of the 18th December in the Court below.

Respondent No. 4 to have her costs out of the estate.

The decree as to 1st defendant paying the costs of the 2nd defendant stands.

Costs of respondents Nos. 2 and 3 to be borne by their guardian *ad litem*, the plaintiff's husband.

The Receiver to hand over possession to the 1st defendant of all the property in his charge.

The costs of the 1st defendant will include the costs occasioned by the appointment of the Receiver.

MACLEOD, J.—One Haji Abu Haji Habib, a Halai Memon, died intestate at Bombay on or about the 1st December 1914 leaving a son, Mahomed, a widow, Bibibai, and two daughters, Khatubai and Ayshabai, as his heirs according to Muhammadan Law. Ayshabai died after her father leaving as her heirs her husband, Mahomed Haji Sakoor, and a daughter, Hawabai. Khatubai married one Abu Haji Sulleiman. On the 3rd September 1915 she wrote through her solicitors to her brother Mahomed stating that their father left considerable property in Bombay, moveable and immoveable, and calling upon him to render an account and hand over to her her share in the estate left by the deceased.

On the 7th September Mahomed's solicitors replied that as the parties came from Porebunder, according to the law applicable to them a married daughter was not entitled to any share in the estate of her deceased father.

On the 17th September they wrote further that the parties were governed by the rule of Hindu Law. Thereupon Khatubai filed this suit against her brother, Mahomed, her mother, Bibibai, and the heirs of Ayshabai, praying *inter alia* that the plaintiff was one of the heirs of her father Haji Abu and as such entitled to a 7/32nd share in the estate left by him.

The 1st defendant in his written statement contended that the parties were governed by the Hindu Law of inheritance and succession, on the ground that such Hindu Law was retained by Halai Memons of Porebunder and Kathiawar generally when they were originally converted to Muhammadanism or that such law was theirs by custom which had been followed by them from time immemorial, that though the deceased had come to Bombay and carried on business there for many years, he continued to be a Porebunder man and his family had always been governed by the custom of inheritance and succession which prevailed at Porebunder amongst Halai Memons, lastly that the custom of Halai Memons in Kathiawar that they were governed by the Hindu Law of inheritance and succession had been frequently judicially determined in the Courts of Kathiawar. The widow Bibibai supported the 1st defendant while the 3rd and 4th defendants were content to abide by the decision of the Court.

The suit came on for hearing before Marten, J., and after a very lengthy trial the learned Judge decided that the deceased Haji Abu belonged at all mate-

rial times to a family of Halai Memons who were settled in Porebunder, that Halai Memons so settled in Porebunder did not as regards inheritance and succession retain Hindu Law at the time of their conversion to Islam nor had they by immemorial custom adopted Hindu Law, and that the deceased at the date of his death was governed by Muhammadan Law as regards the inheritance and succession to his properties, moveable and immoveable, in Bombay and outside Bombay. That, therefore, the plaintiff was entitled to a 7/32nd share in his estate.

From that decision the 1st defendant has appealed. The origin of the Halai Memons is by no means clear. The word 'Memon' is derived from the word Muamin, *i. e.*, believer, and has been applied to a particular class of converts from Hinduism to Islam. The Bombay Gazetteer states that the Memons in Kathiawar were of two divisions: Cutchi Memons, who were supposed to be the descendants of converted Lohanas and to have come originally from Sind, and Halai Memons, the descendants of converted Kachhias. Kachhias are husbandmen and it is not clear whether it was intended to be implied that the Halai Memons were converted inhabitants of Kathiawar or were immigrants from some other country after conversion. It certainly appears from the evidence of several of the Porebunder witnesses in this case that the tradition is that the Halai Memons came over to Kathiawar from Cutch and were called Halai Memons, as distinguished from Cutchi Memons, from Halar, the name of the Prant in which they settled. They do not intermarry with the Cutchi Memons and this points to their having belonged originally to a different Hindu caste, though in Porebunder the tradition appears to be that they were also Lohanas. If then they were husbandmen in Sind, they would naturally have preferred to pass through Cutch and settle in Halar which was more adapted to agriculture. It is also more probable that they were converted at or about the same time as the Lohanas in Sind rather than that there was a conversion of the indigenous population in Halar. From Halar the Halais spread over Kathiawar and whatever their original occupation may have been, it seems that they are now mostly occupied in trade. Thus they come to Bombay. In the *Khojahs and Memons' case* [*Hirbae* v. *Sonabae* (5)] the defendant, a Cutchi Memon, said that the Halais came to Bombay one hundred and fifty years ago, but however that may be, it is now undisputed that Halai Memons who have settled in Bombay and are called Bombay Memons consider themselves governed by the Muhammadan Law of inheritance and succession and no attempt has ever been made, as far as I know, to establish that they are governed by the Hindu Law. But as regards the Cutchi Memons, ever since Sir Erskine Perry's decision, which has been followed in numerous cases in this Court, it has been taken as settled that they retained after their conversion the Hindu Law of inheritance and succession. Their Lordships of the Privy Council have put the question beyond dispute by their remarks in *Abdurahim Haji Ismail Mithu* v. *Halimabai* (3).

If then the Halai Memons originally immigrated into Cutch and decided instead of settling down there with the Lohana Memons to pass on to a country more suited to agriculturists, and if it be taken for granted that the Lohana Memons retained their Hindu Law of inheritance and succession, there is nothing improbable in the Kachhia Memons having done likewise.

The first question to be decided is whether Haji Abu at the time of his death was a Porebunder or a Bombay Memon for, if he was a Bombay Halai Memon, the question what law governs Halais in Porebunder becomes immaterial. Haji Abu was born in Porebunder of a Porebunder family. His father had a cutlery shop there. Haji Abu himself went to Durban for five years and a few months. After his return to Porebunder his father died. Thereafter he continued his father's business for a short time, when he sold it and came to Bombay at the age of twenty-five or twenty-six. For two or three years he was in service and then opened a shop in partnership with two others. That must have been about 1882 A. D. Until 1899, when Haji Abu spent over Rs. 20,000 on a house at Porebunder, it does not appear that he had any family residence there of his own. No doubt he often

(5) Perry's O. C. 110; 4 Ind. Dec. (o. s.) 100.

used to visit Porebunder, marriages and other ceremonies would be performed there, and the women of the family would go there for their confinements, but that might very well be the custom with many Memons who considered themselves as settled in Bombay, and if Haji Abu had died before 1899 there would have been considerable difficulty in establishing that he was anything else but a Bombay Memon, nor is it likely that any such attempt would have been made. But whether before 1899 he considered himself a Porebunder or a Bombay Memon, there is a considerable body of evidence as regards what happened after 1899 to show that he retained, or reverted to if he had ever lost, his Porebunder environment. He spent what must be treated as a fairly large sum in building a house there, he lived there a considerable part of the year and was a leader of the Jamat. In 1910 the rents of the 4th and 5th floors of his Bombay house, where he used to reside, were debited in the books to his son, and this undisputed fact certainly supports the first defendant's story that his father said to him then: "Do whatever business you want to, I want to go to my native country," and again, "I am now going to Porebunder. If I die there bury me near the graves of my mother and my father's mother." And that thereafter his father only came to Bombay at his son's request when business was pressing. There is also the evidence that the deceased was anxious that his daughters should marry Porebunder men and refused two offers from Bombay Memons for Ayshabai's second marriage, accepting finally a Porebunder man. The witness, Exhibit Com. 21, deposed that he had had a talk with the deceased about these offers when deceased told him that he belonged to Porebunder and liked Porebunder customs of inheritance and, therefore, disapproved forming connections with Bombay men, as there was a difference of customs in Bombay. The witness does not seem to have been cross-examined about this statement and the probability of its truth is supported by undisputed facts. Then the deceased was taken ill at Porebunder and only came to Bombay because his son wrote to him that he would get better medical advice in Bombay.

Such being the evidence it would, in my opinion, be impossible to say that Haji Abu had so completely detached himself from his Porebunder environment as to become a Bombay Memon. It is not, strictly speaking, a question of domicile, since a Hindu or Muhammadan who renounces his domicile of origin does not thereby subject himself to the law of his domicile of choice. And in this connection it may be noted that it may be inferred from the Privy Council judgment in the *Mombassa case* (3) above referred to that their Lordships would consider the case of a Memon migrating from Cutch to some other part of India as different from that of a Memon settling in another country outside India, much stronger evidence being required in the former case to establish a change of personal law.

As Haji Abu died a Porebunder man, his estate in Bombay must be distributed according to the personal law which governs Porebunder Halai Memons. If he had been a Cutchi Memon, it would have been at once presumed that this was Hindu Law and the onus of proving the contrary would lie on the plaintiff. I do not see myself why a presumption which has been so easily arrived at with regard to Cutchi Memons in Cutch should not also be applied to Halai Memons in Porebunder. It is true that Porebunder is a few miles outside the limits of the Halar Prant but that does not, in my opinion, affect the issue. However, the burden of proof has been thrown on the 1st defendant and he has sought to prove his case (1) by showing that the decisions of the Porebunder Courts establish that Halai Memons in Porebunder are governed by the Hindu Law in matters of inheritance and succession, (2) by proving that there is a custom among Halai Memons of Porebunder that in matters of inheritance and succession Hindu Law is applicable.

As regards the first point we have to find whether there is any law in Porebunder (which for the purpose of this case may be considered as a foreign country) governing the succession to estates of Halai Memons, and, if there is, what that law is.

This is a question of fact and must be proved by evidence. There is no Statute

Law but it is argued by the 1st defendant that the evidence of experts based on their opinion, and the decisions of the Porebunder Courts, prove what the law is. If the Porebunder Courts have decided that a particular custom exists, then there is a rule of decision and with all due respect to the learned Judge it is not open to us to question whether the Porebunder Courts were right or wrong, for then our conclusion would be, not what the law of Porebunder is, but what w think it ought to be. I should have been content myself to decide the point on the evidence given by Varajlal Ranchhodji, a Pleader who has been practising in the Porebunder Courts for seventeen years. He was a witness for the plaintiff and was called to contradict evidence given by the witness, Exhibit Com. 2, regarding the distribution of the property of one Ibrahim Nur Mahomed. In cross-examination he said: "In Porebunder there is a conflict of decisions but the latest is that Hindu Law governs Halai Memons. That is the decision of the final Court of Appeal there—the Huzur Court." The only expert called by the first defendant was Narbheshankar Jivanram, who was in the judicial service in the Porebunder State from 1891 until he retired in 1913. He said that in three suits decided by him in 1896 the custom that the Hindu Law of inheritance and succession applied to the Memons of Porebunder was held proved. After those decisions until he retired it was taken for granted by all the Courts of Porebunder that the Memons of Porebunder were governed by the Hindu Law of inheritance and succession. That statement was not entirely accurate, as in a case decided in 1900 by the Sar Nyayadhish it was held that Muhammadan Law applied. The decisions of the Porebunder Courts are not reported but a large number of judgments on this question have been put in as Exhibits. In Appeal No. 8 of 1903-1909, decided by the Huzur Court in August 1909 (Exhibit 10 A), the main question in dispute was the validity of the Will of a Porebunder Memon who died leaving property in Mozambique and Porebunder. It was conceded in argument and found by the Court that the Porebunder Memons followed Hindu Law as regards inheritance and succession. This decision was followed by the Huzur Court in Civil Appeal No. 16 of 1911-1912, which was an appeal in the proceedings for the execution of the decree obtained by one Zulekhabai in Appeal No. 8 of 1908-09. The judgment (Exhibit 10H) given in March 1912 contains the following passage: "So in the matter of inheritance Muhammadan Law does not apply but Hindu Law applies to these Memons. This fact can be taken to be undisputed and even proved so far as this case is concerned." Exhibits 10B, 10C, A15 are all judgments given in 1915 by the lower Courts in which it was taken for granted that the Hindu Law of inheritance and succession applied to Porebunder Memons.

In Civil Special Appeal No. 37 of 1915-1916 the question was finally decided by the Huzur Court as to who was the proper legal representative of Zulekhabai and so entitled to execute the decree obtained by her. The Court decided that the parties were governed by the Hindu Law for the purposes of inheritance and succession. The correctness of this decision has been questioned by Marten, J., on the ground that the Court took an erroneous view of what was decided by the Privy Council in the Mombassa case. No doubt the Court considered that the Privy Council had decided that the distinction between Cutchi and Halai Memons had been done away with and that all Memons were as a general rule governed by Hindu Law, save where a local custom to the contrary was proved. But the Court then proceeded to consider the previous decisions of the Porebunder Courts, disapproving the decisions of the Nyayadhish in February 1915 and the Sar Nyayadhish in October 1900, and approving of the decisions of the Huzur Court in March 1918. It is not for us to say that if the Court had rightly read the decision in the Mombassa case as applying to Cutchi Memons only, it ought to have decided otherwise than it did. It has been contended that as this decision was given after the death of Haji Abu it should not be taken into consideration; but the decision did not constitute a change in the law, it laid down what the customary law had always been. In my opinion, therefore, it has been proved that the law in Porebunder is that Halai Memons in Porebunder are governed by Hindu Law

in matters of inheritance and succession and this would be sufficient to decide the case in favour of the 1st defendant. But assuming that I am not correct, and that the custom has not been judicially determined, there is abundant evidence in the case that the custom is as contended for by the 1st defendant. The onus of proof has been thrown upon him chiefly, it seems, on the ground that Halai Memons in Bombay have always followed Muhammadan Law. This, however, may have been due to special circumstances after their arrival in Bombay and I am not prepared to accept the argument that because Bombay Halais follow Muhammadan Law, Porebunder or Kathiawar Halais must be taken to follow it unless the contrary be proved. However that may, it is an argument which should be disregarded in dealing with the evidence. That can be divided into two classes: (1) evidence of tradition, (2) evidence regarding the application of Hindu or Muhammadan Law to particular instances. Twenty-six Halai Memons including many Shethias were examined on behalf of the 1st defendant. They all swore that Porebunder Memons were governed by Hindu Law in matters of inheritance and succession. Although the Commission sat at Porebunder for over two months only two witnesses were called for the plaintiff. The first, Joosab Tyab, said he had heard that Porebunder Memons were governed by Hindu Law. The second, Haji Mahomed Hassan, said: "I cannot say in what manner and according to what law the Porebunder Halai Memons divide their property. But it ought to be divided according to Muhammadan Law." The plaintiff's witnesses who were examined in Bombay, were all Bombay Memons whose views may be considered as expressed by the typical answer of Haji Musa Haji Oosman at page 355 of paper-book: "There is a strong feeling amongst Halai Memons of Bombay that Halai Memons wherever they may be, they ought to be governed by Muhammadan Law." The evidence of the Porebunder witnesses regarding the tradition is supported by the fact that when the opinion of the community was invited by the Administrator of Porebunder on the Government Notification, Exhibit M, in 1897, several Shethias attended before the Administrator and told him that the Porebunder Halais did not wish to follow Muhammadan Law. But apart fromthat there is no ground whatever for supposing that these Porebunder witnesses were saying something which they did not believe to be true.

With regard to the importance to be attached to evidence of tradition given by leading men of the community, I may refer to the remarks of their Lordships of the Privy Council in *Mir Abdul Hussain* v. *Musammat Bibi Sona Dero* (6). This evidence of tradition would be negatived, if it could be proved that as a matter of fact the property of Porebunder Halais was distributed according to Muhammadan Law.

The instances which have been brought forward on both sides have been considered in detail by the learned Chief Justice and I entirely agree with the conclusions at which he has arrived. No instance has been proved in which the estate of a Porebunder Halai Memon has been distributed in Porebunder according to Muhammadan Law, while considering the numbers of the community a large number of instances have been proved in which the distribution has been according to Hindu Law. The custom may, therefore, be said to have been established by evidence. It may also be noted that the plaintiff's husband, who may be safely treated as responsible for this litigation, was a party to the proceedings in the Porebunder Courts in the matter of the decree obtained by Zulekhabai, and there it suited him to contend that Hindu Law governed Porebunder Memons.

Reference has also been made to numerous decisions in the Court of the Agent to the Governor in Kathiawar on appeal from the Courts of States which do not possess final jurisdiction, and also in the Courts of Junaghad. They are of no value, except to show that it has always been taken for granted that Halai Memons in Kathiawar are governed by Hindu Law in matters of inheritance and succession, while the chief question in dispute was whether they were also governed by the Hindu Law of partition and the joint family.

I agree that the appeal succeeds and the plaintiff's suit must be dismissed.

Appeal accepted.

(6) 43 Ind. Cas. 306; 20 Bom. L R. 528 at p. 535; 16 A. L. J. 17; 4 P. L. W. 27; 34 M. L. J. 48; 22 C. W. N. 353; 23 M. L. T. 117; 27 C. L. J. 240; P. L. R. 1918; 45 C. 450; 12 S. L. R. 104; 45 I. A. 10 (P. C.)

NATARAJA PILLAI v. SUBBARAYA PILLAI.

MADRAS HIGH COURT.

LETTERS PATENT APPEALS NOS. 133 AND 134 OF 1917

AND

CIVIL REVISION PETITION NO. 587 OF 1917.

February 14, 1918.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

NATARAJA PILLAI—PETITIONER —APPELLANT IN BOTH

versus

SUBBARAYA PILLAI AND OTHERS— RESPONDENTS IN L. P. A. No. 133 OF 1917.

VALLAMBAL ACHI AND ANOTHER— RESPONDENTS IN L. P. A. No. 134 OF 1917.

IN C. R. P. No. 587 OF 1917

SUNDARAMMALL—RESPONDENT No. 1 —PETITIONER

versus

SUBBARAYA PILLAI AND ANOTHER— RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 41 (3) —Death of ward—Power of Court to pass order directing guardian to hand over properties to minor's heir—'For any cause', 'property belonging to the ward,' meanings of.

Where the powers of a guardian for the property of a minor cease, owing to the minor's death, the Court has jurisdiction, under section 41 (3) of the Guardians and Wards Act to pass an order directing the guardian to deliver the property of the minor to the latter's heir. [p. 529, col. 2.]

Murlidhar Natha v. *Valabhdas Murlidhar*, 3 Ind. Cas. 172; 33 B. 419; 11 Bom. L. R. 512, followed.

The words "for any cause" in section 41 (3) of the Guardians and Wards Act are not confined to the causes mentioned in clauses (1) and (2) of the section and the death of the minor is also a "cause" which puts an end to the powers of the guardian within the meaning of the expression "any cause." [p. 529, col. 2; p. 530, col. 1.]

The expression "property belonging to the ward" in the same clause includes property which belonged to the person who was a ward though, by the cessation of his minority or by his death, he has ceased to be a ward. [p. 530, col. 1.]

Appeals under clause 15 of the Letters Patent against the judgments of Mr. Justice Krishnan, dated the 30th August 1917, in Civil Revision Petitions Nos. 534 and 535 of 1917, preferred against the order of the District Court, South Arcot, in I. A. Nos. 115 and 143 of 1917 respectively in O. P. Nos. 398 of 1910.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act to revise the order of the District Court, South Arcot, in I. A. No. 116 of 1917, in Original Petition No. 398 of 1910.

FACTS appear from the judgment.

Mr. *S. Muthiah Mudaliar*, for the Appellant.—Under section 41 (3) the Court had no power to direct the guardian to deliver the property to any person claiming to be the minor's heir. The expression 'for any cause' does not include the event of the ward's death. The Court should have directed the guardian to institute an interpleader suit.

Mr. *T. Narasimha Aiyangar*, for the Respondents.—Section 41 (3) covers cases such as the present. The words 'for any cause' are wide enough to include cases of the ward's death, when the powers of the guardian cease.

JUDGMENT.

OLDFIELD, J.—The lower Court's order was passed on the death of a minor to whose property it had appointed a guardian, and directed the handing over of the property by that guardian to one of those, who claimed as the deceased minor's heir.

It is urged, first, that it had no power to pass such an order and should have directed the guardian to institute an interpleader suit. But it is not shown how it had the right to give him any such direction. Section 41 (3) of the Guardians and Wards Act (VIII of 1890) appears wide enough to cover the Court's action; and the Court in *Murlidhar Natha* v. *Valabhdas Murlidhar* (1) appears to have acted similarly without objection being taken by the Appellate Court or the parties. In these circumstances I hold that the lower Court's action was within its powers.

It is then contended that the lower Court used its discretion wrongly. It had materials before it which it apparently considered, and we are not prepared to say that its discretion was not rightly exercised.

The Letters Patent Appeals and the Civil Revision Petition fail and are dismissed with costs, except in Letters Patent Appeal No. 134 of 1917 in which there is no appearance.

SADASIVA AIYAR, J.—I feel clear in my own mind that the words in section 41, clause (3), of the Guardians and Wards Act (VIII of 1890) "for any cause" are not confined to the causes mentioned in clauses (1) and (2) and that when the death of the minor

(1) [illegible] 172; 33 B. 419; 11 Bom. L. R. 512.

ward occurs that also is a "cause" which puts an end to the powers of the property guardian within the meaning of the expression "any cause".

I am also clear that the expression "property belonging to the ward" in the same clause includes property which belonged to the person who was a ward though by the cessation of his minority or by his death, he ceased to be a ward. That under section 41, clause (3). of the Guardians and Wards Act the Court has jurisdiction to pass orders where the powers of the guardian cease through the minor's death seems to have been assumed as a matter of course in the case of *Murlidhar Natha* v. *Valabhdas Murlidhar* (1).

I agree, therefore, that these appeals and the Civil Revision Petition should be dismissed with costs as regards Letters Patent Appeal No. 133 of 1917 and Civil Revision Petition No. 587 of 1917.

M. C. P.

Both Appeals & Petition dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REGULAR No. 271 OF 1917.

May 6, 1918.

Present:—Mr. Justice Rigg.

D. HORMASJI AND ANOTHER—PLAINTIFFS

versus

PO HMYIN—DEFENDANT.

Contract Act (*IX of* 1872), *ss.* 23, 30—*Limitation Act* (*IX of* 1908), *Sch. I, Art.* 89—*Void and illegal contracts, distinction between—Collateral transactions, how affected—Lottery, validity of—Money won in lottery, suit to recover, maintainability of—Limitation.*

The difference between agreements that are void and agreements. that are illegal lies in the effect which their peculiar character imparts to collateral transactions. If an agreement is merely void and not illegal, the plaintiff can recover from a third party money which the latter has received on his behalf under the void agreement, the contract under which the money was received for the principal not being affected by the collateral agreement under which the money was payable. If an agreement is illegal, *i. e.*, prohibited by law under a penalty, the plaintiff cannot recover, as his claim is founded on an illegal act, and the receipt of the money is itself an illegal act. [p. 532, col. 2; p. 533, col. 1.]

The law forbids the holding of a lottery or sweep, but it is not illegal to receive prize money won in a lottery or sweep, and if such money is received by a person as agent for the winner he is bound to account for the money to his principal, and section 30 of the Contract Act will not operate to bar a suit against the agent to recover money so received by him. Such a suit must be brought within the period of limitation contained in Article 89 of Schedule I to the Limitation Act, and the cause of action arises when payment to the principal is refused. [p. 532, col. 2; p. 534, cols. 1 & 2]

Messrs. *N. M. Oowasji* and *Banerji*, for the Plaintiffs.

Messrs. *Campagnac* and *Maung Kun*, for the Defendant.

JUDGMENT.—In August 1913 Baw Gaing won the first prize of a sweep conducted by the Indian Telegraph Association in Rangoon. The prize was worth Rs. 96,380 and was paid over on the 29th August by three cheques to the defendant Po Hmyin. In August 1917 Baw Gaing by a registered deed assigned all his rights in this money to D. Hormasji for a sum of Rs. 5,000. The suit was originally filed by the assignee alone, but during the trial with the consent of the parties Baw Gaing was added as plaintiff and an amended plaint and written statement were filed. The case for the plaintiffs is that the prize money was paid over to the defendant with the consent of Baw Gaing to be held by defendant as Baw Gaing's agent and in trust for him. They denied that defendant was entitled to any portion of the money or to the half claimed by him as remuneration for his services in obtaining the money from the Indian Telegraph Association and pleaded that even if any such agreement was proved, it was unconscionable and induced by undue influence. Judgment was prayed for the sum of a lakh, being the principal Rs. 96,380 with interest at 12 per cent. per annum less Rs. 5,500 waived, or in the alternative for an account and a decree for the amount found due.

The defendant replied that Baw Gaing being unable to collect the prize promised him a half share in it after expenses had been deducted, which expenses amounted to Rs. 16,350. At the request of Baw Gaing the prize money was paid over in three cheques, two of Rs. 40,000 and one of Rs 16,380, a sum of Rs. 2, 500-14-4 was paid on account of income-

tax. Subsequently Baw Gaing asked defendant for the hand of his daughter in marriage, and gave defendant Rs. 27,000 by way of bridal presents and also requested him to buy the girl jewellery costing Rs 13,000, which defendant did. It is further alleged that Baw Gaing refused to marry. This refusal is pleaded as an estoppel. Defendant also urged that the lottery conducted by the Indian Telegraph Association was not authorized by Government and that the plaintiffs were precluded by the provisions of section 23 of the Contract Act from claiming any relief. Further he said that as Baw Gaing had consented and acquiesced in the spending of his money by defendant he was estopped from claiming it and that his claim was barred by limitation. The validity of the assignment to Hormasji of Baw Gaing's rights in the prize money was denied and the suit was said to be bad as being speculative, champertous, and opposed to public policy. Defendant denied that any undue influence had been exercised by him and claimed that in any event he was entitled to deduct a sum of Rs. 58,889-14-4 made up as follows:

(*a*) Rs. 40,000 given to him by Baw Gaing.

(*b*) Rs. 16,380 expenses incurred in obtaining the prize.

(*c*) Rs. 2,509-14-4 income-tax paid on the prize.

It is admitted that the last sum was paid and must be deducted. It is also clear that Rs. 8,000 were paid to Maung Thin for assistance in recovering the money, but defendant declines to disclose how he spent the remaining sum of Rs. 8,380 and his Advocate admits that he cannot now claim this sum as part of his expenses. On these pleadings issues were fixed. The first issue is, whether the defendant collected the prize money on account of Baw Gaing, and second whether Baw Gaing consented to give defendant half the prize money for his trouble in collecting it less expenses incurred. These two issues may be conveniently discussed together.

Baw Gaing bought his ticket from Thu Kha, and on the 23rd August 1913 was informed by the Indian Telegraph Association of his good fortune in winning the prize. He went with Thu Kha to draw his money, but the officials of the Indian Telegraph Association required proof of his identity. Po Hmyin says that Baw Gaing came to him and told him that Thu Kha was claiming the prize and promised him half the value of the prize if he helped him.

On the evidence I think there can be no doubt that before the money was drawn Baw Gaing had promised to give Po Hmyin a share in the prize. He represents the share as an indefinite amount, but I think he did promise him a half. I answer the first two issues as follows: Po Hmyin did collect the prize money on account of Baw Gaing but Baw Gaing consented to Po Hmyin retaining half the sum, less expenses incurred for himself.

The third issue is, whether defendant expended Rs. 16,380 in collecting the prize. The answer to this issue is that he spent Rs. 8,000, as there is no proof of how the remainder was spent.

The fourth and fifth issues may be discussed together. They relate to an alleged agreement that Baw Gaing should marry the daughter of Po Hmyin and an alleged gift by him of Rs. 40,000 as bridal presents .....I believe the evidence that the marriage was arranged for the November of 1913 and that Rs. 10,000 were spent at the request of the Baw Gaing for the bride and that he said he would settle his money as *kanwin*. The marriage did not take place, as Baw Gaing broke out into syphilitic sores which the treatment he underwent did not cure. The answers to the fourth and fifth issues are that at Baw Gaing's request Rs. 10,000 worth of jewellery was bought for his bride, and that the rest of the money was to be set aside for the marriage. As *kanwin* it would be joint property belonging to the bride and bridegroom on their marriage.

The next issue is, whether the agreement that Po Hmyin should take half the prize for recovering the money is unconscionable and voidable as being made under undue influence. Undue influence is defined in section 16 of the Contract Act. The question is, whether the relations between the parties were such that Po Hmyin was in a position to dominate the will of Baw Gaing and whether he used that position to obtain an unfair advantage over him. Baw Gaing had lived with Po Hmyin for a number of years,

but had left his house some years before he won the sweep. He had not succeeded in getting the prize money.....An artificial atmosphere of suspicion and of the great difficulty to be encountered in obtaining the prize money was created, and in these circumstances Baw Gaing consented to Po Hmyin receiving the extortionate sum of Rs. 40,000 for his services. It appears to me that Po Hmyin was in a position to dominate the will of Baw Gaing and used his position to do so. I answer this issue in the affirmative.

The tenth issue is, whether the plaintiff Hormasji is precluded by reason of the provisions of section 23 or 30 of the Contract Act from suing defendant. Defendants contend that the lottery was an illegal transaction, and that no suit will lie for the recovery of any money paid on account of the winner to him. On this point two decisions of this Court have been cited. Defendant relies on *Maung Pe* v. *Maung Maung* (1), in which Fox, J., held that a plaintiff who sued to recover a pony won in a raffle but delivered to defendant would not succeed. The learned Judge remarked that the suit was one to enforce a right to property alleged to have been derived from what was an offence punishable under the Indian Penal Code, and that the case stood on the same footing as a suit by a thief to recover his share of the spoils of a theft. With all due deference to the opinion of the learned Judge, I venture to think that a raffle is not an offence punishable under the Indian Penal Code. The judgment did not deal with the position of the winner of the raffle towards a third person who had received the prize on his behalf. This case was considered in *Gulliver* v. *Winter* (2). In this case several men joined in a confederacy for buying tickets in the Calcutta Derby Sweep. Plaintiff was one of the subscribers and sued defendants who received the prize money for his share. Defendants contended *inter alia* that an offence under section 294A, Indian Penal Code, had been committed and that the transaction was not merely void under section 30 of the Contract Act but was illegal and that, therefore, plaintiff could not recover. Chitty, J., held that no offence under section 294A had been committed, but that in any case the illegality of the transaction did not affect the question, the test being whether plaintiff required any aid from the illegal transaction to establish his claim. In the present case the promoters of the sweep conducted by the Indian Telegraph Association were prosecuted and convicted under section 294A of the Penal Code.

That section makes it penal to keep any office or place for the purpose of drawing any lottery not authorized by Government, or to publish any proposal relative to the drawing of any ticket in a lottery. The attention of Chitty, J., was not drawn to section 13 of the Burma Gambling Act, which imposes penalties for conducting the game of *ti* or similar games or for collecting the surplus over from the money paid to the winner. A lottery is a form of the game of *ti*. But neither under section 294A of the Penal Code nor under section 13 of the Burma Gambling Act, read with section 109 of the Penal Code, does a person who receives money won in a lottery appear to commit an offence. A person who takes a ticket would, I think, be punishable as an abettor. The decided cases draw a distinction between money paid under agreements which are merely void and agreements which are illegal between agreements which the law will not aid and agreements which the law desires to prohibit, and this distinction appears not in the comparative validity of the two, for both are void, but in the effect which their peculiar character imparts to collateral transactions. To the former class of cases belong such decisions as *Tenant* v. *Elliott* (3), *Beeston* v. *Beeston* (4) and *Bridger* v. *Savage* (5), in which it was held that though the original contract was void the plaintiff could recover from a third party who had received the money on his behalf. In *Bridger* v. *Savage* (5) Bowen, L. J. (page 368), said: "It is to be observed that the original contract of betting is not an illegal one, but only one

(1) 7 Bur. L. Rep. 58.
(2) 11 Bur. L. Rep. 18.

(3) (1797) 126 E. R. 744; 1 Bos. & Pul. 3; 4 R. R. 755.
(4) (1876) 1 Ex. D. 13; 45 L. J. Ex. 230; 33 L. T. 700; 24 W. R. 96.
(5) (1885) 15 Q. B. D. 363; 54 L. J. Q. B. 464; 53 L. T. 129; 33 W. R. 891; 49 J. P. 725.

which is void. If the person who has betted pays his debt he does nothing wrong. Therefore, when the bet is paid the transaction is completed and when it is paid to an agent, it cannot be contended that it is not a good payment for the principal. The contract under which he received his money for the principal is not affected by the collateral contract under which the money was paid to him." To the second class of cases, *i. e.*, cases in which the original contract was for a consideration the receipt of which renders the receiver liable to a penalty imposed by the common law or by Statute, belong such cases as *Farmer* v. *Russell* (6), *Nicholson* v. *Gooch* (7) and *Gorenstein* v. *Feldmann* (8). In *Farmer* v. *Russell* (6) the facts were very curious. Plaintiff agreed with another person to carry and deliver counterfeit half pence to him for the purpose of cheating sailors at Portsmouth. Defendants were the carriers employed by the plaintiff for this delivery and received money on his behalf. They were sued for a balance of the money due and Eyre, C. J. (page 914), said: "The case comes to this; that the money has got into the hands of a person who was not a party to the contract, who has no pretence to retain it, and to whom the law could not give it by rescinding the contract. Though the Court will not suffer a party to demand a sum of money in order to fulfil an illegal contract, yet there is no reason why the money in this case should not be recovered notwithstanding the original contract was void.... It does not appear that the defendant was not himself a party to the original contract, for there was a circumstance in the report which gave much countenance to the idea that the carrier knew what he was doing, *viz.*, that he was lending his assistance to an infamous traffic. In that case the rule *melior est conditio possidentis* will apply; for if the contract with him be stained by anything illegal, the plaintiff shall not be heard in a Court of law." Buller and Heath, JJ., said that the illegality of the contract did not affect the question, as the money had been paid to plaintiff's use. Rooke, J., however, thought that the plaintiff ought not to be heard on a case for which he could be indicted. He pointed out that if the distinction as to the knowledge or ignorance of the defendant was to be made the basis of the decision, the strange result would ensue that if the defendant was innocent of the transaction he could not retain the money, whereas if he were guilty his guilt would be his indemnity. He accordingly held that a man who had been guilty of a crime ought not to have the assistance of the law to recover the profits of the crime. Eyre, C. J., then added (page 916): "If it is possible to mix the original transaction with the contract on which the action is brought, I agree with my brother Rooke in all his conclusions." In *Gorenstein* v. *Feldmann* (8) plaintiff alleged that she bought from the defendant one-eighth of a ticket in the Hamburg lottery, that the prize money had been paid to defendant who refused to pay her. Mr. Justice Coleridge said that all sales of a share of a lottery ticket were illegal, and any money paid for such a purpose shared the illegality. In *Nicholson* v. *Gooch* (7) Crompton, J., referred to *McGregor* v. *Lowe* (9) and said that although the money in that case was expressly received for plaintiff, the action was held not to be maintainable because such receipt itself was illegal, and part of an illegal transaction in which both principal and agent were concerned. The learned Judge went on to say (page 759): "No action can be founded on or arise out of an illegal act; and the doctrine acted on in *Tenant* v *Elliott* (3) and cases of that description is quite consistent with this principle. The doctrine of these cases is, as laid down by Buller, J., in *Farmer* v. *Russell* (6), that the action of money had and received is not founded on an illegal contract, but on a ground totally distinct from it, on receiving the money for the plaintiff.... The receipt of the money, however, must always be the foundation of the action for money had and received and if the receipt be illegal on the part of the principal and agent, no action can, I think, arise on such receipt. To such cases the doctrine that you may rely on the receipt of the money for

(6) (1798) 126 E. R. 913; 1 Bos. & Pul. 296.
(7) (1856) 119 E. R. 752; 5 El. & Bl. 999; 25 L. J. Q. B. 137; 2 Jur. (N. S.) 303; 103 R. R. 842.
(8) (1911) 27 T. L. R. 457.
(9) (1824) 1 Car. and P. 200; R. & M. 67.

you which is legal and that you need not resort to the prior illegal contract does not apply." The case seems to me to lay down clearly the distinction between the two classes of cases; the plaintiff can succeed if he can make out his case otherwise than through the medium of an illegal transaction to which he was a party. In the present case I am of opinion that the receipt of the prize money was not an illegal transaction and that the defendant as Baw Gaing's agent is bound to account for the money.

The eleventh issue is, whether Hormasji is estopped by reason of the consent and acquiescence of Baw Gaing to purchases made from claiming the recovery of the whole or any portion or portions of the money in suit. Whatever may have been the undue influence brought to bear on Baw Gaing to induce him to enter into the contract with Po Hmyin, I think that his subsequent conduct shows that he acquiesced in Po Hmyin treating Rs. 40,000 as his own share of the prize money, and that he cannot claim it. He made the remarkable declaration in this Court that now that he saw Po Hmyin's face and through delicacy he was satisfied to give him Rs. 40,000. He knew about the purchase of the Crisp Street property and never raised any objection. I am of opinion that with regard to this sum, and the Rs. 10,000 spent on jewellery for Po Hmyin's daughter and the fees paid to Maung Thin, Baw Gaing's claim is barred.

The twelfth issue is, whether the assignment of Baw Gaing's interest in the subject-matter of the suit to Hormasji is a valid one. Hormasji was an undischarged bankrupt in 1915, and there is no doubt that he is to a great extent in the position of a *benamidar* for Solomon with whose money this suit is being fought. It is argued that this suit is bad as being of the nature of a gambling transaction. In this case, however, Baw Gaing does not wish to impugn the assignment, and I am of opinion that it is not open to defendant to assail it unless it can be shown that the transaction is a sham one. See *Baldeo Sahai* v *Harbans* (10), *Abdool Hakim* v. *Doorga Proshad* (11), *Jwala Prasad* v. *Baharat Singh* (12) and *Bhagwat Dayal* v. *Debi Dayal* (13). It has certainly not been proved that the transaction between the two plaintiffs is a colourable one.

The thirteenth issue is, whether any portion of the plaintiff's claim is barred by limitation. On the finding of the issue already determined the following sums must be deducted from that claim.

Rs.	a.	p.	
40,000	0	0	paid to Po Hmyin.
8,000	0	0	paid to Maung Thin.
2,509	14	4	paid on account of income-tax.
10,000	0	0	paid for jewellery to Po Myin's daughter.
Total 60,509	14	4	

As regards the rest of the money, I am of opinion that the Article of the Limitation Act applicable is Article 89. It is argued that the agency terminated when the money was collected, but it is clear that this is not the case, and that after it had been collected defendant continued to hold Rs. 40,000 on account of Baw Gaing. The suit for the latter portion of the claim is not barred by limitation. There will be a decree for the 1st plaintiff for Rs. 37,095 with interest at twelve per cent. per annum from November 1916 until the date of realization. Defendant will pay costs on the sum decreed.

Suit decreed in part.

(10) 11 Ind. Cas. 932; 8 A. L. J. 652; 33 A. 626.

(11) 5 C. 4; 4 Ind. Jur. 406; 2 Ind. Dec. (N. S.) 615.

(12) 10 Ind. Cas. 226.

(13) 35 C. 420; 10 Bom. L. R. 230; 12 C. W. N. 393; 7 C. L. J. 335; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49; 35 I. A. 48 (P. C.).

CALCUTTA HIGH COURT.

CIVIL RULE No. 545 OF 1918.

February 14, 1919.

Present:—Mr. Justice N R Chatterjea and Mr. Justice Newbould.

Sreemati PRIYA SUNDARI DASYA —PETITIONER

versus

GOLAPDI SHEIK AND ANOTHER —OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXII, r. 9

PRIYA SUNDARI *v.* GOLAPDI.

—*Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 171, 176 —*Death of plaintiff—Abatement, order of, before expiry of six months—Application for setting aside order of abatement within sixty days of order, whether maintainable.*

Where an order abating a suit was made two days before the expiry of six months from the death of the plaintiff, and an application for setting aside the order of abatement made within 60 days of that order was dismissed on the ground that it was not made within six months of the death of the plaintiff:

Held, that the application was within time and that the suit should be continued after making the necessary substitution.

In the matter of an application under section 25 of the Provincial Small Causes Courts Act.

Babu *Khitish Chunder Chackraburty* (with him Babu *Nitish Chundra Lahiri* and Babu *Panchanon Ghosal*, for Babu *Khitish Chundra Sen*,) for the Petitioner.—This Rule arises out of an application under section 25 of the Provincial Small Causes Courts Act against an order dismissing an application under rule 9 of Order XXII of the Civil Procedure Code. The original plaintiff died on 25th of December 1917 On the 22nd of June 1918, *i.e.*, two days before the expiry of six months, the suit was dismissed on the ground of abatement as the Court was of opinion that no substitution had been made within six months from the death of the original plaintiff. On the 23rd of June 1918 the petitioner's Pleader, on going to file an application for substitution, found that the suit had already been dismissed for non substitution. He thereupon advised the petitioner to make an application for setting aside the order of abatement, which was done within 60 days as required by Article 171 of the Limitation Act.

The order of the Munsif is to the following effect:—"This application was filed on 19th July 1918, *i.e*, more than six months after the plaintiff's death. It appears that the order abating the suit was made before six months had elapsed. This order is, therefore, bad, but it was incumbent upon the applicant to have made her application within six months of the death of the plaintiff. This she did not do and I am not satisfied that she had sufficient cause for not making the application within time. The application is dismissed."

In dismissing the application for setting aside the order of abatement the learned Munsif has failed to distinguish between Article 176 and Article 171 of the Limitation Act. The order of abatement was *prima facie* bad in law, as it was made before the expiry of the six months allowed by law. The present application was made for getting rid of that order and ought to have been allowed. Further, it appears that the petitioner had come to Court for substitution before the six months but could not make the application for substitution, as the order of abatement had already been passed by mistake of the Court.

JUDGMENT.—No one appears to show cause in this Rule.

The petitioner is the legal representative of the deceased plaintiff.

It appears that he instructed his Pleader two days before the expiry of six months for making an application for substitution in the place of the deceased, but the Court made an order three days before the expiry of the six months that the suit had abated and in the circumstances, the Pleader for the petitioner advised him to make an application for setting aside the order of abatement. This was admittedly done within the period of 60 days from the date of abatement.

The order of the Court that the suit had abated, which was passed three days too soon, was clearly wrong and if that order had not been made, the petitioner could have made the application for substitution within six months. After the order of abatement was passed, it is difficult to see how the application for substitution could be made within the six months. The learned Munsif says: "It appears that the order abating the suit was made before 6 months had elapsed."

In all these circumstances we think that the order of the Court below, refusing to set aside the abatement, should be set aside and the suit tried with the petitioner as the legal representative of the plaintiff.

Rule made absolute.

PILLA KAKKADU *v.* VEDULA CHENDRAYYA.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 584 AND 585 OF 1917.

April 18, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Bakewell.

IN S. A. No. 584 OF 1917

PILLA KAKKADU *alias* BALAJI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VEDULA CHENDRAYYA CHANDARI AND OTHERS—DEFENDANTS—RESPONDENTS.

IN S. A. No. 585 OF 1917

PILLA RAMAYYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VEDULA CHENDRAYYA CHANDARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraud, decree obtained by—Suit for declaration that decree is not binding—Decree passed by superior Court—Jurisdiction of inferior Court to take cognisance of suit—Court-fee payable—Court Fees Act (VII of 1870), s. 7 (iv) (c).

A suit to obtain a declaration that a decree passed by a Court was obtained by fraud and is not binding on the plaintiff can be laid in a Court of inferior jurisdiction to the Court which passed the decree, provided the subject-matter is otherwise within the jurisdiction of the Court, in which the suit is instituted. [p. 536, col. 2.]

Arunachellam Chetty v. *Sabapathy Chetty*, 41 Ind. Cas. 937; 41 M. 213; 6 L. W. 368; 33 M. L. J. 499, followed.

A suit for a declaration that a decree is not binding as having been obtained by fraud comes within section 7, sub-section 4, clause (*c*), of the Court Fees Act and the Court-fee payable thereon is an *ad valorem* fee on the value at which the suit is valued in the plaint. [p. 536, col. 2.]

Arunachalam Chetty v. *Rangasamy Pillai*, 28 Ind. Cas. 79; (1915) M. W. N. 118; 38 M. 922; 28 M. L. J. 118; 17 M. L. T. 154, followed.

Second appeals against the decrees of the District Court, Ganjam at Berhampore, in Appeal Suit Nos. 428 and 429 of 1915, preferred against the decree of the Court of the District Munsif, Somepeta, in Original Suits Nos. 147 and 148 of 1915.

Mr. *P. Narayanamurthi*, for the Appellants.

Mr. *K. V. L. Narasimmam*, for the Respondents.

JUDGMENT.—The plaintiffs brought these suits for a declaration that the decrees in two other suits were not binding on them and for a permanent injunction restraining the decree holders from executing those decrees. The decrees were passed by a Subordinate Judge and the present suits were filed in the District Munsif's Court. The plaintiffs valued the relief claimed by them under section 7, sub-section 4, clause (*c*), of the Court Fees Act and filed the suits, as stated, in the District Munsif's Court according to that valuation. It may be mentioned that they had originally filed the same suits in the Subordinate Judge's Court but on insufficiently stamped plaints, and afterwards withdrew the plaints. That does not, however, make any difference in the question we have to consider.

It has been decided by a Bench of this Court, after a very elaborate discussion of the law, in *Arunachellam Chetty* v. *Sabapathy Chetty* (1) that a suit to obtain a declaration that a decree passed by a Court was obtained by fraud and was not binding on the plaintiff can be laid in a Court of inferior jurisdiction to the Court which passed the decree, provided the subject-matter is otherwise within the jurisdiction of the Court where the suit is instituted. The decision seems to be supported by authorities and nothing has been urged against the soundness of that view.

The real question argued is that the valuation for purposes of jurisdiction ought to be according to the amount of the decree and not at the option of the plaintiffs. This point, however, is covered by a recent Full Bench ruling of this Court in *Arunachalam Chetty* v. *Rangasamy Pillai* (2), where it is held that a suit for a declaration that a decree is not binding as having been obtained by fraud comes within section 7, sub-section 4, clause (*c*), of the Court Fees Act and that the Court-fee payable thereon will be on the value at which the suit is valued in the plaint. That is a decision binding on us and it cannot make any difference in this respect that other High Courts, if the contention of the respondent is correct, have taken a different view.

Then, if section 7, sub-section 4, clause (*c*), applies, as we hold that it does, following *Arunachalam Chetty* v. *Rangasamy Pillai* (2), to a suit of this nature, another Full Bench decision of this Court in *Ramiah* v. *Ramasawmi* (3) has laid down that Courts can-

(1) 41 Ind. Cas. 937; 41 M. 213; 6 L W 368; 33 M. L J. 499.

(2) 28 Ind. Cas. 79; (1915) M. W. N. 118; 38 M. 922; 28 M L. J 118; 17 M. L. T. 154.

(3) 18 Ind. Cas. 363; (1913) M. W. N 105; 24 M. L. J. 232; 13 M. L. T. 128.

not reject for purposes of jurisdiction the valuation made by a party for purposes of Court-fee of the relief sought by him in a suit for partition of properties of which he claims to be in joint possession along with his co-parceners, even if such valuation is proved to be not a *bona fide* but an arbitrary valuation. That was in a suit for partition, but the same principle applies to a suit like this, that is to say, where a party is allowed under section 7, sub-section 4, to value a suit as he chooses, that valuation is also good for the purpose of determining the jurisdiction of the Court in which the suit is to be filed.

The result will be that this appeal must be allowed and the decrees of the lower Courts set aside so far as defendants other than the 1st defendant are concerned and the case will have to be disposed of on the remaining issues. We may mention that the 1st defendant died while the appeal was pending in the lower Appellate Court and his legal representatives were not made parties to the second appeal and the time has long since passed. We do not think that this was a case in which the delay which was clearly due to the negligence of the appellants should be excused. Costs will follow the result.

M. C. P.

Appeals allowed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 57 OF 1916.

December 15, 1916.

Present:—Mr. Justice Rigg.

H. J. GREEN—APPELLANT

versus

BA LON—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 9—Holder in due course—Transaction, suspicious—Person taking instrument without enquiry, position of.

A person who takes an instrument evidencing a transaction which excites the suspicion that there is something wrong in the transaction, does not act in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry and is, therefore, not a holder in due course. [p. 539, col 1.]

Mr. *Villa*, for the Appellant.

Mr. *K. B. Banerji*, for the Respondent.

JUDGMENT.—This is a suit by Ba Lon, a clerk in the office of the Official Assignee, for recovery of Rs. 2,000 on a promissory note signed by H. J. Green and C. H. Browne on 16th November 1914 in favour of G. W. Russell and alleged to have been endorsed by him in blank on the 18th October 1915. Browne did not contest the suit. Green said that Russell, Browne and he entered into a partnership to hold a fancy fair. Russell contributed Rs. 5,000 towards the expenses of the fair. Two promissory notes were executed by Browne and himself in favour of Russell, and at the close of the fair, Russell was paid off and the notes discharged. Green alleged that the suit was brought by Ba Lon in collusion with Russell and Browne and that Ba Lon was aware of the defect in the *bona fides* of the endorsement.

Browne filed no written statement, but when the parties appeared before the Judge on the 17th December, his Pleader said that he had made payments. Three days later Browne confessed judgment. I am unable to ascertain from the record what Browne's Pleader meant when he said that he had made payments. It is contended that a show of contesting the case was put forward merely with a view to throw dust in the eyes of the Court and to make it appear that Browne was an honest litigant. The Small Cause Court decreed the suit, and Green appeals from the decision.

On the 27th October 1914, an agreement in writting was entered into between Russell, Browne and Green for financing a fancy fair. The agreement sets out that Russell had accommodated Browne and Green with a loan of Rs. 3,000 on the 26th October, and had undertaken to advance money up to a maximum of Rs. 7,000. The contracting parties agreed to give Russell a one-fourth share in the profits of the fair. This agreement purports to have been signed by Browne and Green as proprietors of the Gaiety Theatre. It is alleged that this description did not appear on the document as originally drafted and executed. The words "Proprietors, Gaiety Theatre" have been embossed by a rubber stamp, and the signatures of Browne and Green have been bracketed in ink which is of a different colour from that of the rest of the document. The same alteration has been made, it is alleged,

in the pro-note for Rs. 3,000 signed on the 26th October and the words "Gaiety Theatre" appear in a lighter coloured ink after H. J. Green in the body of the note. On the note in suit no such description of the parties appears and it is argued that these descriptions have been added after the execution of the agreement and the pro-note for Rs. 3,000, in order to lend colour to the story of Browne that the money secured by these pro-notes was for the Gaiety Theatre and not for the fancy fair.

Browne's story is that Russell advanced about Rs. 10,000 altogether, of which Rs. 5,000 were for the Gaiety Theatre, and the rest for the fair. The fair was held in December and seems to have been a very profitable affair. Russell was paid Rs. 6,000 on the 2nd of January and a further sum of Rs. 1,623 on the 11th. Browne says that nothing has been paid on the promissory notes for Rs. 5,000. If his story is true, Russell was content to wait for his money for another ten months though it was bearing very small interest, and in October sold the notes to Ba Lon for Rs. 1,500. Russell was subpœnaed by both parties, but his attendance was not procured. He is reported to be serving in the army. It is only fair to Russell to say that there is no reason to suppose that his behaviour in connection with the transactions between Browne and himself was not straightforward. If there is any unfair dealing in the present case, it is that advantage has been taken of Russell's absence from Burma and his intention to join the army to secure the success of the projected roguery.

Browne produced accounts relating to the theatre and the fair. At page 267 of the theatre account occurs an entry on 26th October, "to advance loan from Mr. G. Russell on joint signatures of H. J. G. and C. H. B. . . . 3,000." The entry was deleted, but was re-entered with the addition of the words "towards H. J. G.'s capital account." This entry is in a different coloured ink and in a different hand from the rest of the entries on the page, and has evidently been written by the same person who made the entry of 26th October. Further the total daily credit has been added in pencil, and from the 26th October till the close of the account book on the 30th January 1915, every one of the totals has been altered in order to adjust the accounts to these two entries. It is obvious that these two items must have been entered in the book after the 30th January, and after Russell had been paid Rs. 7,623. But this is not all. An examination of the accounts shows that on the 26th October there was a balance of rather more than Rs. 1,000 to the credit of the theatre. On the 15th November, the accounts show an increased credit amounting to nearly Rs. 3,000. There are no expenses to justify the loan, and the average daily expenditure is small. There is no explanation as to the reason for these loans to the theatre, or as to why Russell, who had no interest in the theatre, should have been willing to lend money on so low a rate of interest as 3 and 6 per cent. per annum. Moreover, the note for Rs. 3,000 is clearly the same loan as is referred to in the agreement with Russell about the fair. On these facts I have no hesitation in finding that Browne's story about Russell making two loans, one to the fair and the other to the theatre, is a fabrication. The only evidence of the loan to the theatre is Browne's statement supported by the entries in the account book, upon which I think further comment is superfluous. The loan on account of the fair has been paid off. How is it then that these two notes have come into the hands of Ba Lon? Is his story that he got them from Russell on payment of Rs. 1,500 credible? Or is it more probable that advantage has been taken of the return of the notes to Browne, to launch this claim?

Green is a book-maker who has deposited Rs. 10,000 with the Rangoon Turf Club. Ba Lon himself says that he thinks Green is worth double that sum. Russell was also a book-maker and must have had at least as good a knowledge of Green's circumstances as Ba Lon. Ba Lon is a clerk on Rs. 50 a month. He admits that he thought it worth while under the circumstances to ask Russell why he was parting with the notes so cheaply, but he did not do so, as he was afraid of spoiling so profitable a bargain. He adds that he asked Russell whether anything had been repaid, and was informed that nothing had

been repaid. In view of what has been held above to be the true facts, it is impossible that Russell said anything of the kind. Ba Lon admits that he was surprised at Russell's answer, and thought it advisable to get confirmation, but had no time to find out. He goes on to make the remarkable admission that he thought that if he had enquired, the makers of the notes might have pleaded payment and there might have been a dispute. Yet the Court is asked to believe that Russell was willing to sacrifice Rs. 3,500 out of Rs. 5,000 together with the interest due in favour of a Burman clerk in the Official Assignee's office for no apparent reason, and that this clerk, fully realising this extraordinary state of affairs, was willing to take the notes. The story is an absurd one, and I think it is most probable that Ba Lon is a mere puppet put up by Browne to sue upon the notes that had been endorsed in blank by Russell at the time he was paid off. Even if Ba Lon had pleaded that he obtained the notes from Browne, I think there was on his own showing notice that there was something suspicious about the transaction, and that he could not plead that he was acting in good faith. As Lord Herschell said in *London Joint Stock Bank* v. *Simmons* (1): "Regard to the facts of which the taker of such instruments has notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further enquiry." It is not Ba Lon's case that he paid Browne, and I do not believe that he paid Russell. He is, therefore, not a holder in due course. I reverse the decree of the Small Causes Court, so far as Green is concerned, and direct that the suit against him be dismissed with costs in both Courts.

Appeal allowed.

(1) (1892) A. C. 201 at p. 221; 61 L. J. Ch. 723; 66 L. T. 625; 41 W. R. 108; 56 J. P. 644.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 168 OF 1917.

May 30, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Rafique.

DURGA PRASAD AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

SHAMBHU—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *s.* 60, *proviso*, *cl.* (f)—*Execution of decree*—Mahabrahman, *office of*, *whether can be sold.*

The office of a Mahabrahman or a Birtacharji is a right to perform personal service and, as such, is exempt from attachment and sale in execution of a decree under clause (*f*) of the proviso to section 60 of the Civil Procedure Code. [p. 540, col. 1.]

Appeal, under section 10 of the Letters Patent, from a judgment of Mr. Justice Tudball, dated the 20th November 1917, reported as 43 Ind. Cas. 650.

Dr. *S. N. Sen*, for the Appellants.

Mr. *K. N. Katju*, for the Respondent.

JUDGMENT.—The question raised in this appeal is whether in execution of a simple decree for money what is called Birtacharji can be sold at the instance of the decree holder. This Birt, as we understand it, is the office of Mahabrahman who officiates at funerals of Hindus and performs certain ceremonies. The application for the sale of this description of property has been disallowed by the lower Appellate Court on the ground that it is a right of personal service within the meaning of clause (*f*) of the proviso to section 60 of the Code of Civil Procedure and is, therefore, exempt from sale in execution of a decree. This decision of the Court below has been affirmed by a learned Judge of this Court. He has referred to the authorities on the subject and we deem it unnecessary to repeat them. The only case which is directly in point is the decision of this Court in *Durga Prasad* v. *Genda* (1). In that case a learned Judge of this Court held that the Birt Mahabrahmani or right to officiate as a priest at the funeral ceremonies of Hindus dying within a particular district is a right of personal service within the meaning of section 266 (*f*) of the Code of Civil Procedure and as such is not liable to attachment or sale in

(1) A. W. N. (1889) 169.

execution of a decree. Section 60 of the present Code of Civil Procedure corresponds to section 266 of the old Code. We have not been referred to any case in which this ruling has been dissented from or the correctness of it has been questioned. The policy of the section apparently is to prevent such a compulsory sale as might transfer property of this description to persons disqualified to perform the duties of the office [see the observations of Ranade, J., in *Rajaram* v. *Ganesh* (2)]. Reference has been made to cases in which it has been held that a Birt Jijmani belonging to a Mahabrahman may be mortgaged by a Mahabrahman to another Mahabrahman, but that analogy cannot apply to the case of compulsory sale in execution of a decree, where a stranger might be the purchaser and be a person who can never perform the duties of a Mahabrahman. We think that the office of a Mahabrahman or a Birtacharji, as it is called in the present instance, is a right to perform personal service and as such is exempt from attachment and sale in execution of a decree under the provisions of section 60, clause (*f*). We dismiss the appeal with costs.

Appeal dismissed.

(2) 23 B. 131; 12 Ind. Dec. (N. S.) 87.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 221 OF 1917.

July 18, 1918.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

V. SREENIVASA CHARIAR AND OTHERS —PLAINTIFFS NOS. 1, 4 AND 3—APPELLANTS

versus

P. KUMARA THATHACHARIAR AND OTHERS—DEFENDANTS NOS. 1 TO 5, 11 AND 12, 6 TO 9, 14 AND 15—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Agreement between parties to suit to abide by decision in another proceeding—Adjustment of suit—Estoppel—Evidence Act (I of 1872), s. 115.

An agreement between the parties to a suit to abide by the decision which may be made in another proceeding amounts to an adjustment of the suit when that decision is actually passed within the meaning of Order XXIII, rule 3, Civil Procedure Code. [p. 541, col. 1.]

Rajah of Venkatagiri v. *Chinta Reddi*, 15 Ind. Cas. 378; 37 M. 408; 22 M. L. J. 447; 11 M L. T. 209; (1912) M. W. N. 393 and *Rukhanbai* v. *Adamji*, 1 Ind. Cas. 622; 33 B. 69; 10 Bom. L. R. 366, distinguished.

Quære.—Whether the parties are estopped from contending that they are not bound by the agreement.

Appeal against the order of the District Court, Chingleput, in Appeal Suit No. 443 of 1915, preferred against the decree of the Court of the District Munsif, Conjeeveram, in Original Suit No. 414 of 1908.

Messrs. *C. Narasimhachariar* and *Srinivasachariar*, for the Appellants.

Mr. *T. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.

SPENCER, J.—I am of opinion that the learned District Judge was mistaken in applying the decisions in *Rajah of Venkatagiri* v. *Chinta Reddi* (1) to the facts of this case.

In *Rajah of Venkatagiri* v. *Chinta Reddi* (1) this Court had before it an agreement, as to which there was no written record, of the exact representations of the parties, to postpone the settlement of a dispute, and to take a Small Cause suit out of the control of the Small Cause Court having jurisdiction to decide it, and to make the decision of the Small Cause suit depend upon the decision of the District Munsif in an original suit whose decision would in the ordinary course be subject to appeal. The effect of recognising such an agreement would have been to abrogate the unsuccessful party's right of appeal against the District Munsif's decision and to oust the jurisdiction of the Small Cause Court in a manner not contemplated by law. Accordingly the learned Judges declined to give effect to such an "unauthorised" agreement.

We have also been referred to the case of *Rukhanbai* v. *Adamji* (2) decided by a single Judge. There, Beaman, J., was dealing with a case of an agreement to refer the matter in dispute in an administration suit to the decision of an Assistant Commissioner. He held that there had been

(1) 15 Ind. Cas. 378; 37 M. 408; 22 M. L. J. 447; 11 M. L. T. 209; (1912) M. W. N. 393.

(2) 1 Ind. Cas. 622; 33 B. 69; 10 Bom. L. R. 366.

no regular submission to arbitration and no acceptance by the parties of the so-called arbitrator's award. He finally made an order referring the matter back to the very same arbitrator. The facts of that case are dissimilar from those of this case. Now in the present case we have an agreement in writing signed by the Vakils of the contesting parties to abide by the final decision of another appealable suit in a connected case. I fail to see any valid reason why this agreement *plus* the final decision of the High Court in Original Suit No. 295 of 1886 does not conclude the claims of the parties in this suit and operate as an adjustment of the suit.

The decision of the District Judge must, therefore, be set aside and the decree of the District Munsif restored with costs here and in the District Court.

KRISHNAN, J.—I agree with my learned brother. In this case there was an agreement between the parties to abide by the decision of the High Court in another suit in which the same questions as were involved in this suit seem to have been raised. The arrangement was made by statements of the Vakils in Court and was recorded by the Court, and in accordance with it the Court adjourned the hearing of the case till the disposal of the appeal in the High Court. The High Court has now given its decision. The respondents before us, against whose view that decision apparently went, contend that they are not bound by the previous arrangement and want this suit to be tried on the merits. In the first Court, they urged that their Vakil was not authorised to enter into such an agreement but that was found against. They now rely on *Rajah of Venkatagiri* v. *Chinta Reddi* (1) and contend that the agreement in question is not a valid agreement and is no bar to their claim to have their suit heard on the merits.

It seems to me that though the agreement was a conditional one at the time when it was entered into, it became completed as soon as the High Court's decree was passed and it amounted to a valid adjustment of the suit under Order XXIII, rule 3 of the Code of Civil Procedure. In the case relied on, the terms of the agreement are not found. The learned Judges seem to have looked at it as tantamount to an agreement to postpone the settlement of the case. They say, "the agreement did not settle the dispute but postponed the settlement and purported to authorise the Court to settle it in a certain manner." The agreement in the present case was one putting an end to the dispute in the suit as soon as the High Court's decree was passed. Parties not having resiled from their agreement before that decision was given, I fail to see how it can now be said that the suit has not been adjusted wholly by a lawful agreement, the Court having only to pass a decree in accordance with the agreement. Whatever their position may have been before the High Court's decision, it seems to me that Order XXIII, rule 3, clearly applies now. If the case of *Rajah of Venkatagiri* v. *Chinta Reddi* (1) intended to lay down that all agreements in suit to abide by the decision in some other suit are *ipso facto* invalid, I am with all respect unable to follow it and if it is not distinguishable, I should have felt bound to refer the question to the Full Bench. But as stated above, the nature of the agreement set up in it is not clear.

The decisions relating to reference to arbitration are not in point, as various other considerations arise in them.

It has also been argued before us that the respondents must be held estopped from contending that they are not bound by the arrangement in question and the cases of *Bahir Das Chakravarti* v. *Nobin Chunder Pal* (3) and *Protap Chunder Dass* v. *Arathoon* (4) were relied on. This question was not considered in *Rajah of Venkatagiri* v. *Chinta Reddi* (1). There is considerable force in this contention but it is not necessary to decide it in the present case, as in my view a completed adjustment has resulted.

I agree to the order proposed by my learned brother.

Appeal allowed.

(3) 29 C. 306; [illegible]

(4) 8 C. 455; [illegible] Ind. Dec. (N. s.) 291.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 228 OF 1918.

January 21, 1919.

Present:—Mr. Saunders, J.C.

SOPHIA BLIN—DEFENDANT—APPELLANT

versus

MARIA DAVID—PLAINTIFF—RESPONDENT.

Succession Act (*X of* 1865), *s.* 27—'*Lineal descendant*', *meaning of—Buddhist Law, Burmese, applicability of, to marriages of non-Buddhists.*

A 'lineal descendant', within the meaning of that term as used in section 27 of the Succession Act, is the offspring of a lawful marriage, and not the offspring of a union which is not that of husband and wife. [p. 544, col. 1.]

The Burmese Law is not applicable to marriages of Frenchmen or non-Buddhist non-Burmans celebrated according to Burmese ceremonies or custom in Burma in the time of the Burmese Kings. [p. 544, cols. 1 & 2.]

Mr. *Lutter*, for the Appellant.

Messrs. *May Oung* and *Swinhoe*, for the Respondent.

JUDGMENT.—This was a suit by the plaintiff Maria David claiming to be the legitimate daughter of one Theophile Alphonse Blin deceased, against the widow and administratrix of the said T. A. Blin for a declaration that the plaintiff is the legitimate daughtsr of the deceased and for recovery of a share in the estate, put by plaintiff at one-third. The defendant as administratrix has denied the legitimacy of the plaintiff and defends the suit on this ground.

The District Court has found for the plaintiff and the defendant now comes to this Court in appeal. The facts are briefly that the deceased T. A. Blin, a Frenchman, came to Mandalay about the year 1874 or 1875, and very shortly afterwards formed a union with a Burmese Buddhist lady by the name of Ma Bwin. There were two children of the marriage, Matilda, since deceased, and the plaintiff-respondent Maria, born respectively in 1877 and 1878. The union apparently continued for some years and was then dissolved, but evidence as to how it was dissolved is unsatisfactory. Subsequently the deceased T. A. Blin married the present defendant-appellant. It appears from the evidence that at the time of this marriage Ma Bwin had died. There is no doubt that the marriage between the defendant-appellant and M. Blin was a lawful marriage and it has been admitted by the plaintiff-respondent. The question is whether the union between M. Blin and Ma Bwin was that of husband and wife, and whether, therefore, plaintiff-respondent was born in lawful wedlock. The claim which she has made to one-third of the estate is based upon section 27 of the Succession Act of 1865. M. Blin died intestate, and by that section one-third of his property belongs to the widow, and the remaining two-thirds to his lineal descendants. It appears that Matilda Blin was married to one Joseph Frazer and had left children surviving her, whose title to the remaining third will apparently be governed by the decision in the present suit.

Two issues were framed by the District Court: (1) Is Burmese Law applicable to marriages of Frenchmen or non-Buddhist non-Burmans celebrated according to Burmese ceremonies or custom in Burma in the Burmese Kings' time? and (2) was plaintiff's mother married to her father according to Burmese ceremonies or custom or only his mistress, *i. e.*, is plaintiff legitimate or not? Both these issues were answered in plaintiff's favour by the District Court.

The written statement was not very satisfactory and a note has been added to the first issue that it is admitted by the defendant that "if valid then, valid now." The first issue was first argued, and was decided by a Burmese Judge. After evidence had been recorded and the second issue was ready for decision by the permanent Judge, the Advocate for the defendant desired to argue the question whether if the marriage was valid at the time, it is valid still; that is to say, he did not make the admission which had been made upon the framing of issues when the defendant-appellant was represented by another Advocate.

The Judge discussed the arguments and held apparently that it was an attempt to re-open the first issue, and he also held against the defendant-appellant.

The main argument in this Court has been upon this particular point, and though the learned Advocate for the plaintiff-respondent has drawn the Court's attention to the fact that the point did not arise upon the pleadings, he has not objected to its now being raised and has been heard in reply.

The evidence of the witnesses who were examined must, I think, be taken as proving that there was a marriage between the de-

ceased M. Blin and Ma Bwin which satisfied the requirements of Burmese Law. There was a public entertainment when the parties came together, to which a number of guests including M. D'Avera, Mademoiselle Denegri, Maung Kyaw E, who at the time appears to have occupied an official position in the *Hlutdaw*, were invited. There is evidence that the parties lived openly together as husband and wife and went about together, and that Ma Bwin was received at royal Court, and that persons who were not lawfully married were not so received. According to the evidence of Maung Kyaw E only one wife, the principal wife, was received in the palace. According to Burmese Law no ceremony of any kind is necessary for a marriage, mutual consent is all that is required, and consent may be inferred from the conduct of the parties or established by reputation: *Mi Me* v. *Mi Shwe Ma* (1).

I have no doubt that the evidence upon the record was sufficient to justify a finding that there was, according to Burmese Law, a marriage between M. Blin and Ma Bwin and there can also be no doubt that plaintiff-respondent was the issue of that marriage.

The law applicable is stated in section 13 of the Burma Laws Act, 1898, which provides that in questions regarding succession, inheritance and marriage the Buddhist Law in cases where the parties are Buddhists shall form the rule of decision, otherwise where the case is not provided for by any enactment for the time being in force, the decision shall be according to justice, equity and good conscience. The learned Advocate for the plaintiff-respondent urges that the decision of the question as to the validity of the marriage should be governed by Buddhist Law, which he prefers to call the Burmese law, and that inasmuch as one of the parties to it was a Burmese Buddhist the application of that law will be in accordance with justice, equity and good conscience. I understand that he admits that the validity of the marriage could not be supported if a claim to property in England were based upon it in an English Court, but that is not the case here, and he argues that there is no reason why it should not be allowed in a Court in British India where the property is situated. The case for the appellant is that the term "marriage" has in Christendom an entirely definite and clear meaning, that it implies a voluntary union for life of one man with one woman to the exclusion of all others, and that one of the parties to the union being a Frenchman and a Roman Catholic the parties to this suit being also Roman Catholics and the plaintiff claiming under the Succession Act, the word "marriage" must be taken in that sense, and that if the union between the father and mother of the plaintiff-respondent does not answer to that definition, she cannot succeed in a Court in British India. In *Mi Me's case* (1) quoted above, their Lordships of the Privy Council stated that in Burma polygamy is undoubtedly lawful, and this *dictum* must be accepted, although Mr. May Oung for the plaintiff respondent has suggested that it might be possible to argue that at the time when the marriage was effected polygamy was either discountenanced or directly contrary to law. In the case of *Brinkley* v. *Attorney-General* (2), which was a petition to establish the validity of a marriage under 21 and 22 Victoria Chap. 93, it was held upon the evidence that the marriage was valid according to the law of Japan and that by such a marriage the petitioner was precluded from marrying any other woman during the continuance of the marriage, and that the marriage was valid in England. The learned Judge who decided that case referred to the principle which has been laid down that a marriage which is not that of one man and one woman to the exclusion of all others, though it may be a marriage, is not the status which the English Law contemplates in dealing with the subject of marriage. I think there can be no doubt whatever that the union between the father and mother of the plaintiff-respondent did not exclude according to Burmese Law his union with other women and that it was not, therefore, marriage within the meaning

(1) 14 Ind. Cas. 475; U. B. R. (1912) I, 111 at p. 112; 89 C. 492; 11 M. L. T. 169; (1912) M. W. N. 201; 15 C L. J. 276; 16 C. W. N. 529; 9 A. L. J. 276; 14 Bom. L. R. 204; 22 M. L. J. 360; 5 Bur. L. T. 65; 39 I. A. 57 (P. C.).

(2) (1899) 15 T. L. R. 76; 59 L. J. P. 51; 62 L. T. 911.

of the term as recognized by English Law.

The question then is whether the respondent is entitled to a declaration by a Court in British India that the marriage of her father and mother was valid and whether she is entitled to a share in the property which she claims. The share claimed, as pointed out above, is that allowed by section 27 of the Succession Act of 1865, and it appears to me that the plaintiff-respondent can only succeed if she can prove that she is a lineal descendant of her father within the meaning of the term as used in that Act. It is true that the Act itself makes no distinction between legitimate and illegitimate children except in sections 7 and 8 which deal with domicile, and section 87 which deals with Wills: nor is the meaning of the term wife defined. But the absence of any definition of the term "wife" or of any distinction between legitimacy and illegitimacy is certainly not due to any intention to recognize the position or status of illegitimate children or to admit the claims of a wife who has not been legally married. It is due to an exactly opposite cause. Illegitimate children, that is to say, the offspring of a union which is not that of husband and wife in the sense in which the term is used in the Act are regarded as non-existent or the children of no one: *Smith* v. *Massey* (3). The Act itself was framed by Commissioners as part of a body of substantive law in preparing which the Law of England was used as a basis. It excludes the vast majority of the natives of the country from its operation. It applies to Europeans, East Indians, Jews, Armenians, native Christians and partly to Parsis. As to other persons those persons may be excluded by order of the Governor-General in Council if it is considered inexpedient or impossible to apply the provisions of the Act to them.

I think there can be no doubt that the respondent, who is an East Indian professing the Roman Catholic faith and claims under this Act a share in the intestate estate on the ground of the marriage of her parents, has not shown that there was such a marriage as would be recognized by the Courts in which she makes her claim. That the deceased M. Blin was a Frenchman does not, in my opinion, make any difference in the matter of this main and most important requirement.

It is urged that marriages of Frenchmen are governed by the Code of Napoleon by which publicity is the only essential in form, that this publicity was present in the union between the father and mother, and that as to the form of marriage the parties were governed by the *lex loci contractus*. But this does not get over the difficulty that the marriage was not in itself a marriage as understood in Christendom, and it does not appear that either by the Code of Napoleon or by any other law recognition is granted in France to polygamous marriages. On the contrary by Article 6 of the Code of Napoleon, it is laid down that private contracts cannot derogate from the laws which affect public order or good morals, and the contract of marriage in France as in other European countries is essentially monogamous. The Judge of the District Court appears to have interpreted the term "polygamous marriage" as meaning a union during the subsistence of which the man and woman were faithful to each other. But this is not the correct interpretation of the term, which must be held to include a form of union which permits the taking of more than one wife.

For the respondent an attempt has been made to draw a distinction between cases in which there is a personal disability between the parties to a union, *e. g.*, where they are within the degrees prohibited by their personal law and all other cases in which there is no such disability, but this contention does not get over the difficulty that the marriage set up was in its nature polygamous. The authority for the view that such a marriage is no marriage in the English Law is overwhelming and is not disputed. But the defence attempts to get over it by suggesting the fact that the place where the union was effected, where the property is, and where the parties now reside is the same, that if the plaintiff-respondent was entitled to inherit under Burmese Law, she is at least similarly entitled by justice, equity and good conscience to obtain her inheritance in a British

(3) 30 B. 500; 8 Bom. L. R. 322.

Court which has succeeded the Burmese Court, and that, as the learned Advocate puts it, she should not suffer a grievous wrong on account of the folly or incompetence of the Burmese King, that in deciding the question of marriage between a Burman Buddhist and a foreigner there is no reason which is not consistent with the principles of justice, equity and good conscience why the Buddhist Law should not be applied and the case of *Maung Sein Kyi* v. *Ma E* (4) is referred to, in which in the case of a union between a Chinaman and a Burmese woman no strong reason was found why the customary law of the man should be applied and the customary law of the woman should be utterly disregarded. The case of *Ma Chain* v. *Ma Mo* (5) in Chan Toon's Leading Cases is also relied on. But the parties here are not Buddhists, and in a case between East Indian Christians which depends upon the question whether the union between a Frenchman who was a Christian and a Burman Buddhist was a marriage or not, it certainly does not appear to be opposed to the principle of justice, equity and good conscience that the law administered by a Court in British India should be the law of that country rather than that of the Burmese Courts.

In *Ahmed* v. *Ma Pwa* (6) it was pointed out that in any litigation in which a foreigner found himself involved in Upper Burma before the annexation, he was obliged to submit to its determination by the rules of Buddhist Law because the Courts had no other law which the Sovereign power permitted them to apply, and the suit having been brought in a Court in British India, it was decided by Muhammadan Law which was the law applicable to the parties. The case of *Ma Chain* v. *Ma Mo* (5) ignores the distinction between the meaning of the word marriage as used in Christendom, the meaning of which is also to be applied to the interpretation of the word in the Succession Act, and which appears to me to go to the root of the matter. Such a distinction obviously does not exist in the case of a union between a Chinaman and a Burmese woman. It is hardly necessary perhaps to refer to the suggestion that the folly of the Burmese King should not be allowed to lead to injustice by depriving the plaintiff of her inheritance, so far as this argument does not beg the question; the change in the Government of the country to whatever cause it was attributable has, undoubtedly, affected the law applicable to a great many persons in the country.

The defendant-appellant relied upon a letter admittedly written by the plaintiff to her father filed as Exhibit No. 3. In that letter which was written in 1904 when the plaintiff had been twice married—a letter which I may here state showed a very proper sense of filial duty and affection—the plaintiff after reference to the defendant as her father's lawful wife says: "We are not your legitimate children and without your will we get nothing." No doubt this admission does not prove that the union of the plaintiff's parents was not a lawful marriage, but it does appear to me to prove that not only did the plaintiff regard it as no marriage, but that her father held the same view since it is hardly credible that she would have written to her father in these terms if he had regarded his union with her mother as a lawful union.

For the reasons given I am of opinion that the plaintiff's suit must fail and I see no reason in the circumstances why the ordinary rule as to costs should be departed from.

The appeal is allowed and the plaintiff's suit must, therefore, be dismissed with costs throughout.

Appeal allowed.

S. N. Pal
Advocate High Court
Jammu & Kashmir
Srinagar.

(4) 34 Ind. Cas. 159; 9 Bur. L. T. 179; 8 L.B.R. 399.
(5) Chan. Toon. L. C. II, 224.
(6) U. B. R. (1892-96), Vol. II, 529.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 169 OF 1917.

February 12, 1919.

Present:—Pandit Kanhaiya Lal, A. J. C.

SANKATA PRASAD—PLAINTIFF—APPELLANT

versus

KALI PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—*Reversioner, interest of, nature of.*

SANKATA PRASAD *v.* KALI PRASAD.

Apart from any binding agreement having the force of a decree or operating as an estoppel, a Hindu reversioner holds no right or interest *in præsenti* in the property which a female owner holds for her life Until it vests in him on her death, should he survive her, he has nothing to assign, or to relinquish, or even to transmit to his heirs; and if he is a minor, his guardian cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. [p. 547, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Hardoi, dated the 31st August 1917.

The Hon'ble Mr. *Wazir Hasan*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for Respondent No. 1.

JUDGMENT.—The dispute in this case relates to certain property which belonged to Daulat Ram who died on the 7th August 1875, leaving a widow, *Musammat* Ganesh Kuar, and two daughters, *Musammat* Mendana and *Musammat* Ram Pyari. On the 20th October 1882 *Musammat* Ganesh Kuar executed a deed of gift by which she gave the property inherited by her from her husband to her daughters, *Musammat* Mendana and *Musammat* Ram Pyari, (Exhibit 4) and got mutation of names effected in their favour in equal shares. On the 3rd September 1890 *Musammat* Ganesh Kuar died. On the 2nd December 1894 *Musammat* Mendana too died, leaving three sons, the plaintiff and defendants Nos. 2 and 3.

On the 20th July 1897 *Musammat* Ram Pyari mortgaged a half share of the said property with Iltifat Rasul. On the 24th June 1904 she filed a suit for possession of the remaining half share, which was held by the sons of *Musammat* Mendana, alleging that she was, under the Hindu Law, entitled to the said share on the death of *Musammat* Mendana by right of survivorship. She also claimed Rs. 1,000 on account of mesne profits of that share for the three years preceding the suit (Exhibit A-29). This was followed by a suit by the sons of *Musammat* Mendana including the present plaintiff, who was then minor, for a declaration that *Musammat* Ram Pyari had no power to make a mortgage of her half share beyond her lifetime (Exhibit A-51). Each of these suits was contested on various grounds, which need not be set forth. It is sufficient to say that on the 25th May 1905 a compromise was arrived at, by virtue of which a half share of the disputed property was made over to *Musammat* Ram Pyari with an absolute power of disposal and the other half was allowed to remain in the possession of the sons of *Musammat* Mendana and both the suits were in effect withdrawn. An application for permission to enter into the compromise was made by Radha Kishen, one of the sons of *Musammat* Mendana, on behalf of the present plaintiff as his guardian *ad litem*, stating that the compromise would benefit the minor and save him from the risk and embarrassment of litigation (Exhibit A-35). The Court before which the suits were pending permitted the guardian *ad litem* to enter into the compromise (Exhibit A-37) and dismissed the claims.

The questions for consideration in this appeal are whether the permission granted by the Court to the guardian to enter into the compromise was sufficient to bind the minor and whether the plaintiff, who has since attained majority, is competent to avoid the compromise either on the ground that his guardian *ad litem* could not have validly transferred or relinquished his reversionary interest in the half share, thereby conveying to *Musammat* Ram Pyari an absolute right thereto, or that he had at all events acted improperly in doing so.

On the first point, reading the application for permission to enter into the compromise with the order passed thereon, there is no reason for thinking that the Court before which the compromise was filed had not applied its mind to consider whether the compromise was advantageous to the minor and saved him from the risk of losing the half share which *Musammat* Ram Pyari was claiming forthwith. Section 462 of the old Code of Civil Procedure did not require that the order granting the sanction should in express terms set forth the process of reasoning which had led to the order granting the sanction, and, however desirable it might be that there should be something on the record to indicate that the interest of the minor had been sufficiently considered, it cannot be assumed that in this case this was not done. As observed in *Virupakshappa* v.

Shidappa (1) the form of expression used for the purpose of indicating that the Court grants its leave is a matter of but slight importance; and if the Court, after a consideration of the circumstances, decides to grant leave and expressly says so, it is not open to the minor to avoid the decree, which might be passed in accordance with the compromise, except where fraud or collusion on the part of his next friend or guardian *ad litem* is established.

The compromise filed in this case did not, however, mature into a decree, except in so far as it led in effect to the withdrawal of both the suits, which were dismissed in accordance with it (Exhibits A-35 and A-39). The decrees passed in those suits are binding on the present plaintiff, because no fraud or collusion is alleged; but it is open to him to avoid the compromise, if it went outside the scope of those suits, and the terms agreed to were such as to prejudice his rights. The terms offered on behalf of the plaintiff formed, however, the consideration for the withdrawal, by *Musammat* Ram Pyari, of her claim. The plaintiff cannot, therefore, avoid the compromise except on the condition that he restores the benefit received by him, that is, he refunds the profits he received in respect of the half share to the possession of which *Musammat* Ram Pyari was entitled for her lifetime. Apart from any binding agreement having the force of a decree or operating as an estoppel, a Hindu reversioner has, as pointed out in *Amrit Narayan Singh* v. *Gaya Singh* (2), no right or interest *in præsenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is a mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto.

Under the Hindu Law the plaintiff would have been entitled to a one-third share in the estate left by his maternal grandfather, Daulat Ram, after the widow and daughters of Daulat Ram had died, in case he survived them. On the death of *Musammat* Mendana, *Musammat* Ram Pyari became entitled to the half share left by her. By virtue of the compromise the plaintiff was allowed to retain possession of a one-third portion of that half share before the death of *Musammat* Ram Pyari, which took place on the 20th June 1908. *Musammat* Ram Pyari had withdrawn her suit for possession and mesne profits on the strength of the compromise which the plaintiff now seeks to avoid. He is liable in the circumstances to refund Rs. 366-10-8 on account of one-third of the claim for mesne profits which *Musammat* Ram Pyari withdrew in pursuance of the compromise, and Rs. 1,086-4-4 on account of the profits of the one-third share of the property then in dispute which he retained in his possession by virtue of the compromise from the 24th June 1904, the date of the previous suit filed by *Musammat* Ram Pyari, to the 20th June 1908, the date of her death. Until the above amount is paid, the plaintiff is not entitled to claim possession or mesne profits from the defendants-respondents.

The appeal is, therefore, allowed in so far that the plaintiff will be entitled to a decree for possession of a one third share of the property in dispute subject to the payment of Rs. 1,452-15-0 to the defendant Kali Prasad, being the legal representative of *Musammat* Ram Pyari deceased. The parties will, in the circumstances, bear their own costs throughout.

Appeal allowed.

(1) 26 B. 109 at p. 114; 3 Bom. L. R. 565.
(2) 44 Ind. Cas. 408; 45 C. 590; 23 M. L. T. 142; 22 C. W. N. 409; 27 C. L. J. 296; 34 M. L. J. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 306; 7 L. W. 581; 20 Bom. L. R. 546; 45 I. A. 35 (P. C.).

MATHRA PRASAD *v.* GOKAL CHAND.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 40 OF 1918.

May 22, 1919.

Present:—Sir George Knox, KT., Acting Chief Justice, and Justice Sir P. C. Banerji, KT.

MATHRA PRASAD—DEFENDANT —APPELLANT

versus

GOKAL CHAND AND ANOTHER—PLAINTIFFS —RESPONDENTS.

Evidence Act (*I of* 1872), *s.* 115—*Estoppel--Agreement to hold property as tenant—Ejectment, suit for—Objection that plaintiff is not sole owner of property, whether can be raised.*

M. held a house as the tenant of two brothers *D.* and *L.* The house was attached in execution of a decree obtained against *D.* alone. *L*, during the pendency of execution proceedings, applied for, and obtained, a preliminary decree for partition of the house, but before the decree was made the house was sold by auction and was purchased by *R*, the predecessor-in-title of the plaintiff. After the sale, *M.* executed a *sarkhat* agreement to hold the house as a tenant in favour of *R.* and agreed to vacate the house, if required by *R.* to do so, on receiving a month's notice. He, however, refused to vacate the house when served with notice and the present suit was brought to eject him therefrom. He resisted the suit on the ground that the plaintiff was not the sole owner of the premises, and, therefore, had no title to sue for his ejectment:

Held, that in the presence of the *sarkhat* executed by *M.* in which he agreed to vacate the house if required to do so by *R.*, he was estopped from denying the plaintiff's title to get the house vacated. [p. 548, col. 2.]

Appeal, under section 10 of the Letters Patent, from the judgment of Mr. Justice Rafique, dated the 13th November 1917.

Mr. *D. C. Banerji*, for the Appellant.

Mr. *Uma Shankar Bajpai*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was one for ejectment of a tenant from a house and for arrears of rent. The house belonged to two brothers Debi Prasad and Lalta Prasad. In execution of a decree obtained by one Incha Ram against Debi Prasad, he caused the whole house to be attached as the property of Debi Prasad. During the pendency of the attachment a suit was brought by Lalta Prasad for partition of the house, and he made Debi Prasad and Incha Ram parties to that suit. He obtained a preliminary decree from the High Court for partition subject to certain conditions, but before the decree of the High Court was made the property was sold by auction and was purchased by Ram Chand, the predecessor-in-title of the plaintiffs. We may mention that Mathra Prasad, appellant, was a tenant in the house having been put into it by Debi Prasad and Lalta Prasad. After the auction-sale, however, on the 4th of May 1914 Mathra Prasad executed a *sarkhat* (that is, an agreement to hold the house as tenant) in favour of Ram Chand, and in that document he distinctly stated that he took the house from Ram Chand on a rent of Rs. 3 per mensem, and that if Ram Chand wanted to have the house vacated, he (Mathra Prased) would vacate it on receipt of a month's notice. The present suit was brought to eject Mathra Prasad from the house, after serving him with the requisite notice, and for arrears of rent. He resisted the suit on the ground that the house belonged not only to Debi Prasad in whose shoes Ram Chand stood but also to Lalta Prasad and that, therefore, the plaintiffs were not entitled to eject him from the house. This contention was overruled by the Courts below and the learned Judge of this Court has upheld the decree of the lower Appellate Court.

We think that the plaintiffs' claim has been rightly decreed. Mathra Prasad having executed a *sarkhat* in favour of the plaintiffs' predecessor Ram Chand and having agreed to hold the house from him and to vacate it on receipt of notice from him to do so, he is estopped from denying the plaintiffs' title to get the house vacated. This case seems to be similar to that of a tenant who has taken a lease from one of two co-owners of certain property and agreed to surrender the property if called upon to do so by the person who granted the lease. In such a case it is not open to the tenant to dispute his landlord's title. We were referred to the case of *Lal Mahomed* v. *Kallanus* (1). The circumstances of that case were different. Furthermore, it was considered by the Calcutta High Court in the later case of *Kelu Das* v. *Surendra Nath Sinha* (2) and the view taken in it does not seem to have been accepted. In our opinion apart from the fact that there was

(1) 11 C. 519; 5 Ind. Dec. (N. S.) 1104.
(2) 7 C. W. N. 596.

nothing on the record to show that the partition decree made in favour of Lalta Prasad had become final, the defendant is precluded now from disputing the plaintiff's title. We dismiss the appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 126 OF 1918.

February 26, 1919.

Present:—Mr. Daniels, A. J. C.

Babu GAYA PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Pandit GUR DAYAL—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 72, scope of—Mortgagee paying money for protection of property—Possession, order for delivery of—Subsequent mortgagee paying money before actually obtaining possession—Prior mortgagee, payment to—Prior mortgagee, suit by—Puisne mortgagee not made party, effect of—Redemption—Money paid to prior mortgagee, whether must be discharged before puisne mortgagee can be dispossessed—Prior mortgage unenforceable for lapse of time, effect of—Limitation—Interest on money paid in redeeming prior mortgage, whether can be claimed by puisne mortgagee.

The words of section 72 of the Transfer of Property Act are wide enough to cover the case of a subsequent mortgagee who has obtained, in the execution department an order for delivery of possession, and who pays up for the protection of the property the money due to a prior mortgagee after the passing of the order for delivery of possession but before he is actually put in possession under that order. [p. 550, col. 1.]

If a prior mortgagee neglects to make a puisne mortgagee a party to his suit, the rights of the puisne mortgagee cannot be affected by the decree passed in such suit. [p. 550, col. 1]

A sale which does not affect the interest of the puisne mortgagee is not covered by section 72 of the Transfer of Property Act. [p. 550, col. 2.]

Where a mortgagee makes a payment of money which is not immediately necessary in order to save his security, the payment cannot be brought within the provisions of section 72. [p. 551, col. 1.]

A usufructuary mortgagee who redeems a prior mortgagee can use the prior mortgage as a shield against a person who wants to dispossess him by paying off his usufructuary mortgage, and can insist that the money due under both the usufructuary and the prior simple mortgage which he has redeemed must be paid before he can be made to give up possession of the property. The fact that at the date the usufructuary mortgage was being redeemed the prior simple mortgage was unenforceable on account of lapse of time will not affect the matter. [p 551, col. 2; p. 552, col. 1.]

In such a case the usufructuary mortgagee is entitled to claim interest which has accrued due since the date of payment on the money paid by him. [p. 552, col. 1.]

Appeal against the decree of the Subordinate Judge, Hardoi, dated the 4th January 1918, modifying that of the Munsif, Bilgram, dated the 28th February 1917.

Mr. *A. P. Sen* and Babu *Bisheshwar Nath Srivastava*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—This is a second appeal in a redemption suit. Two issues have been argued:—

Whether the defendant-respondent Pandit Gur Dayal is entitled in this suit to claim payment of a sum of Rs. 616-11-6 paid by him in satisfaction of an earlier mortgage on the same property, and

(2) whether, if so, the lower Appellate Court was right in allowing simple interest at 1 per cent. on this amount.

Chhater Singh, the original owner of the property, made three successive mortgages as under:—

First mortgage, dated 14th August 1885, for Rs. 300, in favour of Baldeo Singh.

Second mortgage, dated 7th of February 1887, for Rs. 160, in favour of Kalka and Sumer who transferred their rights to the defendant in 1894.

Third mortgage, dated 10th August 1888, in favour of the plaintiffs' father Gopi Charan.

Baldeo Singh obtained a decree on his mortgage on 21st June 1890, which was made absolute on the 11th July 1891. He sold this decree to one Bharat, who took out execution and the property was proclaimed for sale, the date fixed for sale being the 22nd June 1895. In the meantime, the defendant, under a clause in his mortgage which empowered the mortgagee to take possession of the mortgaged property in some eventualities, obtained a decree for possession in April 1895. In execution of his decree he obtained from the Court an order for delivery of actual possession (*dakhldihani*) which was passed on 16th May 1895. Three days later, on the 19th May 1895, delivery of possession was carried out by Court's officer. Between these two

dates, namely on 18th May 1895 the defendant paid up the amount of Baldeo Singh's decree to save the property from sale.

The first point argued is whether this payment is covered by section 72 (*b*) of the Transfer of Property Act. This is contested on two grounds:—

(1) that it was made before the mortgagee took possession, and

(2) that the interest of the defendant could not have been affected by a decree to which he was no party.

As regards the first question, it appears to me that the words of the section are wide enough to cover such a case as this, where the respondent had actually obtained an order in the execution department directing him to be put in possession of the property and all that remained to be done was a formal act by a ministerial officer of the Court. A somewhat analogous case which has given rise to much difference of opinion arises under clause 6 of Article 182 of the Limitation Act, where in certain cases limitation runs from the date of issue of notice to the person against whom execution is applied for. Does this mean the date when the Court orders notice to issue or the date when the ministerial officer of Court actually despatches it? A Full Bench of the Allahabad High Court has recently held in *Kalka Baksh Singh* v. *Ram Charan* (1) that it is the date of the Court's orders which counts. Similarly, when a decree-holder has got an order from the Court in the execution department directing him to be put in physical possession of the property and all that remains to be done is for a peon or other officer to give formal delivery on the spot, he is, in my opinion, entitled to take action for the protection of the property under the provisions of section 72 of the Transfer of Property Act.

The second objection is more serious. It is admitted that the defendant or his predecessors-in-interest were not made parties to Baldeo Singh's suit, though that mortgage was in existence when the suit was brought. It is well established that the rights of a puisne mortgagee cannot be affected by a decree passed on a prior mortgage, if the prior mortgagee neglects to make the puisne mortgagee a party to his suit. If authority is needed for this proposition, it is sufficient to refer to *Umes Chunder Sircar* v. *Zahur Fatima* (2), *Ram Narain Sahoo* v. *Bandi Pershad* (3), *Dip Narain Singh* v. *Hira Singh* (4) and *Het Ram* v. *Shadi Ram* (5). A sale which does not affect the interest of the puisne mortgagee is not covered by section 72 [*Rajendra Prasad* v. *Bahuria Ratan Jot Kuer* (6)].

The learned Counsel for the respondent relies on the decision of the Bombay High Court in *Hassanbhai* v. *Umaji* (7) which was followed in this Court in *Kedar Nath* v. *Saiyad Hafiz Ali* (8), in which it was held that where a prior mortgagee had foreclosed the rights of the mortgagor, he was entitled, as representing the mortgagor, to redeem a puisne mortgagee instead of the puisne mortgagee being entitled to redeem him. It is argued from this that a decree to which the puisne mortgagee is not a party may injuriously affect him by depriving him of his right to redeem the prior mortgage. It is unnecessary to discuss the correctness of the ruling in *Hassanbhai* v. *Umaji* (7) which has been doubted by some Courts, *vide* Gour's Transfer of Property Act (4th Edition), page 1130, since if that ruling is correct it is not sufficient to bring the case within section 72. A mortgagee is always liable to be redeemed by his mortgagor or the representative of his mortgagor. All that has happened, if the Bombay ruling is correct, is that the right of redemption inherent in the mortgagor has passed to the prior mortgagee by reason of the sale or foreclosure. The mortgagee is in no possible danger of losing his security and if he gets possession of the property, as he would have done in this case, before the sale on the prior mortgage takes place, he can resist any attempt to oust him until a decree has been passed to which he has been regularly made a party and in which he has been allowed a right of redemption.

(1) 46 Ind. Cas. 584; 40 A. 630; 16 A. L. J. 633.

(2) 18 C. 164; 17 I. A. 201; 5 Sar. P. C. J. 507; 9 Ind. Dec. (N. S.) 110 (P. C.).

(3) 31 C. 737.

(4) 19 A. 527; A. W. N. (1897) 147; 9 Ind. Dec. (N. S.) 341.

(5) 45 Ind. Cas. 798; 16 A. L. J. 607; 5 P. L. W. 88; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 185; (1918) M. W. N 5'8; 20 Bom. L. R. 798; 22 C. W. N. 1033; 40 A. 407; 45 I. A. 130 (P. C.).

(6) 38 Ind. Cas. 232; 1 P. L. J. 589; 3 P. L. W. 37.

(7) 28 B. 153; 5 Bom. L. R. 892.

(8) 10 C. C. 356.

This was directly held by a Bench of this Court in *Sheo Indar Bahadur Singh* v. *Ghazi-ud-din*(9). It is clear, therefore, that the payment made by the defendant was not immediately necessary in order to save his security and it cannot, therefore, be brought within the provisions of section 72.

This finding, however, does not dispose of the case. There remains the question of section 74 of the Transfer of Property Act and the principle that a puisne mortgagee who redeems a prior mortgage is entitled to hold it up as a shield against any attempt to oust him from the property. The appellant does not deny that section 74 applies, but contends that this does not stand in the way of his redeeming the usufructuary mortgage separately and the prior simple mortgage, should he so desire, later on. This means in practice that he would have no need to redeem it at all. Once in possession of the property he would be secure and the respondent could not enforce his mortgage, as more than twelve years have elapsed not only since the date of the mortgage, but even since the day on which he paid off the decree. A large number of cases have been cited at the Bar but there are two which have a special bearing on this question. *Abdul Qayyum* v. *Sadr ud din Ahmad* (10) was relied on by the lower Court as laying down that a usufructuary mortgagee who satisfies a decree for sale on a prior mortgage is entitled to retain possession until he receives the amount of both this mortgage and his own. That case is not precisely in point, because the decision was specifically based on the provisions of section 72 of the Transfer of Property Act. The puisne mortgagee, having been made a party to the suit for sale on the prior mortgage, was compelled to redeem it on pain of losing his security. On the other hand, in *Kirat Singh* v. *Debi Singh* (11) the same principle was laid down not with reference to section 72 but to the principle of subrogation. In that case two mortgages had been executed, the first mortgage which was simple and the second mortgage which was usufructuary. The first mortgagee brought the property to sale without making the second mortgagee a party. The auction-purchasers nevertheless succeeded in getting possession of the property. They were subsequently redeemed by the holders of the puisne mortgage. As in the present case a suit was finally brought by the representatives of the mortgagor to redeem the usufructuary mortgage without redeeming the prior simple mortgage, the amount of which had been paid by the puisne mortgagee. The Court (Stanley, C. J., and Banerji J.) dismissed the suit in these words:—

"The defendants are in possession not only by virtue of the mortgage obtained by them but also because they have redeemed the prior mortgage of 1863. They have stepped into the shoes of the holders of that mortgage and are entitled to hold up the amount of that mortgage as a shield against any claim that might be brought against them for ousting them from possession of the mortgaged property. The plaintiffs did not in their suit offer to redeem the first mortgage, nor have they, at any later stage of the proceedings, ever consented to do so. Their suit has, therefore, been rightly dismissed and we dismiss this appeal with costs."

That case was similar in principle to the present and the decision was distinctly based on the ground of subrogation and what may be called the doctrine of shield. In that case also the second mortgagee was not made a party to the suit on the first mortgage. It may be that in the case cited the puisne mortgagee could not have regained possession of the property without redeeming the prior mortgage, but it is equally clear in the present case that the respondent could not have hoped permanently to retain possession without doing so. To a suit in which all the necessary parties were joined—and there was nothing to prevent the auction-purchaser under the first decree from instituting such a suit——the respondent could have no defence except an offer to redeem.

A point was made in argument of the fact that a suit to enforce the original mortgage of 1883, assuming that such a suit could lie and that the remedy would not have been by way of execution, would

(9) 33 Ind. Cas. 243; 18 O. C 347.
(10) 27 A. 403; 2 A. L. J. 23; A. W. N. (1905) 11.
(11) 27 A. 308; A. W. N. (1904) 268.

now be time-barred. Where, however, a person redeeming a prior mortgage is entitled to hold that mortgage up as a shield against an attempt to dispossess him by a person whose rights arose subsequently, his right to do so is independent of the question whether as plaintiff he could have enforced the mortgage by sale or otherwise. A party who is in the position of defendant can often rely on rights he might have been unable to enforce as plaintiff. As this Court remarked in *Meharban Singh* v. *Raghunath Singh* (12), there is in general no limitation against defence. The decision arrived at by the lower Courts is in accordance with justice, it is supported by the ruling cited above, and I uphold it.

On the question of interest I agree with the lower Court that the respondent was entitled to simple interest. The fact that the decree did not award future interest is immaterial. The appellant was in possession of the profits of the property against the interest of the usufructuary mortgage. He had to pay a considerable further sum and there is no reason why he should not be recouped. At the same time I consider that 6 per cent. per annum is sufficient under the circumstances. It was faintly suggested that the question of the rate of interest was *res judicata*, but this is clearly not the case. It was unnecessary to determine this question for the purposes of the previous suit in which the question arose.

In the result I modify the lower Court's decree by reducing the rate of interest payable on the sum of Rs. 616-11-6 from 1 per cent. per month to 6 per cent. per annum, but in all other respects dismiss the appeal. As the respondent has been substantially successful he will get his costs of this appeal from the appellants.

Appeal dismissed.

(12) 49 Ind. Cas. 115; 5 O. L. J. 768.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2008 AND 2483 OF 1917.

April 9, 1919.

Present:—Justice Sir John Woodroffe, KT., and Justice Sir Shamsul Huda, KT.

MURALIDHAR ADITYA—PLAINTIFF—APPELLANT

versus

RADHA MOHAN HAZRA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 50, 115—Presumption under s. 50, whether arises after publication of Record of Rights.

After the publication of a Record of Rights under Chapter X of the Bengal Tenancy Act in respect of a tenancy, the tenants are debarred by the provisions of section 115 of the Act from claiming the presumption which is mentioned in section 50 of the same Act. [p. 553, col. 1.]

Appeals against the decrees of the Additional District Judge, Midnapur, dated the 23rd June 1917, affirming that of the Officiating Munsif, 3rd Court at that place, dated the 22nd June 1916.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitra* (with him Babu *Manindranath Banerji*), for the Appellant.—This is a suit for arrears of rent and for enhancement of rent on account of the price of staple food crops having gone high. The defence was that the rent was consolidated for Rs. 26 and had been paid for over 20 years and so the defendants claimed benefit of the presumption under section 50, Bengal Tenancy Act. But afterwards there had been final publication of the Record of Rights under Chapter X of the Bengal Tenancy Act as regards the tenancy in suit Consequently no presumption as is claimed can arise. Refers to section 115, Bengal Tenancy Act. The Record of Rights creates a presumption in my favour. The lower Court relies on *Maharaja Radha Kishore Manikya Bahadur* v. *Umed Ali* (1), but it has been overruled by the Full Bench in *Pirthi Chand Lal Chowdhury* v. *Basarat Ali* (2). Moreover, I rely on the provisions of the Statute itself, which says one cannot get the benefit of the presumption once the Record of Rights is finally published.

Babu *Mohini Nath Bose*, for the Respondents.—Particulars under section 102 (*b*),

(1) 12 C. W. N. 904.

(2) 3 Ind Cas. 449 (F. B.); 37 C. 30; 13 C. W. N. 1149; 10 C. L. J. 343.

Bengal Tenancy Act, are not recorded.

[Dr. *Mitra*.—If it is recorded that the tenant is an occupancy *raiyat*, the landlord is entitled to enhancement. If he had been a tenant at fixed rate it would have been so recorded. The status is recorded, so all the incidents thereto naturally follow. *Pirthi Chand Lal Chowdhury* v. *Basarat Ali* (2) has fully considered the matter. Refers to *Harihar Persad Bajpai* v. *Ajub Misir* (3).]

The Record of Rights is not quite accurate. Particulars under section 102 (*b*), Bengal Tenancy Act, being not recorded in the Record of Rights, it is erroneous and so section 115, Bengal Tenancy Act, does not apply. There ought to be a remand for adjudication according to law.

Dr. *Mitra* was not called upon to reply.

JUDGMENT.

WOODROFFE, J.—In these two appeals it has been contended that the Courts below should have held that the Record-of-Rights having been finally published under Chapter X of the Bengal Tenancy Act in respect of the tenancy in suit, the defendants were barred by the provisions of section 115 of that Act from claiming the presumption which is mentioned in section 50 of the same Act.

The learned District Judge had based his decision upon the case of *Maharaja Radha Kishore Manikya Bahadur* v. *Umed Ali* (1). But having regard to the Full Bench decision in *Pirthi Chand Lal Chowdhry* v. *Basarat Ali* (2) and to the decision which is reported as *Harihar Persad Bajpai* v. *Ajub Misir* (3), we think that the learned Judge's view of the law cannot be supported, and we, therefore, set aside the judgment and decree and remit the case to him for re-hearing. On the re-hearing the matter to which the learned Judge will direct his attention is the third issue, which deals with the alleged rise in the price of the staple food crops, the claim for enhancement on that account and the amount of enhancement which under the circumstances is to be allowed.

The appellant is entitled to his costs in the two appeals before us, but having regard to the fact that the two appeals raised the same question, we think that there should be only one hearing fee.

All other costs both before and after remand will follow the decision on the remand. The finding of the lower Appellate Court on issue No. 1 as to there being one consolidated *jama* will stand.

SHAMSUL HUDA, J.—I agree.

Appeals allowed.

(3) 22 Ind. Cas. 604; 45 C. 980.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 15 OF 1918.

June 6, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Rafique.

NIADAR SINGH—DECREE-HOLDER—APPELLANT

versus

SABIT KHAN AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 60—Execution of decree—Agriculturist, house belonging to, whether can be sold.

Having regard to the provisions of section 60 of the Civil Procedure Code, the house of an agriculturist, which is appurtenant to his agricultural holding, is not liable to sale in execution of a decree obtained upon a mortgage of the house made by the agriculturist.

Appeal, under section 10 of the Letters Patent, against the judgment of Justice Sir George Knox, KT, dated the 23rd November 1917.

Dr. *S. N. Sen*, for the Appellant.

Mr. *S. A. Haidar*, for the Respondents.

JUDGMENT.—The question in this case is whether the house of an agriculturist, which has been found to be appurtenant to his agricultural holding, is liable to sale in execution of a decree obtained upon a mortgage of the house made by the agriculturist. The appellant relies on the decision of the Full Bench in *Bhola Nath* v. *Musammat Kishori* (1). In that case the view seems to have been taken that the house of an agriculturist which was mortgaged by him was liable to sale in execution of a decree, provided that it did not appertain to his agricultural holding. As in this case it has been found that the house appertains to the agricultural holding of the respondents, it is not liable to sale having regard to the provisions of section 60 of the Code of Civil Procedure. We dismiss the appeal with costs.

Appeal dismissed.

(1) 11 Ind. Cas. 646; 34 A. 25; 8 A. L. J. 1045.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2243 OF 1917.

March 19, 1919.

Present:—Justice Sir Ernest Fletcher, Kt., and Mr. Justice Cuming.

AMULLYA CHARAN DAWN—PLAINTIFF—APPELLANT

versus

ASKARI KAZI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Interest, high rate of—Mortgagee, whether entitled to contractual rate of interest.

Where it is not shown that there was any undue influence or coercion, interest on a mortgage must be calculated and allowed at the rate provided for by the contract between the parties in the mortgage-deed, even though the interest would run up to a large sum.

Appeal against the decree of the Officiating Subordinate Judge, 2nd Court, Burdwan, dated the 25th June 1917, affirming that of the Munsif, 3rd Court at that place, dated the 4th September 1916.

FACTS appear from the judgment.

Babu *Sarat Chandra Roy Chowdhury* (with him Babu *Satya Charan Sinha*), for the Appellant.—This appeal is on behalf of the plaintiff and it arises out of a suit for the enforcement of a mortgage bond dated June 1904. In the bond the defendants stipulated to pay interest on the principal sum borrowed at the rate of 15 per cent. per annum. The bond contains a further stipulation that in case of default of payment of interest for one year the mortgagee will be entitled to compound interest at the same rate. The Courts below have reduced the amount of interest, apparently thinking that interest at the rate of 15 per cent. per annum with yearly rests was too high, and, therefore, the stipulation for the payment of interest penal. The view taken by the Courts below is wrong, especially when there is no evidence that the rate of interest was inserted in the bond by undue influence or coercion. Having regard to the decision of their Lordships of the Judicial Committee reported as *Azis Khan* v. *Duni Chand* (1), the Court cannot reduce the interest unless it is shown that the creditor used his influence on the mortgagor in fixing the rate of interest. In this case there is no evidence that the creditor did so.

(1) 48 Ind. Cas. 933; 23 C. W. N. 30; 101 P. R. 1918; 165 P. W. R. 1918.

Babu *Atindra Nath Mukherjee* for Maulvi *A. K. Fuzlul Huq*, for the Respondents.—Having regard to the fact that the mortgagee was a needy man and was compelled to borrow money at a very high rate of interest as well as to the fact that the amount of interest has come up to a pretty large sum of money, the amount of interest has been rightly reduced. Refers to *Challaphroo* v *Banga Behary Sen* (2).

JUDGMENT.

FLETCHER, J.—The only question involved in this appeal is this: Is a mortgagor entitled to the contractual rate of interest where it is not shown that he dominated the will of the borrower and where it is not shown that there was any undue influence or coercion? I am clearly of opinion that he is. The recent decisions of the Privy Council show quite clearly that if facts are established to bring the case within the provisions of the Indian Contract Act, then the mortgagee is entitled to the contractual rate of interest. The fact that the interest would run up to a large sum owing to the borrower having failed for a period of 4 years to repay the principal or to keep down the interest, does not seem to be any sufficient ground for holding that the lender had dominated the will of the borrower. We must allow this appeal and direct that, in calculating the amount due upon the mortgage, interest be calculated and allowed at the rate provided for by the contract between the parties in the mortgage-deed. The respondent must pay the costs of the appellant in all Courts.

CUMING, J.—I agree.

Appeal allowed.

(2) 31 Ind. Cas. 394; 20 C. W. N. 408; 22 C. L. J. 311.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 119 OF 1918.

February 3, 1919.

Present:—Pandit Kanhaiya Lal, A. J. C. and Mr. Daniels, A. J. C.

BADAL SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAHABIR SINGH—PLAINTIFF—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 233 (k)—

BADAL SINGH v. MAHABIR SINGH.

Jurisdiction of Civil and Revenue Courts—Partition—Plots belonging to one co-sharer assigned to another—Suit to recover possession of plots, maintainability of.

A co-sharer claimed exclusive title to several plots of land in a village which was partitioned by the Revenue Court. He was a party to the partition proceedings, but he failed to apply to the Court either to exclude those plots from partition, or to allot them to his *mahal*. Some of these plots were allotted to the *mahal* of another co-sharer:

Held, that the suit was barred by section 233 (*k*) of the U. P. Land Revenue Act. [p. 555, col. 2.]

Appeal against the decree of the Subordinate Judge, Partabgarh, dated the 8th January 1918, reversing that of the Munsif, Partabgarh, dated the 12th March 1917.

Babu *Bisheshwar Nath Srivastava*, for the Appellants.

The Hon'ble Mr. *Wazir Hasan*, for the Respondent.

JUDGMENT.

KANHAIYA LAL, A. J. C.—The question for determination in this appeal, which has been referred to a Bench for decision, is whether a co-sharer who claims an exclusive title to certain plots of land can file a suit in the Civil Court for the proprietary possession of those plots or for the declaration of his title thereto after a partition of the village, in which those plots stand, has been effected, allotting the said plots to another co-sharer of the village. The Court of first instance found in the negative but the lower Appellate Court took a different view. It appears that Suraj Baksh Singh and his brother held a 16-pies share in two villages. On the 6th August 1860 Suraj Bakhsh Singh made a gift of certain plots of land in the said villages, measuring 10 *bighas*, in favour of Ram Prasad Singh, the uncle of the plaintiff-respondent. Six *bighas* out of the said plot formed part of the *shamilat* land of the villages. The remaining 4 *bighas* were apparently in the separate possession of Suraj Bakhsh Singh and were entered in the name of Ram Prasad Singh in pursuance of the gift. The dispute in the present appeal relates to some of the plots which formed part of the *shamilat* land of the two villages.

Suraj Bakhsh Singh and his brother subsequently sold an 8-pies share of each of the two villages to Madho Singh, the predecessor-in-interest of the defendants-appellants, exempting 3 *bighas* of the *shamilat* land, which had already been given to Ram Prasad Singh (Exhibit 6). They similarly sold another 8-pies share of each of the said villages to the predecessor in-interest of the plaintiff-respondent, exempting the remaining 3 *bighas* of the *shamilat* land, which had been given to Ram Prasad Singh (Exhibit 3). The donee was thus the proprietor of the 10 *bighas* of land given to him subject to any rights which the co-sharers of the donor might enforce at the time of the partition in regard to that portion of the land, comprised in the gift, which was the *shamilat* property of all the co-sharers.

Both the villages were subsequently partitioned on the application of the present plaintiff and some other co-sharers. The disputed plots were allotted partly to the defendants and partly to the persons other than the plaintiff. The plaintiff as the heir and legal representative of the donee, who had died prior to the partition, did not urge at the time that those plots should be allotted to his *mahal* or excluded from the partition. He now seeks to go behind the partition and claims the plots allotted to the defendants and compensation for those allotted to the other co sharers.

It is obvious, however, that as a party to the partition proceeding it was open to him to raise the question of his alleged title to the plots in dispute under section 111 of the U. P. Land Revenue Act (III of 1901). The claim for partition related to certain fractional shares in the entire villages. According to paragraph 2 of the plaint, the plots in dispute formed part of the *shamilat* land of the villages; and if there was any arrangement by which the plots in dispute were held in the separate possession of the donor in lieu of other plots which the other co-sharers held in their possession, such an arrangement, not uncommonly effected to prevent constant disputes about the profits, held good, as pointed out in *Ram Autar* v. *Thakur Jagan Nath Bakhsh Singh* (1), till a regular partition was effected but no longer. In any event, the failure of the plaintiff to apply for the exclusion of those plots from partition or for the allotment of the same to his *mahal* estops him from raising any question of title inconsistent with the partition, which has already been completed. Section 233, clause (*k*), of the U. P. Land Revenue Act (III of 1901) excludes the jurisdiction of the Civil Court to deal with

(1) 10 O. C. 204 at p. 207.

any matter arising out of or connected with the partition or union of *mahals* except as provided by sections 111 and 112 of that Act. The decisions in *Muhammad Sadiq* v. *Laute Ram* (2), *Lachman Das* v. *Hanuman Prasad* (3) and *Bijai Misir* v. *Kali Prasad Misir* (4) enforce the view that a question of title, which could have been raised in the partition proceedings, cannot be raised outside it except in the manner provided by sections 111 and 112. In *Subha Singh* v. *Hari Singh* (5) a suit filed by one co-sharer for the recovery of possession over land allotted to another co-sharer in contravention of an agreement entered into between them at the time of partition was held to be excluded from the cognizance of the Civil Court by section 119, clause (*d*), of the Oudh Land Revenue Act (XVII of 1876) then in force, which contained provisions of a similar character. In *Thakur Sanwal Singh* v. *Bhikhari* (6) and *Kali Pershad* v. *Musammat Thakur Dei* (7) it was similarly held that a complete partition had the effect in law of vesting title in the party in whose favour the partition had been carried out, and the Civil Court had no jurisdiction to go behind it.

The learned Counsel for the plaintiff-respondent, arguing on the assumption that the plots in dispute were excluded from fractional shares, which were subject-matters of partition, refers to the decisions in *Shambhu Singh* v. *Dalit Singh* (8) and *Kalka Prasad Manmohan Lal* (9) in support of his contention that the proceedings taken by the Revenue Court did not affect the title of the plaintiff to the said plots. But the assumption made is not justified by the allegations made in the plaint or the circumstances of the case. No plot, which forms part of the *shamilat* land of the village, can become the exclusive property of any co-sharer except by virtue of a partition to which all the co-sharers of the village are parties. No such partition is set up in the plaint. A person who is a party to the partition proceeding cannot be permitted to enlarge the allotment made to him at the partition by setting up a title inconsistent with that partition to the land allotted to the *mahal* of another co-sharer.

The appeal is, therefore, allowed and the claim of the plaintiff dismissed with costs throughout.

DANIELS, A. J. C.—I concur.

Appeal allowed.

(2) 23 A. 291; A. W. N. (1901) 86.
(3) 8 Ind. Cas. 807; 33 A. 169 7 A. L. J. 1156.
(4) 41 Ind. Cas. 912; 39 A. 469; 15 A. L. J. 496.
(5) 5 O. C. 140
(6) 23 Ind. Cas. 860; 1 O L. J. 38.
(7) 23 Ind. Cas. 965; 1 O. L. J. 81.
(8) 23 Ind. Cas 19; 38 A. 243; 14 A. L. J. 293.
(9) 33 Ind. Cas. 86; 38 A. 302; 14 A. L. J. 373.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No 230 OF 1917.

March 14, 1919.

Present:—Mr. Justice Greaves and Mr. Justice Newbould.

KAILASH CHANDRA BANIK AND OTHERS —PLAINTIFFS—APPELLANTS

versus

LATIFANNESSA KHATUN, WIFE OF *Kazi* ABDUL HOSSAIN, AND OTHERS— DEFENDANTS—RESPONDENTS.

Mortgage—Pardanashin *ladies executing mortgage—Independent advice, necessity of—Interest with provision for compound interest, whether penal—Contract Act* (*IX of* 1872), *s.* 74.

In order to make *pardanashin* ladies liable under a mortgage executed by them, the mortgagee must take the elementary precaution of seeing that the ladies have independent advice with regard to the transaction. [p. 560, col. 2.]

A stipulation in a mortgage-bond for interest at the rate of one per cent. per mensem, with a provision for the payment of compound interest, cannot in any way be regarded as a penal provision. [p 560, col. 2]

Appeal against the decree of the Subordinate Judge, First Court, Faridpore.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babus *Ramakanta Bhattacharjee* and *Sarat Chandra Ghose*), for the Appellants.—The Court below is wrong in holding that full consideration did not pass and that only Rs. 2,700 were advanced in cash and on a previous bond. Three of the attesting witnesses have deposed to the effect that full consideration money did pass to the mortgagors. Moreover, one of the mortgagors was an Honorary Magistrate and a teacher for sometime and it cannot be believed that he parted with the receipt from the Registration Office without full

satisfaction of the consideration money. The bare denial on the part of the mortgagors is not sufficient to prove the fact that full amount was not paid. The books of the firm show entries of the payment of the said amount. There is no reason to disbelieve them. The lower Court ought not to have taken them so lightly. Surrounding circumstances ought not to have been taken into consideration by the learned Sub Judge in view of the positive evidence in favour of the plaintiff.

The Court below is wrong in refusing to allow compound interest. The stipulation as to charge of compound interest at 12 per cent. per annum is neither penal nor unconscionable. The terms were to the following effect: "We promise that till the realisation of the said entire amount of principal and interest we shall pay interest on the said amount at one per cent. per mensem or Rs. 50 every month and shall redeem the mortgaged properties, on payment of the entire amount of principal and interest within the month of Chait 1317 B. S. If we are unable to pay off the whole of the interest due for each year within the month of Chait of that year, then the interest of each year will be added to the principal on the expiry of the year and we shall pay interest at that rate, from the 1st of Bysack of the next year, till the whole of the entire amount is realised, *i. e.*, we shall pay at the rate of compound interest."

I contend that all the conflicting decisions on this point have been set aside by the Judicial Committee in its decisions reported as *Aziz Khan* v. *Duni Chand* (1) and *Balla Mal* v. *Ahad Shah* (2).

The Court below is wrong in holding that the three female executants did not formally execute the documents and receive the consideration nor any benefit from the transaction and that they did not get independent advice.

It is admitted and proved that the two female executants had their husbands living with them in the same house and it is inconceivable that they did not get independent advice. The attesting witnesses in their depositions have proved that they understood the nature of the transaction and got the amount. The defendant No. 1, one of the male executants, himself admitted that the female defendants were as much liable as they were.

The Court below was wrong in taking into consideration the probabilities of the case in the face of direct and positive evidence.

Babu *Panchanan Ghose* for Babu *Jitendra Kumar Sen Gupta*, for the Respondents.—The ladies were not free agents. They were not benefited by the bond. They have simply been duped by the male executants. It is a case where undue influence has been exercised and confidence misplaced. The brothers were *murabbi* (sole managers of the estate) and the whole thing was done under their undue influence.

They had no independent advice. If they had any advice it came from suspicious quarters. The position would have been different if they had got independent advice. Referred to *Kali Bakhsh Singh* v. *Ram Gopal Singh* (3) and *Badiatannessa Bibi* v. *Ambica Charan Ghose* (4).

Whether there was due attestation or execution by the ladies was not proved.

[GREAVES, J.—What do you say about the genuineness of the account-book ?]

I have nothing to say against it.

Babu *Jogesh Chandra Roy* briefly replied.

JUDGMENT.—This is an appeal by the plaintiffs against a decision of the Subordinate Judge of Faridpore, dated the 12th May 1917. The suit was to recover a sum of Rs. 13,000 odd alleged by them to be due upon a mortgage for Rs. 5,000 dated the 1st July 1907.

The mortgage in suit is Exhibit 2 and it purports to be executed by Abdus Samad Kaji, Abdul Majid Kaji, Abdurab Kaji and by three ladies, Latifannessa, Mobarakannessa and Jahurannessa. The first three persons signed the document but Latifannessa, Mobarakannessa and Johurannesea signed and affixed their mark by the pen of Kalai Bepari. The mortgage recites a sum of Rs. 1,600 due to the mortgagee, Kailash Chandra Banik, and a present advance of Rs. 3,400

(1) 48 Ind. Cas. 933; 23 C. W. N. 130; 101 P. R. 1918; 165 P. W. R. 1918 (P. C.).

(2) 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. 25; 21 Bom. L. R. 558 (P. C.).

(3) 21 Ind. Cas. 985; 36 A. 81 at p. 91; 18 C. W. N. 282; 16 O. C. 378; (1914) M. W. N. 112; 12 A. L. J. 115; 15 M.L.T. 130; 19 C. L. J. 172; 1 O.L.J. 67; 26 M. L. J. 121; 16 Bom. L. R. 147; 41 I. A. 23 (P. C.).

(4) 23 Ind. Cas. 401; 18 C. W. N. 1133 at p. 1134.

taken in cash. The interest is one per cent. per mensem and there is a provision for the payment of compound interest. The writer of the document appears to be one Kalai Bepari and there are some seven witnesses to the document itself, three of whom have been called before us.

The other witnesses have not been called, nor the writer of the document. The document was presented for registration on the 1st July 1907 at the Madaripur sub-registry office by Abdus Samad and execution was admitted before the Sub-Registrar by Samad, Majid and Abdurab who were personally known to the Sub-Registrar. Execution was also admitted by Latifannessa, Mobarakannessa and Jahurannessa, who were identified to the Sub Registrar by Israid Huq Chowdhuri. The memorandum of registration contains no reference to the passing of the consideration.

The plaintiffs' case is that the balance of the consideration money was paid two days after the registration, namely, on the 5th July 1907. The defence of all the defendants was that only Rs. 1,100 was paid and that in any case the mortgage should only stand for this amount in addition to the Rs. 1,600 previously due and they said that the balance of Rs. 2,300 was never in fact paid. The ladies denied the execution on the 1st July and in any case they stated that they did not understand the nature of the document which they were signing.

The learned Subordinate Judge has accepted the evidence of the defendants and has passed a decree against the male executants of the mortgage for a sum of Rs. 2,700 and he has held that the ladies are not bound by the mortgage and he has held that compound interest is in its nature penal and has accordingly disallowed the provision for compound interest. It remains for us to see whether the learned Subordinate Judge was justified upon the evidence and upon the circumstances in arriving at the conclusion at which he has arrived.

The plaintiff gave his version of the transaction and stated that Kalai Bepari wrote the bond and that the first three mortgagors signed their names and the last three, that is to say, the ladies touched the pen and their names were written by Kalai Bepari. He states that the whole party was in a boat and that the document was written and executed there, and that the women touched the pen in the presence of the persons who appeared as attesting witnesses to the document, and who he states were in the boat. He states that the writer wrote out the document and made everybody understand its contents and that the consideration of Rs. 3,400, that is to say, the balance due, was paid in the same boat but not on the same date. He says that on the date of execution the document could not be registered as it was late, that the next day was market day and that accordingly it was not registered until the 3rd July. Then he states that two days after the registration, on the 5th July, the same parties and the same witnesses met in the same boat and that Rs. 3,400 was paid then; and that he was told by the ladies to pay the entire consideration to the male executants, and he says that he paid the amount before them and that they counted the money and took it. He states in cross examination that on Friday, that is to say, the 5th July the three male executants went to his shop, told him that the document was ready, that is to say, it had been registered and that the consideration should be paid and that he thereupon paid the money, the money coming from the funds of his Madaripur shop.

The next witness is one of the attesting witnesses Hara Lal Saha. He confirms the story of the plaintiff with regard to the execution of the document and states that four days after the execution the consideration was paid, namely, Rs. 3,400 in the presence of the witnesses, the plaintiff paying the money to the mortgagors, it being counted by Samad and the ladies stating that Abdus Samad might take the money.

The next witness, who is also an attesting witness, Rameswar Banik, confirms the plaintiff's story and states that he saw the payment of the consideration two or three days after the execution when the Rs. 3,400 was paid. Then another attesting witness was called, Kali Charan Kundu, and he proved execution and payment of the consideration four days after the execution. The remaining witness on behalf of the plaintiff whose evidence calls for comment is his Gomasta, Dwarika Nath Dutta, who proves the books that were produced before the Subordinate

Judge showing the entries with regard to the payment of the Rs. 3,400. He states that the cash balance on the 19th Asar was Rs. 2,289 and that on the 20th of that month Rs. 1,400 was brought by the plaintiff from the funds at home, and no cross-examination so far as we can see was directed to the genuineness of the books that were produced, the only comment being made that they had been produced after some delay.

On behalf of the defence three witnesses were called. The first was Abdus Samad, who stated that he and the two other male mortgagors alone executed the mortgage and not the three females but that he caused the three females to have the documents registered. He says that the Sub Registrar came to the boat in which the women were and asked him about the document, that he answered that the females were there and that thereupon the Sub-Registrar went away without asking the females anything. He says that no money was paid on that day but that two days after he went to the plaintiff's shop who then paid Rs. 1,100, saying that the balance of the consideration would be paid later. He says that he went for this two or three days later, but that it was not paid and that it has never been paid. Then he states that he caused the names of Abdul Gani, Abdul Majid and Abdul Kader, who appear as three of the attesting witnesses, to be written after the execution: and that the other attesting witnesses signed not at the time of the execution but later at the plaintiff's request. He states that the plaintiff only agreed to lend the money if the witness's mother and sisters joined in the bond and that it was for this reason their names were written, and that he told his sisters and his mother that the document was necessary for the purpose of certain settlement proceedings and that they understood it to be a document for that purpose. In cross-examination he stated that he obtained the receipt from the Registration Office two or three days after the registration and that he made over the receipt to the plaintiff at the time the Rs. 1,100 was paid, and he says there was no talk with the plaintiff when the money would be paid as it is known to every debtor that it must be paid as soon as the receipt of the registry office would be delivered. He also states that he did not demand any paper to show that Rs. 2,300 remained due.

Latifannessa also gave evidence. She denied that any bond was executed by her, that she took any money or that she was liable. She stated that the bond in suit was not read over to her or to her step-mother and that the purport was not explained. She stated that she was taken with her sisters and her step-mother to Madaripur in a boat. She was told by Samad that she could not do business matters and, therefore, it was necessary for her to execute a Mukhtearnama. She said that she thought that it was a document of this nature which she executed and to which she affixed her thumb impression. In cross-examination she stated that she had property jointly with Samad and that the account of all credits and liabilities were with her brother.

The last witness is Mobarakannessa. She denied that she got any money on account of the bond, and she denied liability for the bond and stated that it was not read over to her and that it was not explained—I do not think that there is anything else in her evidence that calls for comment.

The learned Subordinate Judge has apparently not placed much reliance upon the evidence of the witnesses of either side, but in the conclusion at which he has arrived he has, I think, been influenced by the surrounding circumstances and by the conclusion to which he came with regard to the plaintiff's books. As to the surrounding circumstances he says that the plaintiff's story is improbable, namely, the three visits on three occasions in the boat, and he points out with some force that certainly so far as the ladies are concerned, it was much more probable that the transaction would have been concluded upon one occasion and that it would not be likely that they would be brought on three occasions, when the whole matter might have been concluded in one sitting. He is also, I think, influenced in the conclusion that he has come to by the books produced by the plaintiff. So far as Exhibit 3 is concerned, which appears on the back of the same page as Exhibit

3 (*a*), he comes to the conclusion after much searching of heart and long deliberation that the page is interpolated and he arrives at this conclusion because he considers that looking at the writing it looks as if the writing had sunk and he, therefore, draws the conclusion that the page had been steeped in water to look old or taken from some other book and had been then put into the book itself. He also thinks that the page does not fit on to the next page, and he also draws the conclusion from the writing itself, which he thinks looks more like a writing of the present day than a writing at the time the entry is said to have been made.

We have had the opportunity of seeing this book and the entries Exhibit 3 and Exhibit 3 (*a*), and speaking for myself I am not prepared to draw the inference which the learned Subordinate Judge drew therefrom. This being so, we have got to consider whether the conclusion at which the learned Subordinate Judge arrived was right or wrong. Firstly one matter strikes me with great force, that Abdus Samad, who was an Honorary Magistrate and for a short time a schoolmaster, was not the sort of man who would be likely to part with the registration receipt without the payment of the full consideration under the mortgage or at any rate without taking some acknowledgment that a further sum remained due on the mortgage, and it is also to my mind extremely unlikely if the story of Abdus Samad and the other male mortgagors is true that there would not have been some evidence in writing of a demand for the balance of the amount to be advanced under the mortgage.

So far as the ladies are concernad, there is no evidence at all on the record that they obtained any independent advice with regard to the transaction itself. They admittedly, I think I may say, joined in the mortgage for the purpose of assisting their brothers, being instigated so to do by them. They are illiterate and although I think there is no doubt, as the learned Subordinate Judge had found, that they must have known that the document was not a Mukhtearnama but a mortgage, I think in the absence of independent advice as to what they were doing and also having regard tc the fact that they admittedly received none of the consideration money, we should not hold that they are bound by the mortgage itself. If the plaintiff had been desirous of securing himself so far as the ladies are concerned, he should have taken the elementary precaution in a case of *pardanashin* ladies of seeing that they had independent advice with regard to the transaction. So far, therefore, as the three ladies are concerned, we are not prepared to differ from the conclusion of the Subordinate Judge, and as against them the appeal stands dismissed.

So far as the male mortgagors are concerned, having regard to the view we take with regard to the books and to the matters to which I have already referred, namely, the absence of any demand while handing over the registration ticket, we are not prepared to draw the same conclusion from the surrounding circumstances that the learned Subordinate Judge has done, and we think upon the evidence that it has been established that the whole of the consideration money, namely, Rs. 3,400 was, in fact paid to the male mortgagors and that they are liable for this amount.

So far as the question of compound interest is concerned, it seems to us this cannot in any way be regarded as a penal provision having regard to the rate of interest that was contained in the document. In my view it would be making a new contract for the parties, which we are not justified in doing, to say that the provision with regard to compound interest should not prevail.

In the result, therefore, we decree the appeal so far as the male mortgagors are concerned and there will be a decree for the amount due under the mortgage, namely, the sum of Rs. 5,000 together with compound interest as provided in the mortgage against the defendants Nos. 1 to 6. The period of redemption is fixed at six months from this date.

The male mortgagors do not appear at the hearing of this appeal and the only persons who appear to contest are defendants Nos. 7 and 8.

The plaintiff is entitled to his costs against defendants Nos. 1 to 6 but he will pay the costs of the ladies, defendants Nos. 7 and 8.

Order accordingly.

GULAB *v.* LALTU SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 390 OF 1918.

February 24, 1919.

Present:—Mr. Stuart, J. C.

GULAB AND OTHERS—DEFENDANTS—APPELLANTS

versus

LALTU SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 54—Sale of immoveable property of less than Rs. 100 in value by unregistered deed, validity of—Delivery of possession, effect of.

Where a transfer is effected of immoveable property of less value than Rs. 100 by an unregistered instrument and possession of the property passes to the vendee, the sale is valid and cannot be questioned.

Appeal against the decree of the Additional Subordinate Judge, Hardoi, dated the 4th July 1918, confirming that of the Probationary Munsif, Hardoi, dated the 26th November 1917.

Syed *Ali Muhammad*, holding brief of Mr. *Nabi ul lah*, for the Appellants.

Babu *Bisheshwar Nath Srivastava*, for the Respondents.

JUDGMENT.—This appeal questions the decision of the learned Additional Subordinate Judge of Hardoi to the effect that, where property less than Rs. 100 in value has been transferred by an unregistered deed of sale and possession of the property has passed to the vendee, the sale cannot be questioned. The argument for the appellants is that such a transfer contravenes the provisions of section 54, Act IV of 1882. It has been held on more than one occasion in this Court that such a transfer is a good transfer. The latest decision to that effect is of Pandit Kanhaiya Lal in *Sheo Dayal* v. *Raja Muhammad Abul Hasan Khan* (1). There has been no difference of opinion on the point in this Court, but all the decisions so far have been decisions of single Judges. The view taken in this Court has been the view which was taken by a Bench of the Calcutta High Court in *Gunga Narain Gope Kuli Churn Goala* (2). The validity of this view has been questioned by a Bench of the Madras High Court in *Muthukaruppan Samban* v. *Muthu Samban* (3). There being some conflict of authority, and a Bench of this Court never having yet decided the point, I should refer the decision of this appeal to a Bench if I considered that there was any reasonable doubt in the matter, but reading the section I cannot see that the view taken by the Calcutta High Court and this Court can be reasonably questioned. The words of the section are—"In the case of tangible immoveable property of a value less than Rs. 100 such transfer may be made either by a registered instrument or by delivery of the property." From this it is clear that if the property is delivered the transfer is good. The view of the Madras High Court appears to be that the delivery of a property which gives a good title to the transferee is nullified if in addition the transferor executes an unregistered instrument. I fail to see how, when the transferee has already got a good title, his title can be lost by any act on the part of the transferor, and I have great difficulty in following the reasoning of the Madras High Court in view of the fact that registration of a deed transferring property of less than Rs. 100 is optional. I, therefore, do not consider it necessary to refer the point to a Bench. I accept the view that has always been taken in the Court, which is the view taken by the learned Additional Subordinate Judge, and dismiss this appeal with costs.

Appeal dismissed.

(1) 38 Ind. Cas. 671; 20 O. C. 33.
(2) 22 C. 179; 11 Ind. Dec. (N. S.) 121.
(3) 25 Ind. Cas. 772; 38 M. 1158; 1 L. W. 754; 16 M. L. T. 344; (1914) M. W. N. 768; 27 M. L. J. 497.

HEMLATA DEBI *v.* RADHARAMAN BANERJEE.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 259 OF 1917.

February 26, 1919.

Present:—Justice Sir Ernest Fletcher, KT., and Mr. Justice Beachcroft.

HEMLATA DEBI—PETITIONER—APPELLANT

versus

RADHARAMAN BANERJEE AND ANOTHER—OPPOSITE PARTIES—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 50

HEMLATA DEBI v. RADHARAMAN BANERJEE.

—Revocation of Letters of Administration—Sufficient cause—Failure to file inventory, whether sufficient cause.

Where an application is made years after the grant of Letters of Administration to revoke the Letters, cause must be shown why this should be done. The mere fact that the inventory required to be filed within six months of the grant has not been filed is not a sufficient cause, unless it can be shown that the inventory was withheld wilfully and unreasonably. [p. 563, col. 1.]

Appeal against the decree of the District Judge, Birbhum, dated the 13th August 1917.

FACTS appear from the judgment.

Babu *Hemendra Nath Sen* (with him Babu *Dhirendra Nath Sen* for Babu *Bimal Chunder Sarkar*), for the Appellant.—The grant of Letters of Administration ought to be revoked under section 50 of the Probate and Administration Act, because it was defective in substance. The widow was insane at the time of the death of her husband and she cannot inherit property of her husband according to Hindu Law. Hence the citation was not properly issued and served according to law.

I further contend that no inventory of the estate has been filed, as required by section 50 and Chapter VII of the same Act, even after the expiry of six months. The non-production of the inventory of the estate is sufficient ground for the revocation of the grant. Referred to *Walter Rebells* v. *Maria Rebells* (1).

Babu *Bankim Chandra Mukherjee*, for the Respondents.—The widow was not insane at the time of the death of her husband and this fact has been sufficiently proved in the lower Court.

That being so, the citation should be regarded as being properly served. The order-sheet shows that the Nazir was directed by the District Judge to issue citations and special citation went to the widow, and general citations must be presumed to have been served in the proper and usual manner in the absence of evidence to the contrary.

My learned friend has not shown that the inventory was wilfully or unreasonably withheld and hence his contention about revocation is not sustainable merely on the ground of non-production of the same.

(1) 2 C. W. N. 100.

Referred to *Durgagati Debi* v. *Saurabini Debi* (2) and *Kali Das Chuckerbutty* v. *Ishan Chunder Chukerbutty* (3).

Babu *Hemendra Nath Sen*, in reply.—No citation was issued though in the order-sheet the direction was to the same effect with the following words, "Issue citations."

As regards the inventory the onus lay on the opposite side to show that it was submitted duly and it has failed to do that. This has been done in express violation of law. Hence the grant ought to be revoked on that ground.

JUDGMENT.

FLETCHER, J.—This appeal is preferred against the decision of the learned District Judge of Suri, dated the 13th August 1917. The appellant applied for revocation of the Letters of Administration with the Will annexed that had been issued to her brother-in-law, one of the respondents to the present appeal, as the certified guardian and for the use of his wife, the other respondent. The appellant, who was the petitioner in the Court below, says that the Letters ought to be revoked on the ground that there is defect in the substance and also on the ground that no inventory of the estate has been furnished to the Court. The facts are these: The estate, which amounts to Rs. 399, belonged to the father of the applicant. He had a wife and six daughters. Three of the daughters had been married during his lifetime and the other three were not. On his death, an application was made for issue of Letters of Administration with the Will annexed. The time that elapsed between the date when the application was filed in Court and the date when the Letters were ordered to issue was not long, because the date of filing the application was the 1st June 1903 and the order for issue of the Letters of Administration was made on the 25th June 1903. From the proceedings in the original application for Letters of Administration with the Will annexed, it is quite clear that there was no concealment from the Court. The application stated quite fully what the deceased's family consisted of at the time of his death. Further, the

(2) 33 C. 1001 at p. 1007; 10 C. W. N. 955.
(3) 31 C. 914 (P. C.); 9 C. W. N. 49.

widow would ordinarily be the heiress of the deceased and after her would come in the daughters who were unmarried at the date of his death and then would come the married daughters. In order to get over the difficulty which met the appellant, she set up that the mother was a lunatic at the date of her father's death and, therefore, should be excluded from the course of succession under the Hindu Law and that, as this fact was not brought to the notice of the Court, there was a defect in substance, the citation having been issued on the lunatic. There is no reason to think that her mother was other than a sane one at the time of her husband's death. As to the citation, we have got the document by which the Judge directed the Nazir to serve certain citations. Special citation went only to the widow. General citations were served in the proper and usual manner. I think in this case that the citation was properly issued; at any rate, it was issued in the manner in which the Court directed that it should issue and which the Court thought proper. There cannot be any defect in substance as regards that.

The next point that was urged was that the inventory of the estate had not been filed. As it has not been shown that it was wilfully or unreasonably withheld, there is no reason why the Letters should be revoked. It seems to have been assumed by the learned Vakil for the appellant in the course of his argument that, if he could show that there had been no inventory, he was entitled to have the Letters of Administration revoked. But this is not so. He has got to show that it was wilfully and unreasonably withheld and that the Court would have jurisdiction to direct that Letters of Administration should be revoked. I think no cause has been shown in the present case why the Letters of Administration with the Will annexed should be revoked and it has been held on more than one occasion that when an application like this is made years after the grant of the Letters of Administration, cause has got to be shown why the Letters should at this date be revoked when it may be very difficult or even impossible to procure evidence which would establish the due execution of the Will. Nothing has been shown in this case which would lead us to come to the conclusion that the appellant has established any cause for having the Letters of Administration revoked, as prayed for. I agree with the conclusion arrived at by the learned District Judge. The present appeal, therefore, fails and must be dismissed with costs, two gold *mohurs*.

BEACHCROFT, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

FULL BENCH.

CIVIL REFERENCE No. 3 OF 1918.

January 7, 1919.

Present:—Sir Daniel Twomey, KT., Chief Judge, Mr. Justice Ormond, Mr. Justice Pratt and Mr. Justice Maung Kin.

MA NYUN—APPELLANT

versus

E. E. TEXEIRA AND OTHERS—RESPONDENTS.

Buddhist Law, Burmese—Mortgage of joint property by husband—Decree on mortgage, whether binding on wife—Civil Procedure Code (Act V of 1908), O. XXXIV. r. 1.

Per *Twomey, C. J., Pratt and Maung Kin, JJ.*—A Burmese husband who mortgages the joint property of himself and his wife with her knowledge and consent does not act as *benamidar* for the wife, and a decree against him alone will not affect the wife's interest in the property. [p. 565, cols. 1 & 2; p. 566, col 1.]

Per *Ormond, J. (Per contra)*—A Burmese husband mortgaging the joint property of himself and his wife is a *benamidar* for the wife and a decree against him alone will bind the wife's interest in the property. [p. 566, col. 2.]

ORDER OF REFERENCE.

RIGG, J.—(*July 11th*, 1919).—The Courts below have arrived at concurrent findings of fact in this case, and the only point argued is whether Ma Nyun is bound by the mortgage decree in Suit No. 16 of 1915 of the District Court, Insein. The facts are simple. With the full knowledge and consent of his wife Maung Naung Po mortgaged certain of their joint properties to the Misses Texeira, who obtained a decree on the mortgage, but did not join Ma Nyun as a party to the suit, nor sue Maung Maung Po as her agent or repre-

sentative. Ma Nyun then filed the present suit for a declaration of her title in the mortgaged property. Three rulings of this Court have been cited with reference to the point under discussion:—*Ma Sein* v. *Muthucurpan Chetty* (1) in which Twomey, J., held that although a Burmese Buddhist wife may sometimes be held bound by her husband's acts as her agent in mortgaging the property, yet the mortgagee, if he neglects to add the wife as a party to a suit on the mortgage, cannot enforce the decree so obtained against her. *Ma Tin Me* v. *Maung Maung* (2), where a contrary conclusion was arrived at by a Bench of this Court. The decision was based on the ground that in such cases as the present the wife was estopped from pleading that the mortgage decree did not bind her interest, as she had allowed her husband to be held out as the ostensible owner. *Ma Shwe Me* v. *P. A. R. M. Chetty* (3), which followed *Ma Tin Me's case* (2). In neither of these two cases was any reference made to the decision in *Ma Sein's case* (1). It is argued that the doctrine of estoppel cannot be applied to prevent Ma Nyun from pleading that she is not bound by a decree to which she was not a party, and that it has no application and cannot be pleaded against the directions and prohibitions enacted by Statute Law and rights accruing to any party by reason of such prohibitions. In support of this contention the following cases have been cited: *Sham Lal Chatterjee* v. *Hazari Mal* (4), *Sitarama Chetty* v. *Krishnasami Chetty* (5) and *Chidambara Chettiar* v. *Vaidilinga Padayachi* (6). Reference has also been made to the alteration of the wording of what was formerly section 85 of the Transfer of Property Act, by the omission of the words "provided that the plaintiff has notice of such interest" when the section was re-enacted as Order XXXIV, rule 1 of the Code of Civil Procedure, and it is urged that the doctrine of notice can have no application in a case where a party has not been joined in in the suit, and that the alteration was made for that reason. Further it is argued that a Burmese Buddhist husband stands in a totally different position towards his wife, from the *karta* or manager of a Hindu family, and has no implied authority to deal with the joint property, so that a decree against him is not binding on his wife. It has long been settled law that the *dictum* "the husband is lord of his wife" does not mean that he is entitled to deal with the joint property as he pleases. As Burgess, J. Co., pointed out in *Ma Me* v. *Maung Gyi* (7): "A Burman wife and husband are for many purposes partners, and if the wife is not included in the proceedings along with the husband, it is much as if a decree were obtained against a partner individually and execution were brought against the partnership property as his solely. Of course this cannot be done, and all that can be proceeded against is the interest of the judgment-debtor in the partnership property. If it is sought to make both a Buddhist wife and her husband and the whole of the joint property of both liable for a debt, the wife as well as the husband should be made a party to the proceedings."

In the present case the husband was not sued as his wife's representative or agent.

I am inclined to think the view of Twomey, J., is correct, but in view of the other two conflicting judgments I refer to a Full Bench the following questions:

"In the case of Burmese Buddhists where the joint property has been mortgaged by the husband with the full consent and with the knowledge of his wife, is the wife's share in that property liable to be dealt with in execution of a decree obtained in a mortgage suit, in which her husband only was made defendant, or is he her representative for the purposes of the suit, and is she estopped from contesting the decree?

Messrs. *Chari* and *K. C. Bose*, for the Appellant.

Mr. *Patel*, for the Respondents.

JUDGMENT.

TWOMEY, C. J.—There can be no doubt

(1) 25 Ind. Cas. 931; 7 L. B. R. 135.
(2) 29 Ind. Cas. 881; 8 Bur. L. T. 66.
(3) 27 Ind. Cas. 788; 8 Bur. L. T. 97.
(4) 13 Ind. Cas. 326; 15 C. L. J. 451.
(5) 21 Ind. Cas. 24; 25 M. L. J. 264 at p. 270; (1913) M. W. N. 676; 38 M. 374.
(6) 30 Ind. Cas. 408; 38 M. 519.
(7) U. B. R. (1892-96), Vol. II, p. 45 at pp. 46, 47.

that the mortgage effected with the wife's knowledge and consent bound the wife's interest in the property as well as her husband's interest. But it is going a step further to hold that the mortgagee, who has sued the husband alone, can execute the decree against the wife's interest too. The general rule is laid down in Order XXXIV, rule 1 of the Code of Civil Procedure, which renders it necessary in bringing a suit on a mortgage to join as parties all persons having an interest in the property. But it is admitted on the part of the wife in this case (and there is ample authority to support the view) that a decree against a *benamidar* binds also the beneficial owner, the reason being that the *benamidar* represents the real owner for the purpose of the suit. The question for consideration, therefore, is whether the husband is *benamidar* for the wife in the circumstances stated in the reference. The joint property in question is stated to have been "mortgaged by the husband with the full consent and knowledge of his wife." We are not justified, I think, in assuming that the consent and knowledge of the wife extended to the husband's action in mortgaging the property in his own name as sole owner, suppressing the fact that his wife had an interest in it. And it seems to me that nothing less than this assumption would be involved in holding that the husband was his wife's *benamidar* as regards her interest in the property. It may well be on the facts stated in the reference that the wife intended the husband to mortgage in his own name only his own share, and as regards her share to mortgage it openly as her agent. It is going too far, in my opinion, to impute to her an intention to set up a fictitious owner of her share. It is not stated that she ever in fact transferred her share *benami* to her husband and, I think, we have no solid ground for deciding that she was privy to her husband's action in holding himself out as sole owner. I would hold, therefore, that the husband was not *benamidar* for the wife in the circumstances stated. And it is only if he was her *benamidar* that he could be regarded as representing her in the mortgage suit. In answer to the question referred I would say that the husband is not the wife's representative for the purposes of the suit, and the wife's share is not affected by the decree.

PRATT, J.—I concur.

MAUNG KIN, J.—The question for the most serious consideration is whether the husband could, under the circumstances, be held to be a *benamidar*. The property in question is the joint property of the husband and wife and the mortgage of it was made by the husband alone in his own name, as if he were the sole owner. In view of the fact that it is not alleged that the husband disclosed to the mortgagees that his wife had an interest in it or that he had any wife at all, it must be held that he represented to the mortgagees that he was the absolute owner and that the mortgagees accepted the representation as true and took the mortgage. The property has turned out to be the joint property of the couple and the mortgagees have sought to get out of the difficulty by proving that the mortgage was made with the full knowledge and consent of the wife. But the real point for consideration is whether there was any reason to believe at the time of the mortgage that the mortgagor was the absolute owner. We are not told that the property was in the name of the mortgagor alone but only that he mortgaged it in his name. So far as I can see after reading a long line of cases on *benami* transactions, a *benamidar* is a person who has been clothed with the *indicia* of ownership by the act of the real owner; any dealing of the property by such a person in his own name is held to be binding on the real owner and it is so held because an estoppel arises against the real owner for having held out to the world that some other person is ostensibly the owner. In the present case there is no evidence of the wife having held out to the mortgagees that her husband, the mortgagor, was the owner. In my judgment we cannot draw the inference that she must have done so, merely because she allowed her husband to mortgage her share also. It does not necessarily follow that she would have consented to his dealing with the property as if it were his own. For these reasons I am of opinion that the mortgagor was not a *benamidar* for the wife and the cases which hold the acts of a *benamidar* binding upon

the real owner cannot be applied to this case.

My view amounts to saying that in the mortgage suit the wife was not represented by the husband. That being the case, the decree passed therein does not bind the wife.

ORMOND, J.—The case before us is this:—A husband (Burmese Buddhist) executed a mortgage in his own name as owner, with the full knowledge and consent of his wife (also a Burmese Buddhist) who was entitled to a half share in the land mortgaged. The mortgagees did not know of the existence of the wife at the time of mortgage but came to know of the wife before suit. Does the decree obtained by the mortgagees against the husband alone bind the wife?

At the hearing of the reference I intimated that the husband was in the position of a *benamidar* and Mr. Chari, who appeared for the wife, admitted that if so, the decree would be binding on the wife; and he was good enough to submit authorities on that point. I am still of the same opinion and I regret that I cannot agree with my dissenting learned colleagues.

The property acquired during the marriage of a Burmese Buddhist couple is the joint property of both; but they can each own separate property.

In *Ma Shwe Me* v. *P. A. R. M. Chetty* (3) I based my decision upon implied authority, *i. e.*, the authority given by the wife to her husband to effect the mortgage in his own name as owner implies an authority to the husband to represent her by appearing and defending a suit on the mortgage as owner. In *Ma Tin Me* v. *Maung Maung* (2) the decision was based upon estoppel, *i. e.*, the wife having held out her husband to be the owner, she was estopped from saying that a decree obtained against him was not a decree against the owner.

In *Gopi Nath Chobey* v. *Bkugwat Pershad* (8) it was held that "in the absence of any evidence to the contrary, it is to be presumed that the *benamidar* had the full authority of the real owner to institute a suit as owner in his own name, and if he does so, any decision come to in his presence would be as much binding upon the real owner as if the suit had been brought by the real owner himself." The decision has been quoted with approval in subsequent cases, and the principle has been held to apply equally whether the *benamidar* is a plaintiff or a defendant in the suit. There was no question in these cases of a fraudulent or unauthorised transaction by the *benamidar*. If, therefore, the owner of land authorizes a *benamidar* to transfer the land in his own name as owner to a third party, such authority includes, or implies, an authority to the *benamidar* to sue or to be sued as owner in connection with such transfer; and the *benamidar* in such suit represents the owner.

In the present case—as also in the case of *Ma Sein* v. *Muthucurpan Chetty* (1)—the husband acted with the full knowledge and consent of his wife, *i. e.*, the wife's knowledge and consent extended, not only to the fact that her share was being mortgaged, but also to the fact that her husband as owner was mortgaging her share. The husband, therefore, was the *benamidar* for his wife.

The husband, in mortgaging as owner his wife's share, represented to the mortgagee that he was the owner of the property and that representation was authorised by the wife. It was, therefore, the wife's representation, made through her husband, that her husband was the owner. She made the representation intending that the mortgagee should believe it to be true and to act upon it, and she cannot now say that the mortgagee should not have believed it and should have made independent enquiries. The fact that the mortgagee did not know at the time that the representation was that of the wife, does not affect the case. He is able to show that it was in fact her representation and is entitled to make use of it accordingly. The wife knew of, and consented to, the acts of her husband and she stood by and allowed the decree to be made in the mortgage suit without applying to be made a party to that suit.

For the above reasons, in my opinion, the decree was binding on the wife and the decision in *Ma Sein's case* (1) is erroneous.

Answered in negative.

(8) 10 C. 697 at p. 705; 5 Ind. Dec. (N. S.) 468.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2121 OF 1918.

December 18, 1918.

Present:—Sir Henry Rattigan, KT., Chief Judge.

AHMAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

SUNDAR SINGH—PLAINTIFF—RESPONDENT.

Custom—Shamilat—*Co-sharer cultivating portion of shamilat*—*Remedy of other co-sharers.*

Where a co-sharer cultivates a part of the common land, the other co-sharers can apply for partition but are not entitled to an injunction restraining the co-sharer from cultivating the land. The fact that a fair is held on the land every year when the land is free from crops and that it is reserved for camps of officers on tour does not affect the matter.

Second appeal from the decree of the District Judge, Mianwali, dated the 29th August 1917, reversing that of the Munsif, 1st Class, Shahpur, dated the 31st May 1917, dismissing the plaintiff's suit with costs.

Mr. *Mukand Lal Puri*, for the Appellants.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—Plaintiff, one of many proprietors, sued for a perpetual injunction to restrain defendant No. 1 from cultivating or building on a plot of 4 *bighas* 2 *kanals* of land, on the allegation that the land was *shamilat* and had been used as a camping ground for officers on tour and for the purposes of an annual fair which took place in the month of Sawan. Defendant pleaded that he, as one of the proprietors, was entitled to cultivate part of the *shamilat* and had actually done so in respect of this plot for some twenty years. The first Court found as a fact that defendant had for many years been cultivating the plot in question and that though it had been used for the purpose of the fair at a time of the year when land was free from cultivation, there was nothing peculiar in the facts of the case to deprive the defendant of the ordinary right which a proprietor has of cultivating *shamilat*. The Court accordingly, after discussing the facts in a well considered judgment, dismissed the suit. The District Judge, on appeal, reversed the order of the lower Court mainly on the ground that the Revenue authorities *contemplated* excluding this particular plot from partition and reserving it as a place

for the holding of the annual fair. He accordingly granted plaintiff a perpetual injunction restraining defendant from cultivating or building on the site in dispute, but directed that his decree should be contingent on the Revenue authorities finally reserving the land from partition as necessary for the purposes of the said fair.

It appears to me after hearing arguments that this was not a proper case in which to grant an injunction. Defendant has not built on the land, and I am informed, has no intention of doing so and his cultivation of it (such as it has been) has in no way prevented the land from being used for the purposes of the fair. No new circumstance has been proved which would justify the Court in issuing an injunction of the kind asked for and plaintiff's proper remedy is obviously to apply for a partition.

I accordingly accept the appeal with costs throughout and dismiss the suit.

Appeal accepted.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 39 OF 1916.

May 30, 1918.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

ALLAHRAKHIO ABDULLA—APPLICANT

versus

LADKIK SACHOO—OPPONENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2 (3)—Adjustment of decree out of Court—Court, whether can recognize adjustment without certification.

Under rule 2 (3) of Order XXI of the Civil Procedure Code, a Court cannot recognize the payment and adjustment of a decree out of Court unless such payment is certified to it, although the question of payment is a question which the Court executing the decree must, under section 47 of the Code, inquire into and decide. [p. 568, col. 1.]

Application for revision against the order of the Judge, Small Cause Court, Karachi.

Mr. *C. M. Lal*, for the Applicant.

Mr. *Isardas Hiranand*, for the Opponent.

JUDGMENT.—This is an application for revision of the order made by the Small

Cause Court, Karachi, directing execution to issue on a money-decree for Rs. 515 obtained by the judgment-creditor, Ladik Sachoo, against the applicant, Allahrakhio Abdullah.

The defence raised in the lower Court was that there was an adjustment and payment prior to the execution application. As the judgment debtor had, however, not proceeded under Order XXI, rule 2 (1), and had not required the decree holder to certify, and as the payment and adjustment had not been certified, the Small Cause Court refused to recognize it and ordered execution to issue. This is the only point raised in the revision application. It is contended that the judgment-creditor was guilty of fraud in that he omitted to show the adjustment and payment in the execution application. But this ground could not be established without proof of the adjustment and payment, and as the Court is forbidden to recognize this fact under Order XXI, rule 2, sub rule (3), the defence of fraud must fail.

Mr. Lobo refers to the cases of *Trimback Ramkrishna Ranade* v. *Hari Laxman* (1) and *Hansa Godhaji Marwadi* v. *Bhawa Jogaji Marwardi* (2), which are based on the principle that Order XXI, rule 2, merely raises the presumption that an uncertified payment has not been made and does not affect the jurisdiction of the Court to inquire into the fact of payment under section 47.

But no question of jurisdiction arises. Section 47 only requires that questions relating to the execution, discharge and satisfaction of the decree shall be decided by the Court executing the decree and not by separate suit. The question of payment is, therefore, a question to be decided by the Court executing the decree under section 47. Order XXI, rule 2, sub-rule 3, merely provides that the Court, when doing so, shall not recognize a payment or adjustment, which has not been certified. This rule is a rule of procedure. It is mandatory. The construction put upon it by the Bombay High Court is not supported by the decisions of any other High Courts and would render it nugatory.

We differ from the rulings and reject this application with costs.

Application rejected.

(1) 7 Ind. Cas 940; 34 B. 575; 12 Bom L. R. 686.
(2) 33 Ind. Cas. 232; 40 B. 333; 18 Bom L. R. 22.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 178 OF 1917.

September 6, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

ZAINAB BIBI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

M. A. L. CHETTY FIRM, BY ITS MANAGING PARTNER ALLAGAPPA CHETTY—DEFENDANT—RESPONDENT.

Probate and Administration Act (*V of* 1881), *s.* 90—*Will restricting power of executors to mortgage property—Mortgage in excess of powers, validity of.*

Where a Will directs the executors on the death of the testator, to sell his property to pay debts, that is a restriction on the power of the executors to mortgage the property for the payment of the debts. If the property is mortgaged by them, the mortgage is voidable under section 90 (4), Probate and Administration Act, at the instance of any other person interested in the property, that is, voidable at the instance of any one interested in the estate. [p. 569, col. 1; p. 570, col. 2.]

Mr. *Giles* (with him Mr. *Lambert*), for the Appellants.

Mr. *N. M. Cowasjee*, for the Respondent.

JUDGMENT.

ORMOND, J.—Jamaluddin died in January 1899 leaving his widow Asbabi, three sons and five daughters. By his Will he appointed Kader Bux an executor, his wife an executrix and his two adult sons Abdul Rahman and Abdul Rahim executors of his Will. The plaintiff Chetty sued on a mortgage, dated the 3rd September 1906, which was executed by Asbabi in her personal capacity and as guardian of the minor children and also as executrix and by the three other executors and by the three adult daughters. He obtained a decree on the original side. The three adult daughters now appeal in Civil First Appeal No. 178 and the three children, who were minors at the time of the execution of the mortgage, appeal in Civil First Appeal No. 177. One of those three (Hazara Bee) was a minor at the time of the institution of the suit but has since attained majority.

The grounds common to the two appeals are, first, that the Will restricted the power of the executors to mortgage and, therefore, that the mortgage as against the estate is bad under section 90, sub-clause 2, of the Probate and Administration Act, inasmuch as no leave of the Court was granted; secondly, that the

plaintiff had notice that a portion of the sum advanced under the mortgage was for the purpose of building and that the executors had no power to borrow for that purpose and, thirdly, that the ladies who executed the mortgage were *pardanashin* and were not made acquainted with the nature of the transaction and, therefore, the execution by them of the mortgage was a nullity. In Appeal No. 177 there is an additional ground, namely, that Ashabi had no power to bind the minors as their guardian because she had not obtained the leave of the Court; but Mr. Giles who appears for the appellants concedes that, the mother having been appointed guardian under the Will without any restrictions, section 29 of the Guardians and Wards Act does not apply and that she had power to mortgage on behalf of the minors.

As to the execution by the ladies, the learned Judge apparently thought they were not strictly *pardanashin* but he found as a fact that the terms and nature of the document were fully explained to them We must take it, I think, that the ladies were *purdanashin*. In the written statements filed by Ashabi and the three other ladies they admit having signed the document, but they say the contents were not read over and explained to them and that it was not explained to them that under the Will of the deceased without the leave of the Court the executors had no power to mortgage the property of the deceased and that if they had known that the Will forbade all such transactions, they would never have executed the said document as it was not their intention to mortgage their own share only but to join with all the beneficiaries in raising the money which it was represented to them was necessary for the good of the estate. They clearly state that it was their intention by this document to effect a valid mortgage of their shares in the estate and on behalf of the estate, provided the shares of the other beneficiaries were also mortgaged; and their only ground of complaint is that they were not told that the Will restricted the power of the executors to mortgage. The question, however, as to whether they understood the nature of the transaction was gone into at the trial and an issue was raised as to whether the nature of the transaction was explained to the defendants who were *pardanashin* ladies. Mr. S. Dhar, who drew up the document, says he explained the document to the ladies because it was his invariable practice so to do and the Sub-Registrar who attended at the ladies' house says the ladies appeared before him and admitted that the document had been read over and explained to them. If the ladies had not understood the nature of the transaction they would, I think, not have made the above admission in their written statement. On behalf of the three appellants in Appeal No. 177, Mr. Giles contends that the admission made by their mother in her written statement is not binding on them inasmuch as she had ceased to be their guardian and that it is open to them still to show that the plaintiffs had not proved that the document was explained to their guardian, a *pardanashin* lady. That, no doubt, is true, but the fact that the mother, who was resisting the mortgage on her own account, made such an admission in her written statement, must be taken into consideration when determining whether or not the transaction had in fact been explained to her. There is no ground to suppose that the mother's interest is in any way adverse to that of the then minors. I concur with the learned Judge in his finding that the nature of the transaction was explained to and understood by the ladies.

Under the Will the executors were directed to sell on the death of the testator so much of the immoveable property as should suffice to pay debts and the rest was to be kept in trust. The learned Judge has held that this clause does not impose a restriction on the executors' power to mortgage. The learned Judge says there is no direction to sell at once. I think he must have overlooked the words "on my death" and the distinction between a power to sell and a direction to sell. If the testator directs his executors to sell property in order to pay debts, in my opinion, that is a restriction on the power to mortgage the property for the payment of the debts. The case of *Kunti Chandra Chattopadhya v. Kristo Chura Acharjee* (1) is an authority

(1) 2 C.L.R. 510.

in support of this view. The authorities cited to us show that where the Will merely gives a power to sell, it does not restrict the power to mortgage; but that a definite direction to sell does amount to a restriction of the power to mortgage. In my opinion the Will did restrict the power of the executors to mortgage. But that only rendered the mortgage voidable at the instance of any other person interested in the property (section 90, sub-clause 4, of the Probate and Administration Act), *i. e*, voidable at the instance of any one interested in the estate. All the adults who were interested in the estate executed the mortgage. The mother, Asbabi, executed it as guardian on behalf of the minors and she had power to do so. None of the persons interested in the estate can now avoid the mortgage, since they have affirmed it from the beginning by joining in its execution.

Of the Rs. 1,50,000 secured on this mortgage, Rs. 35,000 was in respect of moneys previously advanced by the plaintiff for the purpose of putting up buildings on land belonging to the estate, which had been completed; Rs. 25,000 went to pay off a mortgage debt originally borrowed by the deceased Jamaluddin; Rs. 15,000 went to pay off a previous mortgage of the plaintiff's and Rs. 30,000 was advanced for the purpose of putting up a two-storied building on the estate. The learned Judge has found that the money was borrowed for the benefit of the estate and I see no reason to differ from that finding.

It is, therefore, a good mortgage binding on the estate and binding on all the defendants. I would dismiss the appeal with costs. The appellants should be required to pay the Court-fees on the memorandum of appeal which would have been paid by them had they not been permitted to appeal as paupers.

TWOMEY, C. J.—I concur.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 248 OF 1916.

September 22, 1916.

Present:—Mr. Fawcett, A. J. C.

THE FIRM OF LUDHOMAL-PURTOMAL & CO.—PLAINTIFFS

versus

THE SECRETARY OF STATE FOR INDIA—DEFENDANT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17, O. XXIII, r. 1—Amendment of plaint, when can be allowed—Good faith of plaintiff—Withdrawal of suit, leave for, whether can be granted after leave to amend has been refused—Limitation Act (IX of 1908), s. 19, Sch. I, Arts. 30, 31—Acknowledgment, letter denying liability, whether amounts to—Railway Company, suit against, to recover compensation for non-delivery of goods—Limitation.

Ordinarily, the amendment of a plaint ought not to be allowed where the application for amendment is not made in good faith. [p. 572, col. 1.]

An application made at a late stage of the suit, merely to get an advantage over the other side in the course of arguments on a preliminary issue and raising a plea which clearly is an afterthought, is not an application made in good faith, as the effect of allowing the application might be to take away from the defendants the defence they have raised, and, therefore, unjustly prejudice them. [p. 572, col. 1.]

Where a Court has refused an application to amend a plaint, it ought not to allow the plaintiff to withdraw the suit with liberty to institute a fresh suit, as if in such a case permission is granted, it would practically be the same as if the Court had allowed the application for amendment of the plaint already refused. [p. 572, col. 2.]

On 24th November 1913, plaintiff booked certain goods by the N. W. Railway consigned to himself: the goods were delivered to a third person under an indemnity bond by the Railway. In May 1915 the plaintiff brought the present suit, alleging that he had suffered monetary loss which he claimed with interest. He relied upon a letter from the Railway to himself, as an acknowledgment of liability operative under section 19 of the Limitation Act, in which he was informed that the delivery of the goods under an indemnity bond was perfectly correct and that his claim, which was against the person to whom the goods had been delivered and not the Railway, could not be entertained. The defence was that the suit was barred by limitation under Articles 30 and 31 of Schedule I to the Limitation Act:

Held, (1) that the suit, as framed, was one to recover compensation for non-delivery of goods and was governed by the period prescribed in Article 31, the cause of action being that the defendants had not performed their contract, not that they had performed their contract improperly so as to make it a case of misfeasance instead of one of non-feasance, and that, as the cause of action arose in December 1913 and the suit was not instituted till May 1915, it was clearly time-barred; [p. 573, col. 1.]

(2) that the letter relied upon by the plaintiff from the Railway contained no acknowledgment of liability within the meaning of section 19 of the Limitation Act, but, on the contrary, amounted to a denial of liability. [p. 573, col. 2.]

Mr. *T. G. Elphinston*, for the Plaintiffs.

Mr. *C. M. Lobo*, for the Defendant.

JUDGMENT.—In this suit the plaintiffs admittedly booked three cases of electrical appliances consigned to themselves to Tando Adam by the North Western Railway on the 24th November 1913. In paragraphs 2 and 3 of the plaint it is alleged that the defendants (*i.e.*, the Secretary of State for India in Council) wilfully neglected to deliver the said three cases to the consignees and that owing to their failing to deliver them the plaintiffs suffered a certain monetary loss, which the plaintiffs claim to recover with interest, etc. Paragraph 4 of the plaint states that the cause of action arose in December 1913, when the defendants refused to deliver the cases, and that the plaintiffs rely upon an acknowledgment of the Railway authorities under section 19 of the Limitation Act. The first point taken in the defendants' written statement is that the suit is time-barred under Articles 30 and 31 of the Limitation Act and that the cause of action, if any, arose in November 1913. A preliminary issue has accordingly been framed: Whether the suit is time-barred, as alleged. This was framed on 7th of September and arguments on the point were heard yesterday when, as they were unfinished, the further hearing was adjourned till to-day.

Mr. Elphinston for the plaintiffs has now put in an application that the Court should allow them to amend their plaint (1) substituting for paragraph 2 "that the defendants failed to deliver the said three cases in accordance with their contract and illegally delivered the same to other persons under an indemnity bond", (2) by adding to paragraph 3 an allegation that the loss alleged was due not only to the defendants' failure to deliver in accordance with their contract but also their conversion of the said 3 cases, and (3) by putting back the date, when the cause of action is stated in paragraph 4 to have arisen, from December 1913 to 17th of August 1914, when the defendants are said to have finally refused to deliver the three cases in accordance with their contract. Mr. Lobo for the defendants opposes the application.

The first question which I think the Court should decide is: whether this amendment is, in the language of Order VI, rule 17, "necessary for the purpose of determining the real questions in controversy between the parties". Mr. Elphinston has strongly urged that it is necessary, especially as the defendants in their written statement themselves mentioned the delivery by them of the goods to a third party, which delivery is stated in the proposed amendments to have been done illegally and to amount to a conversion of the goods. Mr. Elphinston also relies on a letter from the District Traffic Superintendent of the Railway to the plaintiffs, dated 19th May 1914, in which he says that this delivery of the consignment to the third party was perfectly correct. It is, therefore, urged that the real question in controversy in this suit is whether this delivery was justified as defendants contend, or illegal as plaintiffs contend. It is, no doubt, the case that if the suit is fought out that would be the main question in dispute. But, in my opinion, it does not follow that, therefore, the amendments now proposed to be made in the plaint are necessary for the purpose of determining that question. Under Order XIV, rule 1, issues arise in a suit when a material proposition of fact or law is affirmed by one party and denied by the other, and each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. Here the defendants in their written statement have pleaded that the delivery was justified and that plea is controverted by the plaintiffs. It is in no way necessary to have an amendment of the plaint in order to enable them to deny the proposition which the defendants have put forward in their written statement. An issue would, therefore, under Order XIV, have to be framed in the suit on this point on the pleadings as they stand, and no amendments are necessary in order to enable that issue to be raised and to enable the Court to determine that particular [illegible]. I, therefore, do not think that the proposed amendments fall within the [illegible] cases, mentioned in the last

sentence of rule 17, where the Court is bound to allow them.

The only question, therefore, that remains is whether the Court in the exercise of its discretion should now allow the amendments. On this point undoubtedly a fact to be taken into consideration is that the application is made at a very late stage of the case so far as regards the preliminary issue now before the Court. And I think that there can be no doubt whatever that the real object of the application is to put the plaintiffs in a better position than they otherwise are in regard to their contention that the suit is not time-barred.

It is an ordinary rule that amendments should not be allowed where the application for amendment is not made in good faith, see the cases cited in Mulla's Code of Civil Procedure, 5th Edition, page 369. Though I do not mean to cast any aspersions on the plaintiffs or their advisers, I do not think that this application can be said to be one made in good faith when it is really made merely in order to get an advantage over the other side in the course of arguments on the preliminary issue and by raising a plea which is very clearly an afterthought. As the case stands, without giving any decision on the point, it may be said that the defendants certainly have strong arguments in support of their contention that the suit, being one for non-delivery, is clearly time barred under Article 31 of the Limitation Act. If the amendments are allowed, the strength of these arguments, at any rate, may be materially prejudiced by the addition of this plea of misdelivery or conversion, since it will be urged that this takes the suit out of the category of those covered by Article 31. Though the case of *Weldon* v. *Neal* (1) is not directly applicable, yet the principle underlying it, in my opinion, applies to this case, for the effect of allowing the application at any rate might be to take away from the defendants the defence they have raised under the Law of Limitation, and, therefore, unjustly prejudice them. In the circumstances I think there is no sufficient ground for allowing the application and I refuse it.

(1) (1887) 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35 W. R. 820.

Upon delivery of the above order Mr. Elphinston applied to the Court for permission to withdraw the suit, with liberty to institute a fresh suit under Order XXIII, rule 1. Mr. Lobo objects also to this application. The case does not fall under clause (*a*) of sub-rule (2) of that rule, *viz*, where the suit must fail by reason of some formal defect, because the point regarding the alleged bar of limitation is much more than a purely formal defect. The only question is whether there are sufficient grounds for allowing plaintiffs to institute a fresh suit under clause (*b*) of sub-rule 2. As to this, it is clear that if the permission asked for is granted, it would be practically the same as if the Court had allowed the application for amendment of the plaint already refused, subject to plaintiffs paying up all defendants' costs up to date, with only the added penalty of paying additional Court-fees (Rs. 15) in the fresh plaint. The leave to amend was refused on grounds which show that it is not a case where any injustice to the other side by allowing the amendments can be compensated for by costs. And to give permission for the withdrawal of the suit would be inconsistent with this, because it would practically be saying that the injustice to the defendants can be compensated for by costs and allowing the plaintiffs to achieve their object by paying these and a little more in Court fees, etc. I, therefore, do not think that there are sufficient grounds for granting the permission asked for, and that there is no real unfairness in keeping the plaintiffs to the allegations actually contained in the plaint and disallowing the further additions which are clearly intended merely to meet the contention as to limitation set up by the defendants, not only in this Court but also in the Small Cause Court, where the plaint was originally filed.

I now come to the merits. Mr. Elphinston has very fully and ably argued the question for his clients and has satisfied me that in any case the suit does not fall under Article 30 of the Limitation Act. Mr. Lobo for defendants also admits this. The only question, therefore, is whether this is a suit against a carrier for compensation for non-delivery of goods, so as to fall under Article 31. On this point Mr. Elphinston

has cited a ruling of the Punjab Chief Court in *Fakir Chand* v. *Secretary of State for India in Council* (2), where Mr. Justice Rattigan held that the word 'non-delivery' in this Article does not include misdelivery, and that the case of misdelivery falls within the purview of Article 115 of the Act. With due deference I do not think that the grounds given are fully sufficient for holding that the Legislature did not intend to include such a case as the present one under the word non-delivery. Mr. Lobo has pointed out that, whatever be the manner in which the carrier may have dealt with the goods, whether he may have misappropriated them or delivered them to some one else, the complaint of the plaintiffs in both cases is one that they have suffered injury through the non-delivery to them of the goods. And in this plaint, as I have already pointed out, the cause of action is specifically alleged to be a failure or neglect to deliver. What gives plaintiff this cause of action is that the defendants have not performed their contract with him, not that they have performed their contract improperly so as to make it a case of misperformance instead of one of non-performance. The fact that the defendants allege that delivery was given to a third party which the plaintiffs say was a misdelivery, is, it seems to me, immaterial in considering whether the description of the suit is or is not one in which plaintiffs seek compensation for non-delivery of the goods. In this case I think there can be no doubt whatever that it is such a suit, and that the case, therefore, falls under Article 31 of the Limitation Act.

As regards the time from which limitation starts, the ordinary rule is that goods have to be delivered by a carrier within a reasonable time, and such time would, at any rate, not be later than December 1913, when according to the plaintiffs the cause of action arose. The suit should, therefore, have been brought at any rate before the end of 1914, but was in fact not instituted till May 1915.

I must, therefore, hold the suit barred, unless the plaintiffs show that they are saved by some acknowledgment falling within the scope of section 19 of the Limitation Act. The plaintiffs rely on a letter from the District Traffic Superintendent at Karachi of the 19th May 1914, Exhibit 5, as an acknowledgment of liability operative under that section. In that letter he informs the plaintiffs that the action of the Station Master, Tando Adam, in giving delivery of the consignment to the Electrical Trading Co. on the indemnity bond is perfectly correct and that he regrets he cannot entertain their claim, which is against the above firm and not against the Railway.

Mr. Elphinston contends that this is a sufficient acknowledgment, having regard to the terms of Explanation (1) of the section, and he relies on the case of *Haji Ajam Goolam Hossein* v. *Bombay and Persia Steam Navigation Co.* (3), as a somewhat similar case supporting this contention. He says that in that case there was an acknowledgment that 35 cases had been short-delivered, *i.e.*, 35 cases which ought to have been delivered had not been delivered, and that that was held by the High Court to be a sufficient acknowledgment of liability. That, however, does not appear to me to be a correct statement of what led the learned Judges to hold that the acknowledgment in that case was a good one, because there was in that case a distinct acknowledgment that the 35 cases in question ought to have been delivered to the plaintiffs, and there was also a re-offer of the cases in question to the plaintiff. That, it was said, "implied an acknowledgment of liability of the Company to account to the plaintiff for the cases." It is also quite clear that section 19 itself requires that there should be an acknowledgment of liability in respect of the right claimed by the plaintiffs. In the present instance the letter relied on does not contain any acknowledgment of liability to account to the plaintiffs for the 3 cases in dispute but, on the contrary, the letter denies such a liability and says that any claim the plaintiffs had was against the Trading Co. and not against the Railway. I think, therefore, it is clear that there has been no acknowledgment

(2) 19 Ind. Cas. 477; 170 P. L. R. 1913; 122 P. W. R. 1913.

(3) [illegible]; 4 Bom. L. R. 147.

of liability within the meaning of section 19, Limitation Act. Nor has there been any acknowledgment of a state of facts, from which it is a necessary consequence that the defendants are liable to the plaintiffs.

I hold, therefore, that this letter, which was, as shown by subsequent correspondence, approved by the higher Railway authorities, is not an acknowledgment of liability sufficient to save the bar of limitation otherwise arising under Article 31, Limitation Act.

The suit of the plaintiffs must, therefore, be dismissed with costs.

Suit dismissed.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 116 OF 1918.
January 23, 1919.
Present:—Mr. Justice Pratt.
PO DWE AND OTHERS—APPELLANTS
versus
K. M. T. T. S. CHETTY—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 65 (c)—Mortgage—Mortgagor, duty of, to pay public charges—Failure to perform duty—Sale of mortgaged property—Re-transfer to mortgagor—Mortgagee, position of.

Under section 65 (c) of the Transfer of Property Act a mortgagor is bound to pay the revenue accruing due on the mortgaged property while he continues in possession. The mortgage is not extinguished if he fails to perform that duty and the land is sold for arrears of revenue and the purchaser re-sells the land to the mortgagor. The mortgagor, on his purchase from the auction-purchaser, is not entitled to plead for his own benefit that by reason of his failure to pay the revenue and consequent sale there has been a statutory extinction of the mortgage. [p. 574, col. 2.]

Mr. *A. B. Banerji*, for the Appellants.

Mr. *N. S. Aiyar*, for the Respondent.

JUDGMENT.—The facts are set forth in the judgment of the Sub-Divisional Court. Maung Po Thin mortgaged his land to the plaintiff K. M. T. T. S. Chetty. Subsequently the land was resumed by Government for non-payment of revenue. After the resumption Po Thin was allowed to occupy the land by the Collector and subsequently sold the land to the third, fourth, fifth and sixth defendants represented by the present appellants. The point for determination is whether the mortgage was extinguished when the land was resumed by the Revenue authorities for non-payment of revenue. The Court of first instance held that the mortgage was extinguished as there had been no fraud on the part of the mortgagor. The Judge was apparently of opinion that the mortgagee was also liable to pay the revenue and having failed to do so was estopped from contesting the extinction of the mortgage. This view, however, has not been supported, and it is difficult to see how the question of estoppel comes in. On appeal the Divisional Judge held that the mortgage was not extinguished and that the mortgagee continued to hold a lien on whatever interest the mortgagor retained in the land. The question of notice does not arise as the mortgage was by registered deed. I have no doubt that the view of the learned Divisional Judge is correct. In *Sanagpally* v. *Intoory Bolla Reddy* (1) a Bench of the Madras High Court held that a mortgagor being bound under section 65 (*c*) of the Transfer of Property Act to pay the revenue accruing due on the mortgaged property, when he continues in possession, the mortgage is not extinguished if he fails to perform that duty and the land is sold for arrears of revenue and the purchaser sells the land to the original mortgagor. They took the position that a man cannot be allowed to take advantage of his own wrong, and even though the land might have vested in the purchaser at the auction-sale, the original mortgagor on his purchase from the auction-purchaser is not entitled to plead for his own benefit that by reason of his failure to pay the revenue and consequent sale there has been a statutory extinction of the mortgage.

The facts of the present case are even stronger, since there has been no sale by the Revenue authorities but merely resumption. After resumption the mortgagor was allowed to re-occupy and himself actually sold the land. The purchasers, in so far as they derive their title from the mortgagor, cannot be allowed to plead extinction of the mortgage. Under section 43 of the Transfer of Property Act had the mortgagor, had no interest in the land at the time of the mortgage and subsequently acquired an interest,

(1) 26 M. 385.

the mortgage would have held good with respect to that interest.

For appellants it is urged that they derived no title by the purchase from the mortgagor since he was merely a tenant-at-will of the Government without any title to the land, and the purchasers have succeeded to his position and are now tenants of the Government. In other words, they plead a paramount title. The plea is specious and no doubt the mortgage can only affect such interest as the mortgagor had in the land at the time of the sale to appellants. It cannot operate to affect any subsequent title the purchasers may have obtained from Government. So far as appellants are concerned, the mortgage will hold good with reference to the possessory interest in the land which the mortgagor had at the time of the sale by him. That interest may conceivably be so small as to have no saleable value, but that is the respondent's bad luck. The appeal must be dismissed with costs. There appears to be a slight ambiguity in the judgment and decree of the Divisional Court owing to the misplacing of a comma. All that can be sold is the right, title and interest of the defendant Po Thi in the land at the time of the sale by him to the appellants.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2706 OF 1918.

February 12, 1919.

Present:—Mr. Justice Broadway.

Musammat GULAB DEVI—DEFENDANT—APPELLANT

versus

MONJI RAM, MINOR, THROUGH GIANO—PLAINTIFF AND AJUDHIA PARSHAD—DEFENDANT—RESPONDENTS.

Adverse possession—Use of vacant site as "convenient adjunct", effect of—Title by purchase, proof of.

The use of land in a village as a "convenient adjunct" cannot be regarded as an indication of an assertion that the land so used is the property of the person using it. [p. 576, col. 1.]

A person who sets up a title to property by purchase must prove that his vendor had a title in the property sold. [p. 575, col. 2.]

Second appeal from the decree of the District Judge, Karnal, dated the 13th June 1918, affirming that of the Munsif, 1st Class, Rohtak, dated the 4th January 1918, decreeing the claim with costs.

Lala *Shamiar Chand*, for the Appellant.

Mr. *Brij Lal*, for the Respondents.

JUDGMENT.—On the 27th June 1916 one Harnath executed a deed of sale in favour of Chhelu, whereby he sold to him an *ahata kham* for Rs. 400. Chhelu erected a *chhappar* and other structures thereon and when he proceeded to make a door to the south, he was turned out by the defendants who claimed to be mortgagees in possession. Chhelu thereupon instituted this suit claiming to be restored to possession and was granted a decree, which decree was affirmed on an appeal filed by the defendants to the District Judge. The defendants have thereupon come up to this Court on second appeal through Mr. Shamair Chand and I have heard Mr. Brij Lal for the respondent. The case has been rendered difficult by the findings of the learned District Judge, which are to the effect that this *ahata* was part of the property mortgaged to the appellants in 1882, but that Harnath (who is a non-proprietor) acquired a title to it by taking hold of it as an occupancy tenant and holding it adversely for more than "12 years." The oral evidence has been disbelieved by both Courts and it is, therefore, difficult to understand on what material this finding has been arrived.

It seems clear that when this *ahata* was mortgaged to the appellants in 1883, there was a public way forming its western boundary. Harnath has built on the western portion of the *ahata* and has sold the eastern part to Chhelu, but there is nothing to show when Harnath erected his house or in what way he acquired possession that can be regarded as having been adverse *qua* the portion sold. Admittedly when Chhelu purchased this *ahata*, it contained no buildings of any kind on it. Harnath has not been examined by either side, but his sister *Musammat* Gulab Kaur's evidence is against Chhelu. Now it was incumbent on the plaintiff to prove that his vendor had a title in the property sold [*Deba v. Rohtag*

(1) [illegible] A. W. N. (1903) 95; 3 A. L. J. 384.

concerned, he has failed to establish. His house is to the north of this *ahata* and the learned District Judge seems to think that either he or Harnath had been using this site as a "convenient adjunct." Such user in a village, however, cannot be regarded as an indication of an assertion that the land so used is the property of the person so using it.

I am unable to find any evidence on the record which can be regarded as proving that Harnath held possession of this site for over 12 years. I accordingly accept this appeal and setting aside the decrees of the Courts below dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 38 OF 1917

June 2, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Rafique.

Musammat RUKMINA KUAR AND OTHERS —OBJECTORS—APPELLANTS

versus

SHEO DAT RAI AND ANOTHER— DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution of decree—Decree for possession of property on payment of money without fixing time for payment—Limitation for execution.

A decree directed that upon payment by the plaintiff of a certain sum of money "in any year in the month of *Jeth*" he was to receive possession of certain property. The decree was passed on the 22nd January 1894, the money was deposited on the 15th June 1915 and an application to execute the decree was made on the 29th June 1916. The defendant objected that the application was barred by limitation:

Held, (1) that the decree, being indefinite as to the date on which payment was to be made, was incapable of execution on the date on which it was passed and was, therefore, not governed, as to the period of limitation for its execution, by Article 182 of Schedule I to the Limitation Act;

(2) that the right to execute the decree could not arise unless payment was made and that the plaintiff was, therefore, entitled to execute the decree within three years of the date when he made the payment.

Appeal, under section 10 of the Letters Patent, from a judgment of Justice Sir George Knox, dated the 14th of March 1917.

Mr. *K. K. Varma*, for the Appellants.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—We agree with the view taken by the learned Judge of this Court. The decree was one for delivery of possession passed on the 22nd of January 1894 on the basis of an arbitration award. It provided that the plaintiffs-decree holders were to get possession upon payment of Rs. 750 to the defendants in any year in the month of Jeth. The money was deposited on the 15th of June 1915 and the application for execution was made on the 29th of June 1916. It was contended that the application was time barred. The learned Judge of this Court has held that the application was not barred by limitation. Article 182 of the Limitation Act applies to cases in which the decree is capable of execution on the date on which it was passed, except in the circumstances mentioned in some of the special clauses to the Article. The decree in this case was not capable of execution on the date on which it was passed. Therefore, if Article 181 is applicable to the present case, limitation would run from the date on which the right to apply accrued. It is clear that the right to apply did not accrue until Rs. 750 was paid and the right to pay the money was given to the decree-holders in the month of Jeth of any year. The decree is, undoubtedly, indefinite as to the date on which payment was to be made, but it certainly did not direct that payment was to be made in the month of Jeth following the date of the decree. The Court executing the decree had to give effect to the decree as it stood and could not go behind it. Taking the decree as it stands, the decree-holders had the right to pay Rs. 750 at any time they liked in the month of Jeth of any year. Their right to execute the decree could not arise unless the payment was made Therefore, they were entitled to execute the decree within three years of the 15th of June 1915 when they made the payment. We dismiss the appeal with costs, including fees on the higher scale.

Appeal dismissed.

PERIANAN CHETTY *v.* KUDUPOODY MALLAYA.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 91 OF 1918.

December 9, 1918.

Present :—Mr. Justice Pratt.

C. P. R. PERIANAN CHETTY—PLAINTIFF —APPELLANT

versus

KUDUPOODY MALLAYA—DEFENDANT —RESPONDENT.

Negotiable instruments—Pro-note, whether discharged by fresh pro-note—Liability on basis of previous pro-note, whether extinguished.

A promissory-note may be discharged by a fresh note or by a cash payment, and when once discharged, the original note ceases to be in force against a signatory who did not execute the fresh note. [p. 578, col. 2.]

A, *B*, *C* and *D* executed a pro-note in favour of *K*. Later on *K* accepted a fresh note from *A*, *B* and *C* in renewal of the original note. *K* obtained a decree on this note against *A*, *B* and *C* and brought a suit against *D* on the first note:

Held, that the suit was not maintainable as the execution of the second note operated to discharge the liability of all the executants of the former note. [p. 577, col. 2.]

Mr. *Anklesaria*, for the Appellant.

Mr. *Villa*, for the Respondent.

JUDGMENT.—On the 12th December 1915 Kudupoody Mallaya, Kuthy Subrayadu, Kuthy Mangamma and Dhomaty Reddy executed a promissory note in favour of the plaintiff Chetty for Rs. 500.

On the 5th of January 1916 a second promissory note was taken in renewal of the former of the previous year from Kuthy Subrayadu and Kuthy Mangamma and the name of Kudupoody Mallaya also appeared as signatory.

The Chetty sued Kuthy Subrayadu, Kuthy Mangamma and Kudupoody Mallaya in Civil Regular No. 7103 of 1917 of the Court of Small Causes on the second note and obtained a decree against the first two named defendants only, the Court finding that it was not proved that Kudupoody executed the second note.

Plaintiff then instituted a suit against Kudupoody Mallaya on the first note and the suit was dismissed, the lower Court holding that the execution of the second promissory note under the circumstances operated as a discharge of the liability of all the executants of the first note.

The sole question for decision is whether on the facts in evidence plaintiff could revive his claim on the old note as against Kudupoody.

There can be no doubt from the Chetty's own evidence that his intention, when he had the new note executed, was to accept it as complete satisfaction of the old one. He stated in so many words in the first suit: "The promissory note in suit is a renewal of the other and the previous note is entered as *settled* in the ledger. The discharged note was returned to defendants."

Kuthy Subrayadu deposed that the name of Kudupoody was deliberately omitted from the second note by arrangement with him.

When his name was entered in the second note and by whom it is not clear, but it is certain that the Chetty accepted the second note as a discharge of the first and was content to have on it a signature purporting to be Kudupoody's, which he was unable to prove, and which may have been fraudulently entered under his direction.

I am of opinion that under the circumstances the Chetty has in equity no claim on the second note as against the defendant Kudupoody. His Advocate now says that the Chetty made a mistake, when he said the note was returned. I see no reason to believe this. There was no reason why the Chetty should have deliberately stated that he returned the note unless he did so.

How he obtained it back from the signatories is not clear, but it looks as if they did not consider it of any value since they had executed a fresh note in lieu of it, so left it lying about and the Chetty quietly annexed it.

It is certain that the Chetty recovered it somehow since he filed it as evidence in his suit against Kudupoody alone.

Mr. Anklesaria for the Chetty quotes a number of rulings in support of his contention that defendant, having pleaded non execution of the new note, cannot plead that the old note is discharged and that he is liable until the debt is satisfied; but the answer seems to be that the debt on the old note was satisfied by the execution of the new, and I see no reason why, if plaintiff liked to dispense with the execution of the new note by Kudupoody, or took a signature under such circumstances that the possibility of fraud arises, he should be entitled to revert to the old note,

His accounts show that he wrote off the original note as settled.

In support of his contention that the liability of the defendant on the first note is not extinguished by the second to which he was not a party, the Advocate for the Chetty relies on *Har Chandi Lal* v. *Sheoraj Singh* (1). In that case the original mortgagor of certain property died after execution of the mortgage. In 1887 the widow and nephew executed fresh mortgages of the property and thereupon the mortgagee handed over the original mortgage deed of 1876 to the nephew. It was subsequently held that the mortgages of 1887 were not binding on the widow.

Their Lordships of the Privy Council held that the intention of the mortgagee after the two deeds of 1887 were executed was to accept in them a new security, but that intention was entirely frustrated by the fact that the deeds of 1887 were held to be not binding on the widow and it was not in accordance with equity and good conscience that the respondents, who had successfully maintained that the transaction embodied in the deeds of 1887 was not binding on the widow, and consequently did not bind them as the heirs of her husband, should now claim the benefit of the transaction as a release of the mortgage of 1876.

They held that under the circumstances the mortgage of 1876 was unaffected by the mortgages of 1887.

At first sight it would seem arguable that the logical corollary of this ruling is that plaintiff, not having got what he intended at the time of the second promissory note, could revert to the original note, but on analysis I am of opinion the cases are not parallel.

A promissory note is quite different from a mortgage and there is nothing to prevent the holder from accepting satisfaction in any form he chooses from any of the executants.

It is clear that the Chetty accepted the new note in satisfaction of the old and it is by no means certain that he had any intention of making Kudupoody a party to it. He may have been quite content originally to take the signatures of the two defendants only against whom he subsequently obtained a decree, and afterwards have inserted the name of the third.

Kudupoody's case was that he only signed the first note as surety for the other two principals

It is impossible to my mind to hold on the facts that the liability of defendant Kudupoody on the first note remained unaffected by the second. If the Chetty chose to discharge him from liability without receiving any payment from him personally, he was at liberty to do so.

The case of *Jamna Bai Saheb Mohitai Avergal* v. *Vasanta Rao Ananda Rao Dhybar* (2) seems to have no bearing on the point now at issue.

Muhammad Askari v. *Radhe Ram Singh* (3) refers to mortgages, which, as I have already remarked, are on a different footing.

A promissory note may be discharged by a fresh note equally well as by a cash payment; and once discharged by such payment the original note cannot, to my mind, be held to be still in force as against the signatory, who did not execute the fresh note. Had Kudupoody obtained the execution of the second note under false pretences, it would have been different.

If the Chetty's allegation that Kudupoody was a party to the second note is true, then clearly the first was extinguished thereby.

If it was false, then the Chetty has been guilty of fraud, and he cannot be allowed to take advantage of his own fraud.

If he accepted a new note by two in exchange for an old one by four, he must abide by his own action. He cannot, because he is subsequently dissatisfied with the results of his own conduct, go back to his original security, after having accepted the new note as payment for the old.

(1) 39 Ind. Cas. 343; 39 A. 178; 32 M L. J. 241; 15 A. L. J. 223; 1 P. L. W. 330; 5 L. W. 502; (1917) M. W. N. 290; 25 C. L. J. 316; 21 M. L. T. 292; 21 C. W. N. 765; 19 Bom. L. R. 444; 44 I. A. 60 (P. C.).

(2) 34 Ind. Cas. 213; 39 M. 409; 14 A. L. J. 534; 18 Bom. L. R. 432; 31 M. L. J. 18; 3 L. W. 540; 24 C. L. J. 74; 20 M. L. T. 31; (1916) 1 M. W. N. 452; 43 I. A 99 (P. C.).

(3) 22 A. 307; A. W. N. (1900) 73; 9 Ind. Dec. (N. S.) 1236.

I am fortified in my view by the decision of the Calcutta High Court in *Gour Chandra Das* v. *Prasanna Kumar Chandra* (4).

In that case after a bond had been executed by the 1st defendant and the 2nd defendant was added as an executant without the assent of the first, it was held not only that that this alteration vitiated the deed against 1st defendant but that plaintiff was not entitled to succeed on the basis of the original consideration.

I dismiss the application with costs.

Application dismissed.

(4) 33 C. 812; 3 C. L. J. 363; 10 C. W. N. 783.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 52 OF 1917.

August 9, 1918.

Present:—Mr. Pratt, J.C., and Mr. Kemp, A.J.C.

WADERO RASOOLBUX AND OTHERS—PLAINTIFFS—APPLICANTS

versus

ALLAHBUX AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 107 (2), O. XXIII, r. 1 (2),—Appeal—Appellate Court, whether can allow withdrawal of suit.

Although section 107 (2) of the Civil Procedure Code confers upon an Appellate Court the same powers and imposes the same duties, as nearly as may be, as those of a Court of original jurisdiction, an Appellate Court has no power under Order XXIII, rule 1 (2), of the Code to allow a suit to be withdrawn in appeal, as distinguished from the appeal itself, with liberty to institute a fresh suit, as to do so would be tantamount to setting aside the decree in the suit.

Application for revision against an order of the Assistant Judge, Larkana.

Mr. *Rupchand Bilaram*, for the Applicants.

JUDGMENT.—The only question that arises in this appeal is whether the lower Appellate Court had power to allow the plaintiffs-appellants to withdraw the suit in appeal under Order XXIII, rule 1 (2), with liberty to institute a fresh suit.

The lower Court relied on the Full Bench judgment of the Madras High Court in *Balide Kamayya* v. *Pragada Papayya* (1).

(1) 37 Ind Cas. 414; 40 M. 259; 21 M. L. T. 82; (1917) M. W. N. 217 and 246; 5 L. W. 558; 32 M. L. J. 477.

We agree with the Madras High Court that there is nothing in the language of Order XXIII to forbid the exercise of the power in appeal and that the change in the wording of Order XXIII, rule 4, does not affect the question, but we cannot agree that this power in regard to the suit as distinguished from the appeal is vested in the Appellate Court by section 107 (2). That section gives the same powers and imposes the same duties "as nearly as may be" as those of the Court of original jurisdiction. In respect of Order XXIII this power goes no further than to allow an appeal to be withdrawn. The original Court cannot allow a suit to be withdrawn after decree is passed, for that would mean setting aside a decree. Nor can the Appellate Court make an order which would have the effect of setting aside a decree. It is clear that a plaintiff-appellant cannot withdraw his suit under rule 1 (1) in appeal, for otherwise he might do so simply with the object of wiping out the adverse decree. If rule 1 (1) is in appeal limited to the withdrawal of the appeal, rule 1 (2) must also be so limited.

We agree with the decision of the Bombay High Court in *Eknath* v. *Ranoji* (2), which has been followed by this Court in Miscellaneous Appeal No. 5 of 1916. We reverse the order of the lower Appellate Court and remand the appeal for disposal on the merits. Costs to be costs in the cause.

Appeal remanded.

(2) 10 Ind. Cas. 813; 35 B. 261; 13 Bom. L. R. 237.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 564 OF 1918.

February 17, 1919.

Present:—Mr. Justice Chevis.

NEKI RAM—PLAINTIFF—PETITIONER

versus

KHUSHI RAM—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 102—Unregistered bond, suit on—Consideration denied—Burden of proof—Fraud.

In a suit upon an unregistered bond if the defendant denies consideration, the onus lies on

the plaintiff to prove that the bond was executed for consideration.

In a case in which there is no dispute as to consideration, but the defendant raises the plea of fraud, according to illustration (*b*) to section 102 of the Evidence Act, the onus lies on him to prove the facts which amount to fraud.

Petition, under section 44 of Act III of 1914, for revision of the decree of the Senior Subordinate Judge, Rohtak, dated the 19th April 1918, reversing that of the Munsif, 2nd Class, Jhajjar, District Rohtak, dated the 17th December 1917, decreeing the claim for Rs. 340 with costs.

Dr. *Gokal Chand Narang*, for the Petitioner.

Lala *Shamsir Chand*, for the Respondent.

JUDGMENT.—Plaintiff sues for two instalments and interest due on a bond for Rs. 800. The defendant admits execution of the bond but denies consideration, and says plaintiff promised to give him the money but did not do so. The *onus* of proving that the bond was executed for consideration was placed on the plaintiff. The first Court gave him a decree, the learned Subordinate Judge on appeal dismissed the suit.

Plaintiff applies for revision, and it is urged that defendant's plea is one of fraud, and so the *onus* lies on him, and illustration (*b*) to section 102, Evidence Act, is referred to. But this, I understand, refers to a cause in which there is no dispute as to consideration. If there is no consideration, then apart from fraud, there is no valid contract; if there is consideration there is a contract; though it may be voidable for fraud. There may be cases in which the plaintiff may fail on both grounds, *viz.*, (1) want of consideration and (2) fraud.

The general rule in India is that laid down in *Wazir Singh* v. *Jai Gopal* (1), *viz.*, that when a man sues on an unregistered document such as a bond, if the defendant denies consideration, the *onus* lies on the plaintiff.

I consider the *onus* was rightly p laced on the plaintiff in this case.

This is a revision, so I need not go into facts. I will only remark that the attempt to prove by oral evidence that Rs. 900 or Rs. 926 was paid to the defendant in a lump sum in cash is a stupid lie, if there really was consideration it must have taken the form of settlement of old *bahi* account. Mr. Gokal Chand urges that the Subordinate Judge should have found whether there was any consideration at all, and should not have confined himself to the question whether there was such cash consideration as some of plaintiff's witnesses swore to. I can only say that a man who produces false witnesses does not deserve the help of this Court on the revision side.

The application fails and is dismissed, but I pass no order as to costs. If defendant is telling the truth, he was a fool to execute and deliver the bond without getting the consideration.

Application dismissed.

(1) 17 P. R. 1888.

LOWER BURMA CHIEF COURT.

CIVIL REGULAR NO. 212 OF 1917.

February 1, 1918.

Present:—Mr. Justice Rigg.

PO SO · PLAINTIFF

versus

BA ZAN AND ANOTHER—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, r. 62—Attachment subject to mortgage, effect of—Mortgage—Sale of mortgagor's property in execution of decree obtained by some other creditor—Rateable distribution—Mortgagee, position of.

The effect of an order under Order XXI, rule 62, of the Civil Procedure Code directing the continuance of an attachment subject to a mortgage is that, the purchaser at the auction-sale only buys the judgment-debtor's right of redemption. [p. 581, col. 1.]

A mortgagee of a judgment-debtor who has obtained no decree against the latter, and has not made any application under section 73 of the Civil Procedure Code, cannot claim the assets realised by the sale of the judgment-debtor's property in execution of a decree held by another creditor. [p. 581, col. 1.]

Messrs. *Gregory* and *Munshi*, for the Plaintiff.

Mr. *Maung Pu*, for Defendant No. 2.

JUDGMENT.—The plaintiff's case is that in May 1913, he lent Ba Zan Rs. 500 at 24 per cent. per annum on the security of a registered deed, whereby a room in house No. 195, Dalhousie Street, with the chattels

n it were hypothecated. Defendant Ba Zan only paid interest up till April 8, 1917, and plaintiff sues for a decree for that amount. Further he claimed the sale-proceeds of a part of the chattels hypothecated to him, which had been sold at the instance of the second defendant Su Kwin Ping in execution of a decree against Ba Zan. Plaintiff objected at the time of the attachment to the sale of this property, and the Judge of the Small Causes Court ordered the sale of the goods to proceed "subject to the mortgage." This was an order under Order XXI, rule 62, of the Civil Procedure Code and the effect of it was that the purchaser at the auction-sale only bought the judgment-debtor's right of redemption.

Ba Zan confessed judgment, but the second defendant contested the suit on the grounds (1) that he had no knowledge of the alleged hypothecation in favour of Ba Zan and (2) that plaintiff had no prior claim to the sale-proceeds. Two issues were fixed: (1) whether plaintiff lent Ba Zan Rs. 500 on the security alleged, and (2) whether plaintiff had any prior claim on the proceeds of the chattels sold by order of the Small Causes Court. The loan of Rs. 500 on the mortgage is clearly proved by the evidence of plaintiff and Ba Zan, and on that issue I find in the affirmative. The real issue is whether the sale proceeds ought to be paid to plaintiff or not. I am of opinion that plaintiff has no claim on them. The Small Causes Court Judge had discretion to refuse to continue that attachment, but did not take that course. The mortgagee cannot claim under section 73 of the Civil Procedure Code, as he has no decree against Ba Zan and did not make any application before the receipt of the assets. His only remedy appears to be to pursue the property sold, if he thinks it worth while, into the hands of the purchasers.

Plaintiff's claim against Ba Zan is decreed with costs, and against Su Kwin Ping is dismissed with costs.

Order accordingly.

CALCUTTA HIGH COURT.

CIVIL RULE No. 79 OF 1919.

May 8, 1919.

Present:—Mr. Justice Walmsley and Justice Sir Shamsul Huda, KT.

GOBINDU DAS NATH AND OTHERS —PLAINTIFFS—PETITIONERS

versus

Sreemati NITYA KALI DASI AND OTHERS —DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 115, 149 —Order requiring plaintiff to pay additional Court-fee —Revision, whether lies—Remedy, other, open to plaintiff, effect of.

An order under section 149 of the Civil Procedure Code requiring the plaintiff to pay additional Court-fee is not open to revision under section 115 of the Code, inasmuch as there is another remedy available to the plaintiff, *viz.*, in case of dismissal of his suit for non-payment of the additional Court-fee, he has a right of appeal. [p 582, col. 2.]

Rule against the order of the Subordinate Judge, Murshidabad, in Declaratory Suit No. 505 of 1908.

FACTS of the case will appear from the following extracts from the judgment of the lower Court:—

"In this case the plaintiffs pray for a declaration that the properties in suit are *debutter* properties, that the defendant No. 1, who is the *shebait* of the said idol, is unfit for the office of *shebait*; it is further prayed in the plaint that she (defendant No. 1) may be removed from the office of *shebait* and the properties may be placed in the hands of a Receiver, who may be appointed by the Court to manage the *debutter* properties during the lifetime of the defendant No. 1 * * * * * * The suit is valued in the plaint for the purpose of jurisdiction at Rs. 4,20,312. The plaintiffs have paid a Court-fee of Rs. 10 for the declaratory decree and another Rs. 10 for the prayer for appointment of a Receiver, stating that it is not possible to ascertain the value of the last prayer. So a total Court-fee of Rs. 20 has been paid by the plaintiffs.

The defendants' contention is that the Court-fee paid is inadequate.

So the question is whether the suit has been properly valued and is the plaint sufficiently stamped?

The value of the suit for the purpose of Court-fee should in this case be the same as the value for the purpose of jurisdiction, the plaintiffs having valued

the suit for the purpose of jurisdiction at Rs. 4,20,321 ought to pay *ad valorem* Court-fee on the said valuation, that is, they ought to pay a Court-fee of Rs. 3,000 * * * * * *. The suit is not for a mere declaration. It is a suit for a declaratory decree with prayers for consequential reliefs. * * * * * * I, therefore, hold that the plaintiffs are to pay Court-fee on Rs. 420,312, that is, Rs. 3,000 and that the Court-fee paid is insufficient. The plaintiffs are directed to pay Court-fee of Rs 3,000, less by Rs. 20 already paid, within 15 days from this date."

Babu *Ram Chandra Mozumdar* (with him Babu *Tara Das Chatterjee*), for the Opposite Party, in showing cause.—The order directing the plaintiffs to pay additional Court-fees is not open to revision under section 115 of the Civil Procedure Code. Section 115 applies only where the lower Court has decided the case, *i.e.*, only in cases of final orders, not in cases of interlocutory orders. As a matter of practice the High Court does not interfere with interlocutory orders. See *Chandi Roy* v. *Kirpal Roy* (1). As the petitioner has another and adequate remedy, *viz.*, to prefer an appeal against the order rejecting the plaint for non-payment of Court-fees, the order of the lower Court should not be interfered with.

Further, interference under section 115, Civil Procedure Code, can be made only where there is failure or excess of exercise of jurisdiction or wrong exercise of jurisdiction by the lower Court. In this case the lower Court had jurisdiction to decide whether sufficient Court fees had been paid or not and it has decided that question, and, therefore, no question of jurisdiction arises. See *Balakrishna Udayar* v. *Vasudeva Aiyar* (2). Nor will your Lordships exercise your general power of superintendence under section 107 of the Government of India Act, because that power should be used sparingly and in special cases.

Dr. *Surat Chandra Bysak* (with him Babu *Bepin Chandra Bose*), for the Petitioners.—The decision of the lower Court requiring the petitioners to pay additional Court-fees is illegal and without jurisdiction. Refers to *Ramrup Das* v. *Mohunt Sujaram Das* (3). As regards the question whether your Lordships' revisional jurisdiction should be exercised in a case like this, I rely on *Sasi Bhushan Bose* v. *Maharaja Sir Manindra Chandra Nandy* (4).

JUDGMENT.

WALMSLEY, J.—This is a Rule calling on the opposite party to show cause why the order requiring the plaintiff to pay the deficit Court fee of Rs. 2,980 should not be set aside. It appears to me that the plaintiff has mistaken his remedy, or rather he has another remedy easily available to him and on that account we ought not to interfere under section 115, Civil Procedure Code. If he fails to deposit the sum which he has been ordered to pay, his suit will be dismissed and then he will have a right of appeal. That being so, I do not think we ought to interfere with the order passed by the Court below in our revisional jurisdiction. The Rule is, therefore, discharged with costs, three gold *mohurs*, to be divided between the defendant No. 1 and the defendant No. 2.

Let the record be sent down without delay.

SHAMSUL HUDA, J.—I agree.

Rule discharged.

(1) 10 Ind. Cas. 308; 15 C. W. N. 682.

(2) 40 Ind. Cas. 650; 26 C. L. J. 143; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 19 Bom. L. R. 715; (1917) M. W. N. 628; 40 M. 792; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

(3) 7 Ind. Cas. 92; 14 C. W. N. 932 at p. 936; 12 C. L. J. 211.

(4) 38 Ind. Cas. 835; 24 C. L. J. 448; 21 C. W. N. 310; 44 C. 890.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 103 OF 1918.

December 9, 1918.

Present:—Mr. Justice Pratt.

GOR LUM HPAW—APPLICANT

versus

CAMILLO CAMILATOS—RESPONDENT.

Principal and agent—Broker employed to negotiate

ERFANUDDIN MOLLA *v.* BADAN SHEIKH.

sale of property at certain price—Principal failing to convey—Damages for loss of brokerage, suit for, by broker, maintainability of.

Where a broker is employed to negotiate the sale of a house and he finds a purchaser at the stipulated price, and arranges for his brokerage to be paid by him but the transaction is not completed owing to the owner failing to convey, the broker is entitled to damages on the basis of the brokerage which he would have received had the sale been completed.

Mr. *Chari*, for the Applicant.

Mr. *Higinbotham*, for the Respondent.

JUDGMENT.—Plaintiff was engaged by defendant as a broker to negotiate the sale of his house for Rs. 85,000, on the understanding that he should get brokerage from the purchaser.

Plaintiff found a purchaser at the stipulated price and arranged for his brokerage to be paid by him. Defendant failed to convey and plaintiff sued for damages on the basis of the brokerage, which he would have received, had defendant completed the sale as agreed.

The trying Court remarked that the amount of damages claimed was not questioned and appeared to be properly assessed and gave a decree for Rs. 850 accordingly.

It is contended that no suit would lie as the authority given was revocable and that in any case the measure of damages is the time and trouble actually expended by plaintiff.

Plaintiff performed his part of the contract and was clearly deprived of his brokerage by defendant's failure to sell.

I see no reason why he should not get his damages or why he should be limited to a *quantum meruit*.

There is ample authority for awarding as damages the amount of brokerage that would have been earned. In *Elias* v. *Govind Chunder Khatick* (1) it was held by a Bench of the Calcutta High Court that where a broker has negotiated a loan and found a lender willing to lend the amount, he is entitled to his brokerage, although the transaction was not completed by reason of the inability of the principal to satisfy the attorney as to his title. In that judgment reference was made to the English case of *Prickett* v. *Badger* (2) in which it was held that, where an agent employed for an agreed commission to sell land at a given price succeeds in finding a purchaser at the stipulated price, but the principal, from whatever cause, declines to sell, and rescinds the agent's authority, the agent is entitled to sue for a reasonable remuneration for his work and labour. In the course of his judgment in this case Willes, J., observed: "The plaintiff would have been entitled to receive the commission agreed on, if the defendant's conduct had not prevented his earning it. I must confess I do not see why the Jury should not have given him the full amount."

With this observation I am in full accord and it applies exactly to the facts of the case under revision.

Fisher v. *Drewitt* (3) is another authority in support of the view taken by the lower Court. In *Simpson* v. *Lamb* (4) the facts were different and I see no reason to consider it a sufficient authority for interference with the decree of the Small Cause Court.

I hold that plaintiff was entitled to damages on the facts proved and that the basis for assessment of damges was reasonable.

The application is dismissed with costs.

Application dismissed.

(1) 30 C. 202; 7 C. W. N. 297.

(2) (1856) 140 E. R. 123; 1 C. B. (N. S.) 96; 26 L. J. C. P. 33; 3 Jur. (N. S.) 65; 5 W. R. 117; 28 L. T. (O. S.) 65; 107 R. R. 668.

(3) (1879) 48 L. J. Ex. 82; 39 L. T. 253; 27 W. R. 12

(4) (1856) 139 E. R. 1213; 17 C. B. 603; 25 L. J. C. P. 113; 2 Jur. (N. S.) 91; 4 W. R. 328; 26 L. T. (O. S.) 203; 104 R. R. 806.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 722 OF 1917.

(CIVIL RULE NO. 459 OF 1917.)

January 20, 1919.

Present:—Mr. Justice Beacheroft.

ERFANUDDIN MOLLA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BADAN SHEIKH—PLAINTIFF—RESPONDENT.

Restitution of conjugal rights, suit for—Decree, form of—Relief awardable—Civil Procedure Code (Act V of 1908), O. XXXII, r. 3—Minor not properly represented in suit—Appeal—Appellate Court, power of, to set aside decree—Muhammadan Law—Marriage, essentials of—Vakil of wife, [illegible] effect of—Contract Act (IX of 1872), s. 184.

ERFANUDDIN MOLLA v. BADAN SHEIKH.

In a suit by the plaintiff for a declaration that the defendant No. 1 was his wife and for possession of her as well as for any other proper relief, the defence was that the suit was not maintainable, that the defendant No. 1, who was a minor, was not properly represented in the suit, and that the marriage between the plaintiff and the defendant No. 1 was not valid, because the Vakil who acted for the wife at the marriage was a minor and the ceremonies necessary for a valid marriage had not been performed. The lower Courts gave the declaration asked for and directed the other defendants not to put any obstruction in the way of the wife coming to the plaintiff, and added that the plaintiff would get the defendant No. 1 as his wife:

Held, (1) that the suit was in substance one for restitution of conjugal rights and the Court could, in such a suit, give the plaintiff a declaration that the defendant was his wife and direct the other defendants not to obstruct her in returning to her husband, but that it was not open to the Court to decree the husband possession of the wife and the decree should have merely directed the wife to return to her husband. [p. 586, cols. 1 & 2.]

Where it appears to an Appellate Court on examination of the record that a minor has not been properly represented in the suit, it cannot allow the decree to stand, even though there has been no appeal by the minor, which in the absence of proper representation it was obviously impossible for him to present. [p. 586, col. 2.]

For a Muhammadan marriage all that is necessary is a *proposal* and *acceptance* in the presence of witnesses. The fact that the Vakil who acted for the girl at the marriage was a minor would not affect the validity of the marriage, inasmuch as section 184 of the Contract Act permits a minor to act as agent between the principal and a third person. [p. 587, col. 2; p. 588, col. 1.]

Appeal against the decree of the Additional District Judge, Jessore, dated the 18th January 1917, affirming that of the Munsif, 1st Court, Narail, dated the 22nd February 1915.

FACTS appear from the judgment.

Babu *Probodh Kumar Das*, for the Appellants.—This appeal is on behalf of the defendants Nos. 2 and 3, and it arises out of a suit by the husband for recovery of possession of his wife (the defendant No. 1) on declaration of plaintiff's right over the latter. The defendant No. 1 was given in marriage to the defendant No. 3, and from the time of her marriage with the defendant No. 3 she has been living with him. Plaintiff's case is that he had married the girl (defendant No. 1), and that the defendant No. 2 in collusion with others got her married again to the defendant No. 3 and wrongfully kept her in his house although he had no right to do so. The suit has been decreed by both the Courts below, which directed that the plaintiff should get the girl as his wife and that the other defendants must not put any obstruction in the way of the girl's coming to the plaintiff.

My submission is that the suit is one for possession and not for an injunction or restitution of conjugal rights, and, therefore, the decree in the form of injunction is bad in law. The law does not permit a human being to be treated as a chattel, and so a suit by the husband for the recovery of possession of a wife is not maintainable. Refers to *Ohotun Bebee* v. *Ameer Ohund* (1). The suit by the plaintiff or the decree that has been passed by the Courts below is not for restitution of conjugal rights. The Courts below have erred in law in giving a decree in favour of the husband for the possession of the wife. It is not open to the Court to pass any such decree. The utmost that it can do in a case of this nature is to pass a decree for restitution of conjugal rights. See *Koobur Khansama* v. *Jan Khansama* (2) and *Melaram Nudial* v. *Thanooram Bamun* (3).

But having regard to the fact that the girl in this case is a minor, even a suit for restitution of conjugal rights is not maintainable because it is evident that she is unable to perform the duties of a wife.

My next point is that the minor has not been properly represented in the suit. She is represented by Johuruddi, who, as appears from the finding of the lower Appellate Court, is helping the plaintiff and, therefore, cannot be said to be a disinterested person fit to represent the girl as required by Order XXXII, rule 4, of the Civil Procedure Code. See *Sudhir Chandra Das* v. *Kamal Chandra Dutta* (4).

Farther the question of the validity of the plaintiff's marriage with the defendant No. 1 has not been properly considered by the Courts below. Before passing a decree in favour of the plaintiff, the Court should have considered properly as

(1) 6 W. R. 105; 1 Ind. Jur. (N. S.) 317.
(2) 8 W. R. 467.
(3) 9 W. R. 552.
(4) 41 Ind. Cas. 503; 21 C. W. N. 1043; 45 C. 538.

to whether all the rites and ceremonies of marriage as required by Muhammadan Law had been performed: see Ameer Ali's Muhammadan Law, Volume II, page 364. In a case of restitution of conjugal rights it is necessary to find that there was a valid marriage between the parties and that the necessary ceremonies were performed, and unless the validity of the marriage is proved, there can be no decree in favour of the plaintiff: see *Surjyamoni Dasi* v. *Kali Kanta Das* (5). In this case it appears that the Vakil for the marriage was a minor, and so there could be no valid marriage. See Wilson's Digest of Anglo-Muhammadan Law, 3rd Edition, pages 106-107. From all these facts and circumstances it appears that the decree of the Courts below cannot stand.

Babu *Hemendra Chandra Sen*, for the Respondent.—Both the Courts below have disbelieved that there was any marriage between defendant No. 1 and defendant No. 3, and have found that a valid marriage took place between the plaintiff and defendant No. 1. The evidence, which has been fully considered by the Courts below, shows that all necessary rites and ceremonies requisite for a valid Muhammadan marriage were performed. The guardian, who gave the consent on behalf of the bride, was competent to give her away in marriage. The fact that the Vakil was a minor does not invalidate the marriage, because the presence of the Vakil is not essentially necessary. Refers to Ameer Ali's Muhammadan Law, Volume II, pages 335, 347. See also Wilson's Digest of Anglo-Muhammadan Law, 3rd Edition, page 105. Even under the Contract Act the minor can act as an agent. Refers to section 184 of the Contract Act. The decree has been passed on a finding that there was a valid marriage between the plaintiff and defendant No. 1.

The point that the suit is not maintainable has got no substance in it. The suit is for a declaration that the defendant No. 1 is the legally married wife of the plaintiff and also for restitution of conjugal rights, and merely because the word "possession" has been inadvertently used in the plaint, that cannot alter the nature of the suit. The decree gives in effect a declaration that the defendant No. 1 is the wife of the plaintiff and directs that she is to return to her husband. The form of the decree is in accordance with law. Refers to Order XXI, rules 32, 33, of the Code of Civil Procedure.

The point that the minor has not been properly represented in the suit is taken for the first time in this Court. There is nothing on the record to show that Johuruddi, who was allowed by the Courts below to act as guardian *ad litem*, has got any interest adverse to those of the minor. See Order XXXII, rules 3, 4 of the Civil Procedure Code. The appellants, however, cannot seek to get the decree set aside on that ground.

Babu *Probodh Kumar Das* briefly replied.

JUDGMENT.—The appellants are the second and third defendants. The suit has some remarkable features, which are evident on a perusal of the judgments of the lower Courts, but the feature which principally attracts attention, though perhaps it ought not to be styled remarkable in a country which is notorious for the protraction of litigation, is that the suit, which is virtually one for restitution of conjugal rights and, therefore, essentially one for speedy disposal, has lasted for 6 years, and the practical effect of this is that though the person principally interested, the alleged wife, was a mere child of 7 at its inception, she has now reached an age when she will be in a position, if indeed she has not already attained it, either at once or in the near future, to nullify, if she so chooses, any findings of the Courts as to the fact of her marriage and consequent directions based thereon by exercising her right of repudiation under the Muhammadan Law.

The plaintiff is the first cousin of the girl, who is the defendant No. 1, the second defendant is the uncle of both and the father of the third defendant. The girl's father is dead and her mother has disappeared. Her guardian *ad litem* was one Johuruddi, a brother of the second defendant, of the girl's father and of the plaintiff's mother.

The suit was described in the plaint as [illegible] possession on declaration of he

(5) 28 C. 37; 5 C. W. N. 195.

plaintiff's right over his wife. It was alleged in the plaint that though the first defendant had married the plaintiff, the second defendant, in collusion with six others, had got her married again to the third defendant and confined her in his house. It was asserted that the plaintiff was entitled to possession according to law and in the prayer clause the plaintiff asked for a declaration that the first defendant was his wife and for possession of her, and for any other proper relief. The Munsif gave the declaration asked for and directed the other defendants not to put any obstruction in the way of defendant No. 1 coming to the plaintiff. He added: "the plaintiff will get defendant No. 1 as his wife." This order was reproduced in the decree, and an appeal to the District Judge was dismissed without variation of the decree.

One of the grounds taken in the memorandum of appeal to this Court was that the Munsif had no jurisdiction to entertain the suit. The appellants' Pleader, however, conceded that he could not argue that ground in view of some of the decisions of this Court regarding the competence of Courts to try suits for the restitution of conjugal rights. The points urged were (1) that a suit for the possession of a wife is not maintainable, (2) that the first defendant was not properly represented, (3) that as there was a question of the validity of the marriage, it was necessary for the Court to find what were the essential ceremonies of a valid marriage and whether those ceremonies had taken place, which the Court had not done, (4) that the Vakil who acted for the first defendant at the alleged marriage, being a minor, was incompetent to act and, therefore, the marriage was invalid.

The first point taken involves an accurate statement of the law, *viz.*, that a suit for the possession of a wife is not maintainable. But that is not enough to justify dismissal of the suit which, as I have already remarked, is in substance one for restitution of conjugal rights. It was open to the Courts to give the plaintiff a declaration that the first defendant was his wife and it was also open to them to direct the other defendants not to obstruct her returning to her husband. But it was not open to them to decree the husband possession of his wife. The decree should have directed her to return to her husband. There was some discussion in this Court as to whether a decree for restitution of conjugal rights can be made in the case of a wife who is a mere child as, obviously, a child of 7 is not capable of performing all the duties of a wife. Having regard to the time that has elapsed since the suit was instituted, the question has not now the same importance as it might have had 3 years ago. But, in any case, the husband is the guardian of the wife and as such he would be entitled to the order, subject to any provisions which the Court might make for the protection of the wife: *Kateeram Dokanee* v. *Musammat Gendhenee* (6). To make the decree conformable with law it would, therefore, be necessary, in any event, to vary the decree of the lower Court, though the point taken is one which does not interest the present appellants. The interest of the third defendant arises by reason of the fact that he is alleged to have married the first defendant, but that interest is no longer maintainable in view of the finding that the first defendant had previously been married to the plaintiff.

The second point, *viz.*, that the first defendant was not properly represented is one which does not concern the present appellants and, consequently, does not affect their position in any way. But it raises a question of very great importance to the minor, and if it appears on examination that the minor has not been properly represented, it is obviously impossible to allow the decree against the minor to stand, even though there has been no appeal by the minor which, in the absence of proper representation, it was obviously impossible for her to present. It is the duty of the Court to appoint a proper person to be the guardian *ad litem*. The person appointed in this case was Johpruddi, the girl's uncle, who was *prima facie* the proper person to appoint in the absence of the minor's parents. It was alleged in the written statement that the suit had been brought on account of the quarrel between Johurnddi and the second defend-

(6) 23 W. R. 178.

ant regarding the possession of the minor's land by Johuruddi. The fitness of Johuruddi to be guardian was made the subject of the fifth issue in the Munsif's Court, and the Munsif appears to have considered that his fitness was established by the fact of his being the girl's uncle. It is quite possible that the allegation in the written statement was made because Johuruddi was supporting a case which the Courts have found to be true, *viz.*, that the first defendant was married to the plaintiff. But the learned Judge on appeal has found facts which show that Johuruddi was not a disinterested party. He says: "It may be taken almost as an axiom in these cases that the girl's property is really what the parties want and the present suit is no exception. Her father died in 1312 and her uncle Erfanuddin (*i. e.*, third defendant) and Johuruddi want the property." Then, after discussing the question of possession of the land, he finds that Johuruddi's evidence about the girl and her mother having lived with him is untrue, as also was the counter-allegation of their having lived with Erfanuddin. The Judge is clearly of opinion that Johuruddi was playing only for his own hand, and in that view it cannot be said that his interest was not adverse to that of the minor, within the meaning of Order XXXII, rule 4. That being so, the minor has not been properly represented. The view might be taken that the learned Munsif, in appointing Johuruddi as guardian *ad litem*, did so as he was *prima facie* the proper person to appoint in the absence of anything to show that he was disqualified from acting as guardian, provided that the appointment was made after proper enquiry and proper notice. I have referred to the original record to see what was done in the matter. The application to make Johuruddi guardian *ad litem* was made with the plaint. There is no trace of any order on the application itself or in the order-sheet. There is nothing to show that the Munsif ever applied his mind then to the question of the appointment of a guardian *ad litem*, or that he did in fact make any appointment. So far as can be gathered from the record, the appointment was taken as a matter of course.

That being the case, and the learned District Judge having found facts which show that the minor was not properly represented, the decree as against the minor must be set aside. The respondent has not been taken by surprise as the want of representation was made a ground of appeal, though not a good ground of appeal in the case of the present appellants, and respondent's Pleader did argue the point.

There is no substance in the third ground urged. It was urged on the authority of the case of *Surjyamoni Dasi* v. *Kali Kanta Das* (5) that the Court was bound to find what rites and ceremonies were essential to a marriage and whether those had been duly performed. Now, in that case, the rites and ceremonies necessary to a marriage of Hindus of a certain caste were in question. The present is a case of a Muhammadan marriage. For that, all that is necessary is proposal and acceptance in the presence of witnesses. The learned Judge says the necessary ceremonies were proved and he was prepared to accept the evidence of two witnesses whom he names.

The argument on the fourth point is put in this way. Matrimonial agency is true agency within the meaning of the Indian Contract Act (Wilson's Digest of Anglo-Muhammadan Law, 3rd Edition, pages 106-107) and, therefore, the agent who acted for the first defendant at the marriage being a minor was incompetent to act. Now, in Ameer Ali's Muhammadan Law, 4th Edition, Volume II, at page 364, it is stated that the proxy need not be an adult. From the context it might, perhaps, be inferred that this applies to the proxy who carries the proposal. Assuming that to be so, and if minority is a disqualification, it might perhaps be argued, if necessary, that by virtue of section 2 of the Indian Majority Act and of the fact that under Muhammadan Law personal emancipation of a minor occurs on the attainment of puberty, that the agent was not disqualified, there being no finding as to his actual age in this case. But it is not necessary for assuming the soundness of appellants' argument that matrimonial agency is true agency within the meaning of the Contract Act. Section 184 of that Act permits a minor to be

an agent, as between the principal and a third person. There is, therefore, no substance in this point.

The result then is that the appeal must be dismissed with costs, but there will be this variation in the decree that the clause directing that plaintiff shall get defendant No. 1 as his wife will be struck out, and the decree will be set aside as against the first defendant. The setting aside of the decree against the first defendant will not have any practical effect for, if she wishes, she can go to her husband, while, if she does not, she can on attaining puberty repudiate the marriage.

Appeal dismissed;
Decree varied.

LOWER BURMA CHIEF COURT.
SPECIAL SECOND CIVIL APPEAL No. 114 OF 1918.
December 13, 1918.
Present :—Sir Daniel Twomey, KT., Chief Judge.
MA LAY AND ANOTHER—DEFENDANTS—APPELLANTS
versus
TUN SHWE—PLAINTIFF—RESPONDENT.

Buddhist Law, Burmese—Succession—Shares of widow and children from different marriages—Appeal, second—New point, whether can be raised.

Where a Burmese Buddhist marries two wives successively and dies leaving a widow, children by her and children by his earlier wife, the widow is entitled to a one-fourth share of the deceased's property, her children to one-eighth and the children of the former wife to five-eighths. [p 590, col. 1.]

A new point may be raised for the first time in second appeal, provided it is purely a question of law arising on the findings of the Courts below and not affected by any facts outside those findings. [p. 588, col. 2.]

Mr. *May Oung*, for the Appellants.

Mr. *Maung Pu*, for the Respondent.

JUDGMENT.—Maung Pan Di married two wives successively. His first wife Ma Po had a son Maung Wa by a previous husband. Ma Po died about 1899 leaving a daughter Ma Lay by Maung Pan Di. After Ma Pyo's death Maung Pan Di married Ma Pyu. He died about 1904 and after his death his widow Ma Pyu gave birth to a posthumous son, Tun Shwe, the plaintiff in this case who is still a minor and sued through a next friend. He sued his stepsister Ma Lay and her stepbrother Maung Wa for a share of the joint property of Maung Pan Di's first marriage and he joined as 3rd defendant his own mother Ma Pyu, who did not oppose his suit. It may be noted that at the time when the suit was brought any claim that Ma Pyu herself had to share in the joint property of her husband Pan Di's first marriage was barred by limitation, a period of more than twelve years having at that time elapsed from the death of Pan Di. The Sub-Divisional Court dismissed the suit on the ground that the joint property of Ko Pan Di and Ma Po had been partitioned among his heirs before Pan Di's death and before his marriage with Ma Pyu. On appeal, however, the Divisional Court found that there had been no valid partition in Ko Pan Di's lifetime and after a remand to the trial Court for the determination of further issues in the case, the learned Divisional Judge decided that the plaintiff Tun Shwe was entitled to one-sixth share of the joint property of his father's first marriage.

The defendants Ma Lay and Maung Wa appeal to this Court under section 30 of the Lower Burma Courts Act. The grounds of appeal are that the Divisional Court erred in holding that the plaintiff Tun Shwe was entitled to any share in Ko Pan Di's estate and erred also in not holding that Tun Shwe was excluded by his mother (the widow of Ko Pan Di the 3rd defendant).

The latter point is entirely new and the question arises whether this point can now be raised in this special appeal under section 30, Lower Burma Courts Act, seeing that it was not raised in the trial Court or in the lower Appellate Court, but there is good authority for allowing even on second appeal under the Civil Procedure Code a new point to be raised for the first time provided it is purely a question of law arising on the findings of the Courts below and not affected by any facts outside these findings. [See *Nagesh* v. *Gururao* (1).] The learned Counsel for the respondent does not dispute the correctness of this view.

(1) 17 Bom. 303; 9 Ind. Dec. (N. S.) 198.

It is urged by Mr. May Oung for the appellants that on a proper appreciation of the *Dhammathats* the children of the first marriage during which the property was acquired were entitled to three-fourths of the property and the second wife or stepmother who survives is entitled to the remaining one-fourth share, but her children are not entitled to anything. He argues further that even if it is held that the child or children of the second marriage are entitled to a share in addition to their mother's share, the children cannot claim their share during the lifetime of their mother. The only authority cited in support of the latter argument is Parlett, J.'s ruling in *Mi Chit Lu Ma* v. *Wi Win Ma U* (2). The learned Judge said that it appeared to him that during the lifetime of the mother the children were not entitled to a share. I regret I am unable to adopt that opinion. I can find nothing in the *Dhammathats* to support it. It seems to me that where the *Dhammathats* give a definite share to the offspring of the second marriage in addition to the share given to their mother, the offspring cannot be said to get that share as representatives of their mother. The offspring of the second marriage as well as the offspring of the first marriage and the surviving widow have definite vested rights to their respective shares from the date of the father's death.

It appears that neither the Chief Court nor the Judicial Commissioners have yet definitely decided the question whether in a case like the present the offspring of the second marriage are entitled to a share in the joint property acquired during their father's first marriage. The texts dealing with the subject are given in section 229, Kinwun Mingy's Digest, and the substance of them is set out in Mr. Justice Moore's judgment in *Ma Leik* v. *Maung Nga* (3). The learned Judge pointed out that there was a fairly general consensus of authority for the proposition that of the property taken by the father to the second marriage the children of the first marriage shall receive three-fourths and their stepmother one-fourth. He had not to consider in that case whether the stepmother's own children were or were not entitled to a share to themselves in addition to her one-fourth share. But four of the *Dhammathats* extracted in section 229 of the Digest, *viz.*, *Kungya*, *Yazathat*, *Vinicchaya* and *Dayajja*, expressly give the children of the second marriage a share in addition to their mother's one-fourth share. *Kungya* and *Vinicchaya* give the children one-eighth, the *Yazathat* gives them one-fourth. The *Dayajja* has two contradictory texts. The first gives a share to the stepmother only, the second gives a one-fifth share to the stepmother and one fifth share to her children. Section 229 gives extracts from various other *Dhammathats* which allot a share in the property of the first marriage to the stepmother but do not mention her children. There is one *Dhammathat Manu Yin* which expressly declares that none of the property of the first marriage is to be given to the offspring of the second union, and it goes on to say that none of the property of the second marriage shall be given to the children of the former marriage. This isolated *Dhammathat* has not been followed by the Courts in cases dealing with property acquired during the second marriage, and it is clear that no more weight can be attached to its provision regarding property of the first marriage. It is unfortunate that the *Manukye*, the *Dhammathat* of pre-eminent authority, has no provision dealing with this matter but the Kinwun Mingyi's compilation, the *Attathankhepa*, section 220, attempts to reconcile the conflicting *Dhammathats* extracted in section 229 of the Digest.

It was pointed out in *Ma Ba We* v. *Mi Sa U* (4), that although the *Attathankhepa* is not an original *Dhammathat*, it is a work of very considerable weight because the ex-Kinwun Mingyi was a well-known authority on Burmese Buddhist Law. According to this authority the rule under which the stepmother takes one-fourth and the children of the former marriage three-fourths is applicable only when there is no issue by the second marriage. Section 220 of the *Attathankhepa* goes on to say: "If, however, children are born after the second marriage, let the property brought by the father or mother be divided into eight shares, and let the children of the former marriage take five

(2) 35 Ind. Cas. 423; 10 Bur. L. T. 41.
(3) 4 L. B. R. 110.

(4) 3 L. B. R. 171 at p. 182 (F. B.).

shares, the stepfather or stepmother two shares, and the children of the second marriage one share." Thus, the Kinwun Mingyi adopted the rule given in the *Kungya* and *Vinicchaya Dhammathats* and treated the *Dhammathats* which allow a share to the stepmother alone as being applicable only to a childless step-mother.

It was difinitely held in *Ma Ba We* v. *Mi Sa U* (4) that the widow is entitled as against the children of her husband by the former marriages to one-fourth share of the property which her husband brought to his marriage with her. In that case the surviving widow was childless. But having regard to the provisions of the *Attathankhepa* and the *Dhammathats* cited above, I think that the same rule should apply when a widow has children, that is to say, the widow should in any case get her one-fourth share and the one-eighth share of her children should come out of the three fourths which the children of the former marriage would have received if the widow were childless. In other words, the share of the children of the earlier marriage or marriages is reduced from three-fourths to five-eighths if their father leaves issue surviving by his second marriage.

I have now disposed of the two grounds set forth in the memorandum of appeal. The share of the property to which the plaintiff appears to be entitled, under the Buddhist Law of Inheritance appears to be one eighth and not one-sixth, the fraction allowed by the Divisional Court, but I find that the parties agreed as to this fraction in the Divisional Court and I have not been asked to reduce it in this appeal, in the event of my finding that the plaintiff is entitled to share in Ko Pan Di's estate. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 363 AND 364 OF 1918.

February 20, 1919.

Present:—Mr. Daniels, A. J. C.

Thakur RAM SAHU—PLAINTIFF—APPELLANT

versus

Syed IMDAD HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 14—Time spent in proceeding in wrong Court, exclusion of—Pleader's advice, effect of—Due care, exercise of.

The fact that a litigant acts on the advice of a Pleader is not of itself sufficient to entitle him to the benefit of the provisions of section 14 of the Limitation Act, unless the error is one into which he might have fallen notwithstanding the exercise of due care. [p. 591, col. 2.]

Appeals against the decree of the District Judge, Fyzabad, dated the 31st May 1918, confirming that of the Munsif, Akbarpur, dated the 17th December 1917.

Mr. *H. K. Ghosh*, for the Appellant.

The Hon'ble Pandit *Gokaran Nath Misra*, for Respondent No. 3.

JUDGMENT.—These are two connected appeals in two rival pre-emption suits relating to the same property. The sole question raised in both appeals is one of limitation.

The sale which was the subject of pre-emption took place on 30th July 1915 and was produced for registration on the same day. One suit for pre-emption was filed by the plaintiff-appellant Thakur Ram Sahu on 29th July 1916 and the other by the other appellant B. Balak Ram on 31st July 1916. Both suits were filed within a very short time of the close of the period of limitation, and indeed the latter was only brought within the period of limitation by the fact that the registration was not completed by copying the deed into the Sub Registrar's registers until 14th August.

The property sold was an equity of redemption which purported to be sold for Rs. 1,000, but in each case the plaintiff asserted that the real price was only Rs. 550. Nevertheless both suits were filed in the Court of the Subordinate Judge who on the 10th November 1916 ordered the plaints to be returned under Order VII, rule 10, for presentation to the Munsif. Instead

of taking back their plaints, the plaintiffs appealed against this order to the District Judge who dismissed their appeals on the 1st February 1917. They then made an application in revision to this Court which was rejected on 30th March 1917. The records do not appear to have been returned to the Subordinate Judge until 18th April 1917, on which date the plaintiffs took back their plaints. The plaints were presented before the Munsif of Akbarpur on the following day, 19th April 1917.

The plaintiffs rely on the provisions of section 14 of the Limitation Act. The learned Munsif held that section 14 did not apply, inasmuch as the error made by them in filing their suit before the Subordinate Judge was so patent an error that it could not be said to have been made in good faith as defined in section 2 (7) of the Limitation Act ("Nothing shall be deemed to be done in good faith which is not done with due care and attention"). He further held that even if section 14 did apply, the only period which the plaintiffs were entitled to exclude was the period from the filing of the suits before the Subordinate Judge to 30th March 1917. Excluding this period limitation expired in the case of one plaint on 13th April 1917 and in the case of the other on 16th April 1917, the 15th of April having been a Sunday. As the plaints were not presented till 19th April they were both time-barred.

The learned District Judge confines himself to the second point, on which he upheld the Munsif's decision. He held, in my opinion justifiably, that the appellants did not show due diligence within the meaning of the section in waiting till the records were received back from the Subordinate Judge's Court before taking any steps. The plaintiffs knew that limitation was about to expire. If they had moved this Court for the immediate return of the plaints to them, whether directly or through the Subordinate Judge, in order to save limitation, there is little doubt that their request would have been complied with. The case chiefly relied on by the appellants, *Bisheshar Singh* v. *Ram Daur Singh* (1), is not really parallel. In that case the delay which occurred between the order for the return of the plaint and its actual return was only seven days, and this was proved to be due to the action of the Court which required a copy to be made and placed upon the record before the original was returned. It was distinctly found, therefore, that there was no want of due diligence on the part of the plaintiff or those representing him.

On the first point also I am disposed to agree with the respondent that the error made was a very patent error which was hardly entitled to claim the benefit of section 14. The appellants having emphatically urged that the real price of the property sold was only Rs. 550, it is difficult to see how they could, if they had exercised due care and attention, have thought, as they did, that the suit was cognizable by the Subordinate Judge. It is urged that one of them acted on the advice of a Pleader and that the other is himself a Pleader; but it was held by this Court in a case cited by the appellants themselves [*Nawab Mirza Muhammad Bakar Ali Khan* v. *Muhammad Bakar* (2)] that the fact that a party is acting on the advice of a Pleader is not in itself sufficient to protect him, unless the error was one into which he might have fallen notwithstanding the exercise of due care.

The appeals fail and they are accordingly dismissed with costs.

Appeals dismissed.

(1) A. W. N. (1887) 302.

(2) 10 O. C, 291.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 72 OF 1918.

December 16, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Pratt.

THE OFFICIAL ASSIGNEE—APPELLANT

versus

M. C. BHAM—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 56—Fraudulent preference—Intention—Burden of proof.

If a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment

with the dominant view of giving preference to that creditor over his other creditors. Where, however, it is found on the evidence that the dominant motive was not to give preference, but to save his stock in trade from attachment and sale, the transaction cannot be annulled under section 56 of the Presidency Towns Insolvency Act as a fraudulent preference.

The burden of proving the intention of the debtor lies upon the Official Receiver who contests the payment, even if the debtor was insolvent at the time when he made the payment.

Mr. *N. M. Sen*, for the Appellant.

Mr. *N. M. Cowasjee*, for the Respondent.

JUDGMENT.

TWOMEY, C. J.—The question in this case is whether a certain payment of Rs. 753 made by an insolvent to one of his creditors, the respondent Bham, within three months of the date of the petition for insolvency was made "with a view of giving that creditor a preference over the other creditors" (section 56, Presidency Towns Insolvency Act, 1909). The insolvent was a shopkeeper in the Iron Bazaar and the value of his stock *plus* book debts was between Rs. 5,000 and Rs. 6,000, while his liabilities were over Rs. 15,000. He admittedly had no hopes at that time of paying his creditors. The respondent Bham threatened to sue for his debt and to attach the stock. It does not appear that any of the other creditors were pressing for payment or that the debtor had any intention of filing a petition in insolvency. But subsequently one of the other creditors filed a petition and the debtor was adjudicated an insolvent.

The learned Judge has found that the dominant motive for the payment was not the desire to prefer this creditor Bham, but the fear that his stock in trade would be attached and sold. It has, therefore, been held that the case does not fall under section 56 of the Act. The Official Assignee appeals. Section 56 follows word for word the provisions of the English Bankruptcy Law and we are bound, therefore, to attach very great weight to the interpretation which the English Courts have put upon the corresponding English provision. The English rulings were fully considered in a recent Calcutta case of *Nripendro Nath Shahoo* v. *Ashutosh Ghosh* (1) cited by the learned Judge. They show that the burden of proof as to the intention of the debtor lies upon the Official Receiver who contests the payment, even if the debtor was insolvent at the time when he made the payment. If there was real pressure operating on the debtor's mind as the dominant influence and if there is nothing to show that the debtor had any motive or desire to favour the particular creditor in preference to the other creditors, the transaction cannot be annulled as a fraudulent preference. In the present case the creditor Bham is Secretary of the Suratee Bazaar Company, which is closely connected with the Iron Bazaar where the debtor had his shops. The debtor states that he made over the shops to Bham for Rs. 1,600 on Bham promising that he would deduct the amount which was due to him and pay the balance to the debtor. This is denied by Bham, and the witness called by the Official Assignee to support the debtor's statement shows that the sale was to this witness and not to Bham, though the sale proceeds were paid to Bham's son. The evidence of this witness does not go to show that the debtor acted spontaneously. It rather supports the view that he was acting under pressure from Bham.

In my opinion the learned Judge decided the question correctly and I would dismiss the appeal with costs.

PRATT, J.—I am inclined to agree with the view expressed by Vaughan Williams, L. J., in *In re Lake, Ex parte Dyer* (2) that "if a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving a preference to that creditor over his other creditors."

In the present instance, however, the learned Judge on the original side has found on the evidence that the dominant motive of respondent was not to give a preference but to save his stock in trade from attachment and sale.

This finding was justified.

I agree that the appeal should be dismissed.

Appeal dismissed.

(1) 29 Ind. Cas. 128; 19 C. W. N. 157; 21 C. L. J. 167.

(2) (1901) 1 K. B. 710 at p. 717; 70 L. J. K. B. 390; 84 L. T. 430; 49 W. R. 291; 8 Manson 145; 17 T. L. R. 296.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 1 OF 1917.

February 24, 1919.

Present:—Justice Sir Ernest Fletcher, KT, and Mr. Justice Beachcroft.

PRAFULLANANDA GOSWAMI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BROJENDRA NANDAN GOSWAMI AND OTHERS—DEFENDANTS—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 50—Letters of Administration with Will annexed—Revocation, application for—Delay, long, effect of—Burden of proof.

Where Letters of Administration with the Will annexed have been granted to the widow of a deceased person, an application, made more than thirty years afterwards, to call in the Letters and prove the Will in solemn form ought not to be entertained, especially where the object of the application is to prevent the terms of the Will, standing for so many years, from being carried into effect as in the case of an intestacy. In any case, it is for the applicant to establish why the Letters should be called in and the Will proved, having allowed an undue length of time to elapse. [p. 594, col. 2.]

Appeal against the decree of the District Judge, Burdwan, dated the 19th September 1916.

FACTS appear from the judgment.

Dr. *Dwarakanath Mitter* (with him Babu *Haradhan Chatterjee*), for the Appellants.—The appellants' maternal grandfather is alleged to have left a Will by which his brother was made an executor while the grandsons were altogether dispossessed. The testator left a widow and a married daughter. In the Will it is stated that the deceased had no grandson during his lifetime. But he had at least one grandson born at that time. In the application for the Probate, which was granted some two years after the death of the testator, the value of the property was set down to be Rs. 500, while the actual value of the property would be at least Rs. 10,000. Proper notices were suppressed. The first Court did not believe that the notices were properly served. The testator is alleged to have executed the Will two days before his death in 1883 and the Probate was granted in 1885.

My first contention would be that I have got sufficient interest as a reversionary heir and I ought to have been given a notice. See *Brinda Chowdhrain* v. *Radhica Chowdhrain* (1).

Notices were issued on the mother but no notices were served upon the sons, who must be regarded as the next reversioners: *Newell* v. *Weeks* (2), *Moniram Kolita* v. *Keri Kolitani* (3), *Kunja Lal Chowdhury* v. *Kailash Chandra Chowdhury* (4), *Nistariny Dabya* v. *Brahmomoyi Dabya* (5) and *Shyama Charan Baisya* v. *Prafulla Sundari Gupta* (6).

Sections 50 and 69 of the Hindu Wills Act were referred to.

[FLETCHER, J.—I would have been satisfied had any special citation been required.]

Special citations are generally issued to all who have any interest.

Section 64 is the section applicable here. The notice ought to have been issued according to section 62.

[FLETCHER, J.—See *Nalini Sundari Gupta* v. *Bejoy Kumar Roy Chowdhury* (7), *Hoffman* v. *Norris* (8), *Prem Chand Das* v. *Surendra Nath Saha* (9) and *Nistariny Dabya* v. *Brahmomoyi Dabya* (5). You are not entitled to have the revocation as a matter of right: *Brinda Chowdhrain* v. *Radhica Chowdhrain* (1).]

But I invite your Lordship's attention to *Walter Rebelles* v. *Maria Rebells* (10).

They had a contingent interest and could not have succeeded till the death of the mother.

An enquiry should be made before the presence of my client. As a reversioner he is entitled to contest: *Brindaban Chunder Shaha* v. *Sureshwar Saha* (11).

Babu *Mohendranath Roy* (with him Babus *Sajani Rant Sinha* and *Gopendranath Das*), for the Respondents, was not called upon.

(1) 11 C. 492; 5 Ind. Dec. (N. S.) 1087.
(2) (1814) 2 Phillimore 224; 161 E. R. 1126.
(3) 5 C. 776 (P. C.); 6 C. L. R. 322; 7 I. A. 115, 4 Sar. P. C. J. 103; 3 Suth. P. C. J. 765; 4 Ind. Jur. 363; 3 Shome L. R. 198; 2 Ind. Dec. (N. S.) 1102.
(4) 7 Ind. Cas 749; 14 C. W. N. 1068.
(5) 18 C. 45; 9 Ind. Dec (N. S.) 31.
(6) 30 Ind. Cas. 161; 21 C. L. J. 557; 19 C. W. N. 882.
(7) 30 Ind. Cas. 12; 21 C. L. J. 555.
(8) (1805) 2 Phillimore 230 *note*; 161 E. R. 1129 *note*.
(9) 9 C. W. N. 194.
(10) 2 C. W. N. 100 at p. 106.
(11) 3 Ind. Cas. 175; 13 C. L. J. 263.

PRAFULLANANDA *v.* BROJENDRA NANDAN.

JUDGMENT.

FLETCHER, J.—This is an appeal against the judgment of the learned District Judge of Burdwan, dated the 19th September 1916, and it is preferred against an order declining to direct that Letters of Administration granted in respect of the Will of one Premanund Goswami should be called in and that the administrator should prove the Will in solemn form. What happened is this: The deceased Premanund Goswami was the maternal grandfather of the present applicants. He died on the 28th Sraban 1283. The Will is dated two days before and it seems to have been handed over to the Sub Registrar shortly after his death. The deceased left him surviving his widow *Srimati* Basan Coomari as his heiress according to the Hindu Law and an only daughter Rajani Coomari who was the immediate reversioner. Rajani Coomari had two sons, Profulla and Atulanund, then born and there was another son born to her subsequently. These three sons of Rajani Coomari are the three petitioners in this case. In 1885, an application for Letters of Administration to the Will of the deceased Premanund Goswami was made and that application was granted. The first point that has been raised in this appeal is that proper parties were not cited. It is said that the widow Basan Coomari who was the immediate heiress of the deceased Premanund, and the daughter Rajani Coomari, who was the immediate reversioner, were not the only parties necessary to be cited because they were women and taking a woman's interest and that it was essential to go on citing people until a male was cited. No such rule has been established by any text-book that we have seen. The case that has been made really rests on this, that these appellants had an absolute right to be cited and ought to have received special citation to be before the Court. Doubtless they are persons entitled to intervene. This case turns on this. The petitioners are no doubt entitled to make an application like this. But the Court is not bound to grant it without cause shown. I am of opinion that no cause has been shown in this case. These three petitioners, the eldest one being about 43 or 44 years of age and the youngest being of about the age of 31, applied to have their grandfather's Will, made 41 years ago, proved in solemn form. The finding of the learned Judge, which is in accord with the probabilities of the case, is that they must have known about this Will of their grandfather many years ago. It is also established that their mother predeceased their grandmother and that their grandmother died two years before they dreamt of coming to Court. The reason why they came to Court is not far to seek according to the learned Judge. They were originally people of some little property and recognised (with their father who was a Brahmin of a particular sect whose name I do not remember but the learned Judge mentions it in his judgment) for the worship of the family idol and until the appellants got into difficulties, they never thought of questioning the disposition that had been made by their grandfather. Now 40 years after their grandfather has been dead they come forward and say that they want to have the Will proved *per testes*. It is quite obvious that there are no *testes* now to prove the Will and the case has been brought for the purpose of preventing the terms of the Will, which has been allowed to stand for so many years, from being carried into effect as in the case of intestacy. I think in this case the present applicants have shown no cause why the Court should grant their prayer. It is not a matter of absolute right. That has been held in many cases. The applicants have got to establish cause why the Letters should be called in and the Will proved in solemn form having allowed this length of time to elapse. I think no cause has been shown why we should interfere with the judgment of the learned District Judge. In the result, the appeal fails and must be dismissed with costs.

BEACHCROFT, J.—I agree.

Appeal dismissed.

BHAGWAN DAS *v.* ALLAH BAKHSH.

PUNJAB CHIEF COURT.
CIVIL REVISION NO. 337 OF 1915.
August 5, 1918.
Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.
BHAGWAN DAS—DEFENDANT—PETITIONER
versus
ALLAH BAKHSH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 91, 92, 93—Execution of decree—Sale—Suit for refund of purchase-money by auction-purchaser, maintainability of—Refund of purchase-money, when allowable.

A suit brought by a purchaser at a sale in execution of a decree for the refund of a portion of the purchase-money is not maintainable where it is found, as required by Order XXI, rules 91, 92 and 93 of the Civil Procedure Code, that the judgment-debtor had a saleable interest in the property sold.

It is only where a sale is set aside under rule 92 of Order XXI of the Code that the auction-purchaser can obtain an order for the refund of the purchase-money under rule 93.

Revision from the decree of the Judge, Small Cause Court, Lahore, dated the 7th April 1915.

Mr. *Parduman Das*, for the Petitioner.

JUDGMENT.—The plaintiff purchased a house in execution of a decree obtained by Bhagwan Das against Abdur Rahman and paid the price. On a suit brought by the judgment-debtor's sons it was held that they were the owners of 3/4ths of the house. The plaintiff has consequently sued for the refund of 3/4ths of the price, and the Judge of Small Cause Court has given judgment in their favour, following *Fazal Ilahi* v. *Muhammad Jan* (1).

Bhagwan Das has applied to this Court for revision, and it is contended on his behalf that the suit is not maintainable. This contention is supported by *Gurdit Singh* v. *Ghanaya Lal* (2), in which it was held that a suit brought by a purchaser for the refund of a portion of the purchase-money was not maintainable when it was not found, as required by section 315 of the Civil Procedure Code (old), that the judgment-debtor had no saleable interest in the property.

In the case followed by the lower Court, which was decided by a single Judge, the learned Judge pointed out that whereas section 315 of the old Civil Procedure Code contained a stipulation that it must be found that the judgment-debtor had no saleable interest in the property sold, nothing was said about this in rule 93 of Order XXI of the present Code; and he held that under the present law an auction-purchaser was entitled to recover his purchase-money, or some part of it, even when the judgment-debtor had some saleable interest in the property.

That finding was really an *obiter dictum*, as the auction-purchaser's petition for revision was dismissed on account of the delay in presenting it. Moreover, in coming to that finding the learned Judge omitted to notice that the effect of rule 93 of Order XXI of the present Code, read with the two preceding rules, was really the same as that of section 315 of the old Code. Order XXI, rule 93 of the present Code, entitles the purchaser to an order for payment of his purchase money where the sale is set aside under rule 92. Rule 92 provides for the sale being set aside where an application under rule 89, rule 90, or rule 91 is made and allowed. Rule 91 provides that the purchaser may apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. Reading rules 91, 92 and 93 together, it is clear that the present Code has made no change in the law, on the subject of a purchaser's right to a refund. We hold, therefore, following *Gurdit Singh* v. *Ghanaya Lal* (2), that the suit is not maintainable.

We hold further that the suit must fail also by reason of the fact that the sale has never been set aside. As has been held in *Nannu Lal* v. *Bhagwan Das* (3), it is only when the sale has been set aside under rule 92 that the auction-purchaser can obtain an order for the refund of the purchase-money under rule 93.

We accordingly accept the application, set aside the decree of the lower Court, and dismiss the suit. As the case is a hard one for the purchaser, who has been deprived of 3/4ths of the house while he has paid the price of the whole, we direct that the parties shall bear their own costs throughout.

Application accepted.

(1) 18 Ind. Cas. 795; 76 P. W. R. 1913; 79 P. L. R. 1913.
(2) 114 P. R. 1908.
(3) 37 Ind. Cas. 9; 39 A. 114; 14 A. L. J. 1216.

PO KIN v. MA SEIN TIN.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATION No. 26 OF 1918.

January 13, 1919.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Maung Kin.

PO KIN—APPLICANT

versus

MA SEIN TIN—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 109—Probate and Administration Act (V of 1881), s. 86—Order passed by High Court upon appeal under s. 86—Appeal to Privy Council, whether permissible.

An order passed by the High Court upon an appeal made to it under section 86 of the Probate and Administration Act is final and is not open to further appeal to the Privy Council.

Mr. *Ormiston*, for the Applicant.

Mr. *Lentaigne*, for the Respondent.

JUDGMENT.—This is an application for leave to appeal to the Privy Council against an order passed by this Court in appeal under section 85 of the Probate and Administration Act, 1881. There appears to be no precedent for granting leave in such a case. The right of appeal to the High Court is a special right conferred by section 86 of the Act and is analogous to the special appeal to the High Court allowed by section 54 of the Land Acquisition Act, 1894. In the case of *Rangoon Botatoung Company, Limited* v. *Collector of Rangoon* (1), their Lordships of the Privy Council held that in land acquisition cases no appeal lies to the Privy Council under the Land Acquisition Act. With reference to section 54 they remarked as follows:—"That section seems to carry the appellants no further. It only applies to proceedings in the course of an appeal to the High Court. Its force is exhausted when the appeal to the High Court is heard. Their Lordships cannot accept the argument or suggestion that when once the claimant is admitted to the High Court he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction." These remarks appear to us to apply with equal force to orders passed by the High Court in appeals under the Probate and Administration Act. Mr. Ormiston argues that section 109 of the Civil Procedure Code gives every appellant in the High Court the right to a further appeal against the High Court's decree or final order, and urges that the "final order" mentioned in the section is not necessarily a "final order" in a suit or proceeding under the Civil Procedure Code. We consider, however, that the matter is concluded by their Lordships' decision in the case cited above. If the appellant's right is exhausted in the High Court in cases under the Land Acquisition Act, it is also exhausted in cases under the Probate and Administration Act. It is true that the words "or final order" in section 109 of the Code were introduced only in the Code of 1908, which did not come into force till the 1st January 1909, and the appeal to the Privy Council in *Rangoon Botatoung Company's case* (1) was presented before that date. But it is clear that the Privy Council decision did not proceed on the ground that the wording of section 109 had not yet been enlarged so as to make "final order" appealable as well as decrees. It proceeded on the ground that the right of appeal in section 54, Land Acquisition Act, was a special right distinct from that of an ordinary appellant from a Civil Court's decree or order, and their Lordships construed the right as being restricted to the appeals to the High Court, which is the only Appellate Court mentioned in section 54. There is no room for doubt that their Lordships would interpret section 86 of the Probate and Administration Act in the same manner, and the absence of any precedent for an appeal to the Privy Council in such cases supports the view that no such appeal lies.

The application is, therefore, dismissed with costs; Advocate's fee 3 gold *mohurs*.

Application dismissed.

(1) 16 Ind. Cas. 188; 6 L. B. R. 150; 16 C. W. N 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 5 Bur. L. T. 205 & 207; 40 C. 21; 39 I. A. 197 (P. C.).

KRISHNADHAN BANERJI *v.* SANYASI CHARAN.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 138 AND 140 OF 1916.

January 31, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

KRISHNADHAN BANERJI—PLAINTIFF—APPELLANT

versus

SANYASI CHARAN MANDAL—DEFENDANT—RESPONDENT.

Hindu Law—Dayabhaga—Joint family—Karta, *power of, to bind infant members by act—Trade, ancestral—Minor members, liability of*—Karta, *whether can start new trade*—Karta *appointed guardian of minor member, powers of—Guardian and minor—Guardian, powers of, extent of—Contract Act (IX of* 1872), *ss.* 11, 247, 248—*Partnership—Minor, whether can become partner—Liability of minor partner—Firm, liability of, for debt contracted by partner—Civil Procedure Code (Act V of* 1908), *O. XXI, r.* 49.

An ancestral trade like other property is descendible upon the members of a Hindu undivided family, and in carrying on such a trade infant members of the undivided family are bound by all acts of the manager incidental to and flowing out of the carrying on of that trade, including loans contracted for the purposes of the trade. [p. 599, col. 1.]

The guardian of a minor has no power to start a new business on behalf of his ward so as to make him liable for debts incurred in carrying on such business. [p. 599, col. 1.]

The manager of a joint Hindu family has no power to start a new business so as to bind infant members of the family. [p. 600, col. 1.]

The powers of the *karta* of an undivided Hindu family in respect of a trade started after the death of the ancestor for the benefit of the joint family are not the same as those in respect of a trade started by the ancestor and carried on after his death by the *karta* of the joint family. [p. 600, col. 1.]

The embarking on a new and speculative trade by the *karta* of a joint family cannot be said to be for the benefit of the estate. [p. 600, col. 2.]

The powers of the guardian of a minor appointed under the Guardians and Wards Act of 1890 are more limited than those of the *karta* of a joint family in respect of the property of infant members. [p. 600, col. 2.]

If the *karta* of a joint Hindu family chooses to apply under the Guardians and Wards Act to be appointed guardian of a minor member and is so appointed, he comes under the control of the Court and can no longer exercise the powers of a *karta*. [p. 600, col. 2; p. 601, col. 1.]

The position of a guardian is that of a trustee in relation to his ward, he cannot embark on a new trade on behalf of the ward; at any rate, without the sanction of the Court. [p. 601, col. 1.]

As a minor cannot make any contract at all, he cannot really enter into a contract of partnership. But under section 247 of the Contract Act a minor can be admitted to the benefits of a partnership and, though he cannot be personally liable, the share of such minor in the property of the firm is liable for the obligations of the firm. [p. 602, col. 1.]

To make a firm liable for a debt it is not necessary that the money should have been borrowed in the name of the firm. It is sufficient if the debt was taken by one of the partners for the firm and was appropriated to it. [p. 603, col. 2.]

The liability of a minor member of a joint family in respect of a family trade under section 247 of the Contract Act does not depend upon the powers of the *karta* or the guardian, but upon the question whether the minor was admitted to the benefits of the partnership, and his liability under the section is limited to his share of the partnership properties. His liability under section 248 of the Contract Act depends upon the fact of his having been admitted to the benefits of the partnership and his not having repudiated the partnership on attaining the age of majority. He cannot repudiate the partnership merely by saying so, unless he relinquishes the properties of the partnership received for him by his guardian. But his retention of those properties will not make him personally liable for the obligations of the partnership unless it is proved that he retained them with full knowledge of the facts. [p. 605, col. 2; 606, cols. 1 & 2.]

Appeals against the decrees of the Subordinate Judge, 1st Court, Alipur, dated the 28th February 1916.

Sir *Rash Behary Ghose*, Babus *Samatul Chandra Dutt*, *Harendra Nath Mookerjee*, *Satish Chandra Mookerjee* and *Khetra Gopal Banerjee*, for the Appellant.

Babu *Panchanan Ghose*, for the Respondent.

JUDGMENT.—These two appeals arise out of two suits to recover money, one on a hand-note and the other on a *hath chitta*. In the lower Court four suits were tried together. Appeals have been preferred against the decrees in two only, Suit No. 53 of 1914 corresponding to Appeal No. 138 of 1916 and Suit No. 243 of 1914 corresponding to Appeal No. 140 of 1916.

It appears that one Bhuban Mohan had two Karbars, one for fuel wood at Munshigunge, and another for rice and other articles at Kalibazar. He died in Kartick 1306 (November 1899) leaving five sons, *viz.*, Nilratan, Amullya, Sattya Charan, Fatik and Sanyasi Charan. The last two were minors, and Nilratan, the eldest brother, was appointed guardian of the minors under Act VIII of 1890. The ancestral Karbars, *viz.*, the Munshigunge and the Kalibazar business were carried on, on behalf of the joint family, by Nilratan as Karta, assisted by the other two adult brothers. A new Karbar in rice at Orphangunge was started after the death of Bhuban Mohan and carried on on behalf of the joint family. The plaintiff in Suit No. 53 alleges that for the purposes

of the joint family Karbars Rs. 5,000 was borrowed from him on a hand-note on the 7th June 1908, which was executed by Nilratan, Amullya and Sattya Charan. The plaintiff in Suit No. 243 bases his claim on a *hath-chitta* for Rs. 19,700, dated 1st October 1909, and executed by the four elder brothers, Fatik having then attained majority.

It appears that the family Karbars failed and the other sons of Bhuban Mohan have been declared insolvents. Some of the creditors attempted to have the defendant Sanyasi Charan also declared an insolvent but were unsuccessful. In the course of the insolvency proceedings, Nilratan was replaced by the one Motilal Roy as guardian of the minor Sanyasi Charan. The plaintiffs have shared in the distribution of the assets of the insolvents and they seek to recover the balance of debts, due to them from the defendant Sanyasi Charan alone. The Court below has held that the defendant is not liable and the plaintiffs have appealed.

There can be no doubt, that the Orphangunge business was not an ancestral business. The two ancestral Karbars, *viz*, those at Munshigunge and Kalibazar were carried on under the style of Bhuban Mohan-Nilratan, and the Orphangunge business stood in the name of Nilratan alone. The plaintiff's own witness No. 7 stated that it was started 3 years after Bhuban's death, and upon the whole evidence there is no doubt that it was started by Nilratan after Bhuban's death. It was suggested that the Orphangunge business was merely a branch of the Karbars at Munshigunge and Kalibazar, but the mere fact that sometimes money used to be taken from one firm for the other firm does not show that the Orphangunge firm was a branch of the other two.

Then the question is whether the money raised on the hand note and *hath-chitta* in suit was borrowed for the ancestral business or for the Orphangunge business. The money raised by the *hath-chitta* is credited in the Orphangunge accounts. The hand-note money is not credited in any of the account books produced in the case. Some interest paid to the plaintiff appears to have been debited to the accounts of the Katgola business but the learned Subordinate Judge observes: "I have been asked to infer from it that the loan was taken for this firm. No such inference ought to arise and this for two reasons. Firstly, because the Exhibits noticed [Exhibits 2 (4), 2 (5), 3 (1) and 3 (3)] do not say that it was for a particular hand-note that the payments were made, and secondly, because we find it debited in the same accounts as interest paid upon *hath-chitta* money undoubtedly taken for Orphangunge business. The reason for such anomaly seems to be that the Orphangunge business having been started for the benefit of the family, Nilratan did not consider it of any importance whether the interest was paid from the fund of that business or any other *iymali* fund. The hand-note and the *hath-chitta* do not show that the loans were on the credit of the ancestral firm, and when the defendant denied that they were taken for the ancestral firm, it was incumbent upon the plaintiffs to prove the affirmative. This they failed to do. The conclusion, therefore, is that the loans in question were not taken for the benefit of the ancestral firms. That they were taken for the Orphangunge firm can be accepted as established."

It may be that the exhibits referred to above relate to payment of interest to the plaintiff on account of the hand-note in suit, but we agree with the Court below in holding that the Orphangunge business having been started as a joint family business, it was of no consequence that the interest on the hand-note was paid from the Katgola business, and the said fact does not prove that the money borrowed on the hand note was required for the ancestral business.

Exception is taken to the finding of the learned Subordinate Judge that the ancestral Karbars did not require any borrowing, and we are referred to the mortgage bond dated 3rd April 1901 (21st Chait 1307), by which Rs. 6,000 was taken and in which it was stated "there being necessity for money for our business." It was recited that moneys had been taken on *hath chitta* on several dates from the 25th Magh 1307, the last item of Rs. 500 having been taken on the date of the bond. It is pointed out that Bhuban Mohan died in Kartick 1306 (November 1899) and the mortgage bond was executed after the death of Bhuban but before the Orphangunge business was started in 1308. The learned Subordinate Judge may

be wrong in saying that no money was required for the ancestral business but it does not prove that the loan taken under the hand-note was required for the ancestral business, and it was for the plaintiff to prove affirmatively that it was so required, in order to bind the minor. We need not discuss the evidence in detail. We agree with the Court below in holding that it is not proved that the money under the hand-note and *hath-chitta* was required for the ancestral business.

The next question is, whether the defendant is liable for the debts incurred by Nilratan for carrying on the Orphangunge business. We have been referred to various authorities in support of the proposition that a member of a joint Hindu family is liable for debts incurred by the manager for the purpose of carrying on a family trade. But they are cases where the debts were contracted by the manager for carrying on an ancestral family trade. An ancestral trade like other property is descendible upon the members of a Hindu undivided family, and in carrying on such a trade infant members of the undivided family are bound by all acts of the manager incident to and flowing out of the carrying on of that trade, including loans contracted for the purposes of the trade. [See Sausse, C. J., in *Ramlal* v. *Lakhmichand* (1), *Johurra* v. *Sreegopal* (2), *Joykisto Oowar* v. *Nittyanund Nundy* (3), *Bemola Dossee* v. *Mohaun Dossee* (4) and *Rampartab Samrathrai* v. *Foolibai* (5), see also *Sakrabai* v. *Maganlal* (6).] But the Orphangunge business was not ancestral trade and was started by Nilratan sometime after the death of the father. Nilratan was appointed guardian of the defendant who was then a minor under Act VIII of 1890. We do not think that a guardian has any power to start a new business on behalf of the ward so as to make him liable for debts incurred in carrying on such trade. It is contended that Nilratan was Karta of the family, and that the powers of a Karta in respect of a trade started after the death of the ancestor for the benefit of the joint family are the same as those in respect of a trade started by the ancestor and carried on after his death by the Karta of the joint family; but we do not think that they stand on the same footing. In the latter case the trade is started by the ancestor, and the Karta of a joint Hindu family has power to manage such a trade like any other family property which has descended from the ancestor. As pointed out by Sausse, C. J., in *Ramlal* v. *Lakhmichand* (1) cited above: "Were such a power not implied, property in a family trade which is recognized by Hindu Law to be a valuable inheritance would become practically valueless to the other members of an undivided family wherever an infant was concerned, for no one would deal with a manager, if the minor were to be at liberty on coming of age to challenge as against third parties the trade transactions which took place during his minority. The general benefit of the undivided family is considered by Hindu Law to be paramount to any individual interest, and the recognition of trade, as inheritable property, renders it necessary for the general benefit of the family that the protection which the Hindu Law generally extends to the interests of a minor should be so far trenched upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation of that family property: but that infringement is not to be carried beyond the actual necessity of the case." Can the same principle be applied where a new trade is started by the manager of the family after the death of the ancestor? The manager may embark on a new and a speculative trade on behalf of the joint family which in one event may be highly beneficial to the family, but may also result in ruin to the family, and to hold a minor member of the family liable for debts incurred in carrying on such a trade would be to place the interests of minors at the mercy of the Karta. In the present case the father left two profitable Karbars, *viz.*, the Munshigunge and the Kalibazar Karbars, and the starting of the Orphangunge business cannot, therefore, possibly be justified on the ground of necessity, assuming that the starting of a Karbar can be justified on such a ground in any case.

The Court below relied upon the cases

(1) 1 B. H. C. R. App. 51.
(2) 1 C. 470; 1 Ind. Dec. (N. S.) 293.
(3) 3 C. 738 (F. B.); 2 C. L. R. 440; 3 Ind. Jur. 117; 1 Ind. Dec. (N. S.) 1053.
(4) 5 C. 792; 6 C. L. R. 34; 2 Ind. Dec. (N. S.) 1112.
(5) 20 B. 767; 10 Ind. Dec. (N. S.) 1082.
(6) 26 B. 206; 3 Bom. L. R. 738.

of *Makhun Lall Dutt* v. *Ram Lall Shaw* (7) and *McLaren Morrison* v. *Verschoyle* (8) in support of the proposition that the manager of a joint family has no power to start a new business so as to bind the infant members. It is contended on behalf of the appellant that those cases, far from supporting the proposition for which they are cited by the Court below, really support the opposite contention. It is pointed out that in the first case, the father left a gold and silver business, and the two elder sons started a new business in rice in partnership with others, and the profits of the new business were appropriated exclusively by the eldest brother (and the other partners who were strangers to the family). The learned Judge in that case observed:—"It is difficult to see what power the elder brother had to start this new business so as to bind the infants, for it is not suggested that the eldest brother did so as Karta of the family or that there has been any subsequent ratification by the minors." Reliance is placed upon the observation that there was no suggestion that the eldest brother started the new business as Karta as indicating that a Karta has the power, and also upon the fact that the new business was a new line of business. In the second case, *Mc. Laren Morrison* v. *Verschoyle* (8), Stanley, J., after referring to the case of *Ramlal* v. *Lakhmichand* (1), observed :—"The business, however, which Bepin embarked on was not the ancestral business but an entirely new business. The advances made by the plaintiffs to Bepin were not made in the course of the ordinary transactions of the ancestral business, and were not, so far as I have been able to discover, made for the benefit of the joint family. Therefore, I am unable to hold that the other members of the family are bound by his acts or responsible to the plaintiffs for the advances made to him." We are of opinion that the observations in the first case that there was no suggestion that the eldest brother started the new business as Karta, and in the second that the transactions entered into by Bepin were not made for the benefit of the joint family, were additional grounds for holding that the other members were not bound by the acts of the eldest brother and in any case were *obiter*. As for the fact that the new business in the two cases was a new line of business, we do not think that that makes any difference in principle. Suppose the father leaves a small business in rice (say worth one thousand rupees) and the eldest son as Karta starts a new business in rice on an extensive scale dealing with lacs of rupees, would the minor brother be bound by debts incurred for carrying on such trade on the ground that it is in the same line of business? We think the distinction is to be drawn between an ancestral trade and a new trade started after the death of the ancestor by the manager of the family, and not one between the same line of business and a new line of business.

It is contended that the new rice business was started for the benefit of the family, and was for a time a very lucrative one, and that the minor, therefore, should be held bound by debts incurred in carrying on such business. In the recent case of *Palaniappa Chetty* v. *Deivasikamony Pandara* (9) Lord Atkinson held that the phrase "benefit of the estate", as used in the decisions with regard to the circumstances justifying an alienation by the manager for an infant heir or by the trustee of a religious endowment, cannot be precisely defined, but includes the preservation of the estate from extinction, its defence against hostile litigation, its protection from innundation, and similar circumstances, and we think that the embarking on a new and speculative trade by the Karta of a family cannot be said to be for the benefit of the estate.

But whatever the powers of a Karta may be, the powers of a guardian are more limited. Nilratan, as already stated, was appointed guardian of the minor Sanyasi Charan under Act VIII of 1890, and his powers as guardian are governed by the provisions of that Act. If the Karta of a joint Hindu family chooses to apply under Act VIII of 1890 for being appointed a guardian of a minor and has been appointed

(7) 3 C. W. N. 134.
(8) 6 C. W. N. 429.

(9) 39 Ind. Cas. 722; 44 I. A. 147; 26 C. L. J. 153 at p. 162; 21 C. W. N. 729; 15 A. L J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 477 & 507; 40 M. 709; 6 L. W. 222 (P. C.).

as such guardian, he comes under the control of the Court and can no longer exercise the powers of a Karta. We were referred to the case of *Gharibullah* v. *Khalak Singh* (10), where one of the three brothers constituting a joint family was a minor in respect of whom his mother was appointed guardian. In a suit upon certain mortgages executed by the Karta, the adult brother and mother of the minor, it was held by the Judicial Committee that the mortgages must be considered to be mortgages by the family entered into by the Karta of the family with the concurrence of the other adult member of the family, and could, so far as they were found to have been made for the benefit of the family and for legal necessity, be enforced against all the members, and the objection raised that the guardian of the minor had not obtained sanction of the Court for the mortgage was overruled. But that was a case of a Mitakshara family, and it was pointed out by their Lordships that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family, such interest not being individual property, and, therefore, not property with which a guardian, if appointed, would have anything to do. Moreover, that case had nothing to do with the powers of a Karta to start a new trade.

In the present case the family is governed by the Dayabhaga, and the minor had a definite share in the ancestral property in respect of which a guardian could be appointed. Section 27 of the Guardians and Wards Act (VIIi of 1890) provides that a "guardian of the property of a ward is bound to deal therewith as carefullly as a man of ordinary prudence would deal with it if it were his own; and subject to the provisions of this chapter, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property." That section deals with the powers of a guardian with respect to the property of the *minor*, *viz.*, the property of which the guardian assumes charge and it cannot be said that the starting of a *new* trade is reasonable and proper for the benefit of the property. The position of the guardian is that of a trustee in relation to the ward; he cannot embark on a new trade, at any rate without the sanction of the Court; and it is not possible for the Court to keep control over the doings of a certificated guardian if he is allowed to carry on a trade. On the whole we are of opinion that a certificated guardian cannot start a new trade for the benefit of his ward, at any rate, without the sanction of the Court.

The last contention is that the defendant, having received certain properties acquired from the funds of the Orphangunge business, on partition with his brothers, is liable for the debts of the firm, at any rate, to the extent of the properties so received. It appears from the account-books of the Orphangunge firm, Exhibit i (i) that certain properties [74, 74 (1) and 75, Mansatola Lane] were purchased with the funds of that firm, part of the purchase-money having been borrowed. It also appears from Exhibit (4) and the evidence of Shib Chandra Banerjee, witness No. 5 for the plaintiff, that a sum of Rs. 50 was paid from the Orphangunge firm to a creditor of the ancestral business. Exhibits 5 (3), 5 (6) and 5 (9) show that certain monies were borrowed from Hirendra Nath Mondal (son of Nilratan Mondal) for the Orphangunge firm, and the identical currency note was paid for purchasing another property 27, Gurbari Road, which was also partitioned by the arbitrator.

The decree in the partition suit (No. 136 of 1912), dated the 7th January 1913 (Exhibit 41), brought by the Receiver to the estate of the insolvent brothers (Nilratan and others) against the defendant by his certificated guardian, Motilal Roy, shows that No. 75, Mansatola Lane, along with other properties were allotted to the share of the defendant, and Nos. 74 and 74 (1) together with other properties were allotted to the share of the insolvents. The defendant was a minor then, but it is contended that after attaining majority he did not repudiate the act of his guardian, but elected to ratify it by retaining such properties, and that having done so, he is liable for the debts of the firm. Section 247 of the Contract Act provides that a minor may be admitted to the benefits of a partnership, and though

(10) 25 A. 407 (P. C.); 30 I. A. 165; 5 Bom. L. R. 478; 7 C. W. N. 681; 8 Sar. P. C. J. 483.

he cannot be made personally liable for any obligation of the firm, the share of such minor in the property of the firm is liable for the obligations of the firm.

In the case of *Mohori Bibee* v. *Dharmodas Ghose* (11) it was settled by the Judicial Committee that a minor cannot make any contract at all. In view of that decision a minor cannot really enter into a contract of partnership. But section 247 lays down that a minor can be admitted to the benefits of partnership and though he shall not be personally liable, the "share of such minor in the property of the firm is liable for the obligations of the firm." This statutory provision is not the less imperative by reason of the now established interpretation of section 11 and that interpretation cannot take away the force of section 247. The Judicial Committee itself, referring to sections 247 and 248 in support of the proposition that a minor is incapable of entering into a contract, observed: "Again under sections 247 and 248, although a person under majority may be admitted to the benefits of a partnership, he cannot be made personally liable for any of its obligations although he may on attaining majority accept those obligations if he thinks fit to do so."

Several contentions have been raised on behalf of the respondent against the applicability of the provisions of section 247 to the present case. The first is that a case under section 247 of the Contract Act was not made in the plaint nor was any issue raised upon the point. It is true that the plaintiff alleged that all the Karbars were ancestral, but it was distinctly alleged in the plaint that the "Karbars were carried on for the benefit of the defendant and the defendant has been benefited therefrom, and from the assets of the said Karbars considerable, moveable and immoveable, properties have been acquired. The said defendant has been enjoying the same as partner thereto and his ancestral debts have also been paid off and he has thus got his share in ancestral properties free from incumbrance." So that although section 247 of the Contract Act was not referred to, the fact of the defendant having been admitted to the benefits of the Karbars was alleged in the plaint. The defendant denied the allegations and asserted that he had nothing to do with the Karbar. The fourth issue raised the question: "Is the defendant liable for the debts sought to be recovered? If so, what would be the extent of his liability?" and it was wide enough to cover a case under section 247. The question was gone into by the Court below, and we are not satisfied that the defendant has been prejudiced by the omission to frame a specific issue on the point.

The next contention is, that a minor cannot be said to be "admitted to the benefits of partnership" unless there is some consentient act on his part, in other words, that he must enter into an agreement, although such an agreement is invalid according to law. We were referred to certain observations of Sale, J., in the case of *Lutchumanen Chetty* v. *Siva Prokasa Modeliar* (12), *viz.*, that a Hindu infant "can only become a member of the partnership by a consentient act on the part of himself and partners" and similar observations in the judgments of some of the learned Judges in the case of *Official Assignee of Madras* v. *Palaniappa Chetty* (13). No doubt, it is necessary that there should be some consentient act on the part of the adult partners but it is difficult to see how a minor, who is incompetent to contract, can enter into an agreement or give his consent to an agreement. In the Calcutta case, however, what was actually decided was that a minor member of a joint Mitakshara family need not be joined as a co-plaintiff in a suit by the father to recover a trade debt and that decrees obtained in such suits by or against the managers of the business are presumed to have been obtained by or against them in their representative capacity and are binding on the whole joint family. In the Madras case, Spencer, J., observed "a definite and conscious act on the part of other partners is needed for admitting a minor to the benefits of partnership. I do not find that

(11) 30 C. 539; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374 (P. C.).

(12) 26 C. 349; 3 C. W. N. 190; 13 Ind. Dec. (N. S.) 826.

(13) 49 Ind Cas. 220; 41 M. 824; 24 M. L. T. 216; 35 M. L. J. 473; 8 L. W. 530; (1918) M. W. N. 721.

it has been anywhere defined what are the acts which would constitute admission to the benefits of partnership. Mr. Justice Abdur Rahim considers that it implies some definite act such as the allotment of a share or the distribution of a part of the profits or something of an analogous character.....I am clearly of opinion that admission to the benefits of partnership means something more than the mere incident of birth in a particular family." Sadasiva Aiyar, J., on the other hand, was of opinion that partnership in a family business does not depend upon the consent of the partners in many cases, but upon the family being a trading family and the business being conducted for the benefit of the family, persons born into the family from time to time becoming partners as a matter of course.

In the present case the Karbar was started long after the birth of the minor, and we are of opinion that the defendant was admitted to the benefits of the partnership. The Karbar was started and carried on as a joint family business. So long as the family is joint, no specific allotment or distribution of profits is made among the members, but the accounts show that family expenses and even litigation expenses of the joint family of which the defendant was a member were met from the funds of the Karbar, the minor was joined as co-plaintiff in suits for recovery of money due to the Karbar, and lastly the decree in the partition suit (already referred to) shows that properties acquired from the funds of the Karbar were allotted to the minor. It does not appear that the minor stood on a different footing from the adult members of the family for the benefit of which the Karbar was started and carried on. All these go to show that the minor was admitted to the benefits of the partnership, and this disposes of another contention raised on behalf of the respondent that he was not admitted to all the benefits of the partnership.

It is further contended on behalf of the respondent that even if section 247 of the Contract Act applies to this case, the debts due to the plaintiffs are not shown to be the debts of the partnership because the hand-note sued upon was executed by the adult brothers not in the name of the firm, nor was it shown that the loan was necessary for the purposes of the firm. But each partner is an agent for the others, and it is not necessary that the name of the firm should be used in order to make it a partnership debt, provided it is shown that the debt was taken for, and appropriated to, the firm. The money on the hand-note is not credited in the account-books produced, but interest on it was paid from the Orphangnuge firm. The plaintiff stated in his evidence that the loan was taken for the Karbars, and the Mohurir of the defendant himself admitted that loans were taken for the Orphangunge business though he did not refer specifically to the loan raised on the hand-note. The money raised on the *hath chitta* in the other case (Appeal No. 140) is credited in the books of the Orphangunge firm. The controversy between the parties in the Court below was mainly with reference to the question whether the loans were taken for the Orphangunge Karbar or for the ancestral Karbars, and the Court below held: "That they were taken for the Orphangunge firm can be accepted as established." We agree with that finding of the Court below.

It is also contended that any property which might have been received by the defendant on partition ceased to be partnership property after partition and is, therefore, not liable for any partnership debt. We were referred to Lindley on Partnership (pages 397, 398) where it is stated: "It is competent for partners by agreement amongst themselves to convert that which was partnership property into the separate property of an individual partner or *vice versa*. And the nature of the property may be thus altered by any agreement to that effect."

The partnership properties in the present case, however, were partitioned after the business had failed and the shares of the adult partners had vested in the Receiver. There were debts due by the firm. In these circumstances the partners could not by the mere expedient of dividing the properties among themselves prevent the creditors from following the partnership properties. It is said that the fact that the Receiver in insolvency was himself the plaintiff in the partition suit precludes any suggestion of fraud. But the partition took place pending the appeal preferred by the defendant

against the Receiver and the appeal by certain creditors against the defendants: see *Sonyasi Charan Mandal* v. *Asutosh Ghosh* (14). In that case it was held upon the objection of the defendant that the Receiver could not deal with the share of the defendant, and that the "creditor also may, if so advised, pursue his remedy, if any, against the infant in a suit properly framed for the purpose." The appellant in Appeal No. 140, a creditor, was a party to the said appeals. In these circumstances we think that the mere fact that there was a partition of the partnership properties does not absolve the properties received by the defendant from liability for the debts of the firm. This brings us to the question whether any particular creditor can follow the properties received by the defendant as the properties of the partnership. It was contended before the lower Court, as well as in this Court, that such properties, if considered as partnership properties, are liable to the whole body of the creditors of the firm represented by the Receiver in insolvency and not to any particular creditor. This contention was upheld by the Court below and we were inclined to accept that view before these appeals were re-argued. It appears, however, from the insolvency proceedings that the District Judge in those proceedings, on the objection of the defendant, then an infant, dismissed the application of the creditors for adjudication of the infant as an insolvent, but granted it, with regard to the four other partners, and appointed a Receiver of all the four businesses and of all the properties purchased since the death of Bhuban, and four-fifths only of the other properties alleged to have been inherited by all the brothers from their father. Two appeals were preferred against the said order, one by the infant and the other by the creditors. The infant objected to the validity of the order on the ground that the Receiver was not competent to realize the assets of the Karbars and of the properties acquired since the death of his father, as the property of his four insolvent brothers alone had vested in the Receiver who was consequently competent to realise a four-fifths share only of the assets of the partnership business as also of the after-acquired properties. The objections urged by the creditors were that the infant should have been adjudged an insolvent, and that in any view the Receiver was entitled to realise the whole of the properties inherited by the five brothers from their father.

This Court, accepting the contention of the infant, held that the Receiver merely replaced the insolvent partners in respect of the business of the firm, and that he could not deal with assets other than those belonging to the persons who had been adjudicated insolvents. The learned Judges further observed:—"The essence of the matter is that the share of the infant has not vested in him, and he is consequently not entitled to deal with it. The Receiver may, if so advised, institute a suit for dissolution of the partnership in which appropriate proceedings may be taken for realization of the assets. The creditor also may, if so advised, pursue his remedy, if any, against the infant in a suit properly framed for enforcement of his claim. But whatever remedies may be available hereafter to the Receiver or to the creditor, it is clear that the properties of the infant cannot be dealt with by either of them in these proceedings." In the result the creditors' appeal was dismissed and the infant's appeal allowed. The Receiver, who was examined in the present case, says that the minor's one-fifth share of the after-acquired properties had to be given up to him under the orders of the High Court.

The position thus taken up by the minor in those proceedings was that the Receiver could not deal with his share, and he cannot now contend that it is only the Receiver (and not any individual creditor) who can deal with his share of the partnership properties. It is urged, however, that according to the observations made by the learned Judges in that case, it is open to the Receiver as representing the insolvent partners to apply for dissolution of the partnership and then to get the assets realized, and to insist upon payment of the partnership debts, and that the Receiver as trustee for the body of the creditors can distribute the assets. The Receiver has not up to date taken any steps for dissolution of part-

(14) 26 Ind. Cas. 836; 42 C. 225.

nership and the debts due to the firm have been barred by limitation. Had not the defendant opposed the Receiver in those proceedings, the Receiver could have realised and distributed the entire assets. The learned Judges in these proceedings (to which one of the creditors, the appellant in Appeal No. 140, was a party) observed:—"The creditor also may, if so advised, pursue his remedy, if any, against the infant in a suit properly framed for enforcement of his claim." We think that in these circumstances the plaintiffs can follow the minor's share of the partnership properties. Then it is said that in any case the minor alone cannot be sued, and that the Receiver also must be joined in a suit relating to the partnership. But although a minor who has been admitted to the benefits of a partnership does not stand on the same footing as an ordinary partner, his share of the partnership property is liable for the obligations of the firm. That being so, he becomes jointly and severally liable like adult partners, though that liability is limited to his share of the partnership property. The Receiver, therefore, is not a necessary party to the suit.

It is also contended that in order that a partnership property may be made liable, the suit must be brought against the firm, and reliance is placed upon the provisions of Order XXI, rule 49 (1), which provides that property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such. But the rule is subject to the proviso: "Save as otherwise provided by this rule," and clause (2) of the rule lays down that the Court may on the application of "the holder of a decree against a partner" charge the interest of a partner in the partnership property with payment of the decretal amount, appoint a Receiver of such share, direct accounts and enquiries and order a sale of such interests. So that a decree against an individual partner is clearly contemplated by the rule.

It is impossible, however, to say whether the properties acquired from the funds of the Orphangunge business allotted to the defendant on partition represented his share in that business, or represented his share generally in the ancestral properties and the properties acquired from the funds of the ancestral business, without taking a general account of the estate left by Bhuban Mohan and the Karbars. There is no prayer in the plaint for taking such accounts, but there is the general prayer, and in the case of *Joykisto Cowar* v. *Nittyanund Nundy* (3) accounts were directed to be taken though there was no claim for accounts. We think that in the circumstances of the case, and for the ends of justice, the accounts should be gone into for determining the said questions.

We ought to have noticed another contention raised on behalf of the respondent, *viz.*, that once it is found that the Karta or guardian had no power, there is no liability of the minor even to the extent of his share of the partnership properties under section 247, nor is he personally liable under section 248 of the Contract Act. But the liability of a minor under section 247 does not depend upon the powers of the Karta or guardian, but depends upon the question whether the minor was admitted to the benefits of the partnership, and his liability under the section is limited to his share of the partnership properties. The liability under section 248 depends upon the fact of his having been admitted to the benefits of partnership and his not having repudiated the partnership on attaining the age of majority.

Then the question arises whether the defendant is personally liable for the debts of the firm having regard to the provisions of section 248 of the Contract Act. It is contended on behalf of the appellant that the defendant, having been admitted to the benefits of partnership during his minority, became liable for all obligations incurred by the partnership, as he did not give public notice of his repudiation of the partnership. As stated above, the guardian of the defendant did take some properties acquired out of the funds of the Orphangunge Karbar under the partition decree. When the present suit was brought the defendant was still a minor, and his guardian in the written statement repudiated all connection with the Orphangunge Karbar. The defendant on attaining majority accepted the said written statement. But

it is contended on behalf of the appellant that there was no public notice given by the defendant of his repudiation of the partnership, that the defendant retained some properties acquired out of the funds of the Orphangunge Karbar, and there could be no repudiation of the partnership so long as the benefit obtained was not given up by the defendant, and that the defendant so long as he retained the properties could not be said to have repudiated by merely asserting in the written statement that he had no concern with the Karbar. The defendant, on the other hand, contends, first, that at the time when he attained majority the firm had ceased doing any business, secondly, that by accepting the written statement filed by his guardian he had repudiated the partnership and that it was not necessary to give up what had been already received by his guardian in order that the repudiation might be complete, and lastly, that there is nothing to show that the defendant retained any such property with full knowledge of the facts, so that it might be said that he had exercised the option of accepting a personal liability by retaining such property.

As regards the first point, *viz.*, that the firm had ceased to do any business at the time when the defendant attained majority, there is no doubt that the Karbars had failed at that time and business was stopped. But, although the Karbars had failed, they had not been wound up, and the partnership, therefore, cannot be said to have come to an end. With regard to the second point, we think that the defendant cannot be said to have repudiated the partnership merely by saying so, unless he relinquished the properties received for him by his guardian. The last ground, however, appears to be one entitled to consideration. We have already seen that it is not clear whether the properties acquired out of the funds of the Orphangunge Karbar and allotted to the defendant were so allotted as his share of the said Karbar, or as part of his share generally of the ancestral properties, and that question will have to be gone into. But even if it be found that the properties were obtained by his guardian as the minor's share of the Orphangunge Karbar, it does not follow that the defendant retained them with the knowledge that it was his share of the Orphangunge Karbar.

It is to be borne in mind that the plaintiff's case in the present suit was that all the Karbars were ancestral. Even now an enquiry is necessary and accounts will have to be gone into in order to determine whether some of the properties allotted to the defendant under the partition decree were allotted to him as his share of the Orphangunge Karbar or as part of his share in the ancestral properties generally. The defendant was a minor even when the written statement was filed in the present suit by his guardian and he accepted that written statement shortly after attaining majority. The question in whether the defendant had knowledge of all the facts and retained the benefit with knowledge that it was on account of the Orphangunge Karbar, was not gone into the Court below, as the question was not specifically raised in the pleadings. It would be inequitable to hold that the defendant made himself personally liable for all the obligations of the firm merely because he retained some property acquired out of it, without finding whether he elected to affirm the partnership with knowledge of the facts. In all these circumstances, we think that for the ends of justice an enquiry ought to be made as to whether the defendant retained the properties with the knowledge that it was on account of the Orphangunge Karbar, and not on account of the ancestral Karbars and properties.

In the result we direct a general account to be taken by the Court below with respect to the Karbars and the properties left by Bhuban Mohan. The Court will determine on taking such accounts whether any property was allotted to the defendant as his share of the Orphangunge Karbar or as part of his share of the ancestral properties and properties acquired out of the funds of the ancestral Karbars generally. In the first case any such property received on behalf of the defendant will be liable for the claim of the plaintiffs. In the latter case the plaintiffs' claim will have to be dismissed. If the finding on the above point is in the plaintiffs' favour, the Court below will have also to find whether

the defendant on his attaining the age of majority retained any such property with full knowledge of the facts and with the knowledge that such property was received by his guardian on his behalf as his share of the Orphangunge Karbar, in which event only the defendant will be liable personally for the plaintiffs' claim.

It appears that the issues other than the 4th issue were not dealt with by the Court below, as the decision on the 4th issue alone was sufficient for the disposal of the cases. The Court below will, therefore, try all those other issues.

The decrees of the Court below are set aside and the suits remanded for disposal in accordance with the remarks made above. Costs to abide the result.

Appeals allowed; *Cases remanded.*

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1223 OF 1918.

June 21, 1918.

Present:—Mr. Justice Broadway.

Musammat GAURAN—JUDGMENT-DEBTOR—APPELLANT

versus

BRIJ RAJ SARAN—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *O. XLI, r.* 19—*Appeal, dismissal of, for default—Re-admission—Sufficient cause*—Bona fide *mistake of Pleader.*

An act of negligence or a mistake on the part of an appellant's Pleader cannot be regarded as a sufficient cause within the meaning of the law, to set aside an order dismissing an appeal in default of appearance. At the same time, it is discretionary with the Court to pass an order of restoration, if it considers that a case for such an order is made out although the case may not amount to a "sufficient cause". [p. 607, col. 2.]

Thus, where an appellant was notified that his appeal would be heard on the 16th July, but his Pleader by an error noted in his diary the date of hearing as the 17th July and on that date appeared, and learnt that the appeal had been dismissed in default on the previous day and immediately applied for restoration of the appeal:

Held, that as the default was not intentional and was due to an error on the part of the appellant's Pleader, the case was one in which an order for the restoration of the appeal should be made. [p. 608, col. 1.]

Miscellaneous first appeal from the order of the District Judge, Ambala, dated the 4th January 1918.

Lala *Fakir Chand*, for the Appellant.

Lala *Jagan Nath*, for the Respondent.

JUDGMENT.—The facts of this appeal are as follows:—In April 1917 the District Judge of Ambala fixed the 16th of July 1917 for the hearing of an appeal filed by the present plaintiff. The appeal was to be heard at Simla and the notice of date was sent to the appellant's Counsel only. On this notice the date was clearly given as the 16th of July 1917 and it was served on the appellant's Pleader on the 21st April 1917. By an error the Pleader entered the date in his diary as the 17th of July 1917, and on that date, *i. e.*, the 17th of July 1917, he appeared at Simla before the learned District Judge to find that his appeal had been dismissed in default on the previous day. He at once filed an application for restoration of the appeal which was, however, dismissed on the 4th January 1918 and against this order of dismissal the present appeal has been preferred through Mr. Fakir Chand and I have heard Lala Jagan Nath for the respondent. Lala Fakir Chand contended that the non-appearance of his client as well as of his Pleader was due to a misunderstanding and was in no way intentional. In this I agree, for there can be no doubt that the appellant would not have gone to the expense of taking Counsel to Simla the day after the hearing of the appeal itself. I do not, however, think that this negligence or mistake on the part of the appellant's Pleader can be regarded as a sufficient cause within the meaning of the law. At the same time it is within the discretion of the Court to pass an order of restoration, if it considers that a case for such an order is made out although the case may not amount to a "sufficient cause." In this view I am supported by *Somayya* v. *Subbamma* (1) cited by Lala Fakir Chand. Lala Jagan Nath contended that on the merits of the appeal itself restoration should not be ordered. I am, however, not prepared to go into the merits of the appeal, inasmuch as that is for the learned District Judge to consider. In my opinion, inasmuch as the default was not intentional and was clearly due to an error

(1) 26 M. 590.

on the part of the appellant's Pleader I think the appeal should have been restored, and I accordingly accept this appeal and setting aside the order of dismissal in default return the case to the learned District Judge for disposal on the merits. The appellant will, however, have to pay the sum of Rs. 32 to the opposite party before his appeal is heard; and the learned District Judge should fix a date for the payment of the costs I have ordered in his Court. Should the costs be not paid by the date fixed by the learned District Judge he will dismiss the appeal.

Appeal accepted.

LOWER BURMA CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 69 OF 1917.

February 5, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

GYAN SHI—APPELLANT

versus

KIN TWE—RESPONDENT.

Buddhist Law, Chinese—Adoption—Letters of Administration to estate of deceased Chinese, whether can be granted to widow for benefit of adopted son.

K. T. applied for Letters of Administration to the estate of *T. F.*, a Chinese Buddhist, alleging that she was the deceased's widow and that *A. W.* was their adopted son. *G. S.* opposed the application on the ground that she was the deceased's widow and not *K. T*, who was merely a concubine. The District Judge granted *K. T*'s application leaving the question of the status of *G. S.* to be decided in a regular suit. *G. S.* appealed to the Chief Court objecting that *A. W.* was not entitled to inherit: *T. Y.*, a paternal uncle of the deceased, also objected to *A. W.*'s adoption:

Held, that among Chinese Buddhists a person belonging to the same clan as the deceased and with the same surname may be regarded as an agnate; that as *A. W.* belonged to the same clan, and his father had the same surname as the deceased, *prima facie* he fell within the clan of agnates of the deceased; that so far as the question of Letters of Administration was concerned, the objection to his adoption should not prevail; and that, in the circumstances, *K. T.* was entitled to Letters of Administration for the minor *A. W*'s use and benefit. [p. 609, col. 2.]

Mr. *J. R. Das*, for the Appellant.

Mr. *P. N. Chari*, for the Respondent.

JUDGMENT.—The respondent Kin Twe applied for Letters of Administration to the estate of Tan Foke Shaing, a Chinaman deceased, alleging that she was his widow and that during their married life they had adopted a minor son, At Wah. The application was opposed by the present appellant Gyan Shi, who alleged that she was the wife of the deceased and that Kin Twe was merely a concubine. The District Court after hearing the evidence granted Letters to Kin Twe as widow and left the question of Gyan Shi's status to be decided in a regular suit.

No evidence was recorded as to the religion of the deceased. If he was a Confucian only, then the case would be governed by the Indian Succession Act and the widow or widows would be entitled to a share, but if he was a Buddhist the widows under the Chinese Customary Law would apparently be entitled only to maintenance and the adopted son, if his status were proved, would be the sole heir of the deceased.

It is inexpedient to grant Letters of Administration without coming to a conclusion as to whether the estate is to be administered under the Probate and Administration Act or the Indian Succession Act.

The case will, therefore, be remanded to the District Court for further enquiry in accordance with the above observations. The evidence already taken may be treated as evidence in the case. The points to be decided are, whether Tan Foke Shaing was a Confucian only or whether he was a Buddhist as well and, in the latter case, whether the boy At Wah was his adopted son, and if so, who would be the proper person to be granted Letters under section 33, Probate and Administration Act, for the minor's use and benefit.

The record with the additional evidence and the findings with reasons, therefore, should be submitted to this Court for final orders.

A copy of a recent judgment of this Court [in Civil First Appeal No. 68 of 1916 *Kyin Wet* v. *Ma Gyok* (1)] is annexed to this judgment for the guidance of the District Court in dealing with the question of the deceased Chinaman's religion.

The District Court has found that the deceased was a Buddhist. We consider

(1) 47 Ind. Cas. 148; 9 L. B. R. 179, 12 Bur. L. T. 21.

that the evidence is sufficient to establish the fact and we concur in the finding.

The District Court should not have re-submitted the record to this Court before deciding the further questions whether At Wah is the adopted son of the deceased and if so, who should be granted Letters of Administration under section 33, Probate and Administration Act, for the minor's use and benefit.

The case is again remanded to the District Court for further enquiry and findings as above.

FINAL JUDGMENT.

TWOMEY, C. J.—The District Court has now found that the minor At Wah is the adopted son of the deceased and that Kin Twe, his adoptive mother, is the proper person to administer the estate for the minor's benefit. It is objected on behalf of the caveator (and counter-applicant) Gyan Shi (who claims Letters as widow of the deceased) that At Wah is not entitled to inherit. It is urged that according to Chinese Customary Law the agnates can object to the adoption of a person who is not an agnate, that the minor At Wah is not an agnate, and that Tam Yit Phang, a parental uncle of the deceased, objects to At Wah's adoption.

The evidence leaves no room for doubt that At Wah was adopted when he was a small child by the deceased Tan Foke Shaing and was treated by him as his son up to the time of Tan Foke Shaing's death. Kin Twe, who claims to be Tan Foke Shaing's widow and who certainly lived with the deceased for several years at Ma-ubin, brought the child At Wah, then about a year old, from Singapore at Tan Foke Shaing's request. Tan Foke Shaing had no natural children and wished to adopt a child. Tan Foke Shaing brought up the child and put him to school as his son. Kin Twe produces a document which purports to be a record of the transaction by which she acquired At Wah from his natural parents at Singapore. In this document Tan Foke Shaing is described as a fellow clansman of the child's father, who had the same surname or clan-name, Tan. The District Court considered the document to be of doubtful authenticity and declined to rely on it. Kin Twe states on oath that At Wah's father, though not related to Tan Foke Shaing, belonged to the same clan.

According to the summary of Chinese custom given in Parker's Comparative Chinese Family Law an adopted stranger is liable to exclusion by the agnates of his deceased adoptive father, and any person who is not an "agnate" would be regarded as a stranger (1). Jarnigan in "China in Law and Commerce" (2), however, states the rules somewhat differently. According to this writer children out of families who bear the same family name may be adopted. It appears by no means certain that if the person adopted belongs to the same clan he is liable to exclusion by the paternal relatives of the deceased. A person belonging to the same clan as the deceased and with the same surname may be regarded as an agnate, though he may not be what Parker refers to as a "pure" agnate.

We have evidence in this case that At Wah is of the same clan as Tan Foke Shaing and that the boy's father had the same surname. It is not strong evidence, but I think it is sufficient to show *prima facie* that At Wah fell within the somewhat elastic class of "agnates" of Tan Foke Shaing. I would, therefore, hold that so far as the question of Letters of Administration is concerned, the objection of Tan Foke Shaing's paternal uncle should not prevail and that Letters may be granted, as proposed by the District Court, to Kin Twe for the minor At Wah's use and benefit.

The costs of this appeal should be borne by the appellant. Avocate's fee—5 gold *mohurs*.

ORMOND, J.—I concur.

Appeal dismissed.

(1) Parker, pages 23 and 25.
(2) Jernigan, page 125.

PATNA HIGH COURT.
SECOND CIVIL APPEAL NO. 376 OF 1918,
May 23, 1919.
Present :—Mr. Justice Das and
Mr. Justice Adami.
ISWAR DAS MARWARI AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
RAGHUNANDAN MAHTON AND OTHERS
—DEFENDANTS—RESPONDENTS.
Civil Procedure Code (Act V of 1908), O. II, r. 3—

ISWAR DAS MARWARI *v.* RAGHUNANDAN MAHTON.

Misjoinder of causes of action and parties—Multifariousness, test of.

The question of multifariousness can only be decided on an allegation made in the plaint. The real test in determining whether a suit is bad for multifariousness or not is to see whether there is a common question to be tried between the parties on the facts disclosed in the plaint. [p. 610, col. 2.]

Where a suit was brought for recovery of a sum of money on the basis of two *rokkas* with an allegation that all the defendants were benefited by the loan, although one of the *rokkas* was executed by two and the other by one only of the several defendants:

Held, that the suit was not bad for multifariousness. [p. 611, col. 1.]

Appeal from a decision of the District Judge, Santal Parganas

Messrs. *Naresh Chandra Sinha* and *Benarsi Prasad Jhunjhunwala*, for the Appellants.

Messrs. *G. C. Paul* and *Gajendra Prasad Das*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal comes before us from the judgment of the District Judge of Santal Parganas. The substantial question which we have to determine in this appeal is whether the plaint filed in the suit out of which this appeal arises is bad for multifariousness.

Now the suit was brought upon two Rokkas. The plaintiffs allege, first, that all the defendants are members of a joint Mitakshara Hindu family, secondly, that on the 3rd of Jeth 1321 F., the defendants Nos. 1 and 5 for the necessary expenses of the family took a loan of Rs. 200 from the plaintiffs, and thirdly, that on the 21st of Sawan 1321, they, meaning by that word, as we think, the defendants, the members of the joint family, took another loan of Rs. 725 from the plaintiffs on another Rokka. On these allegations the plaintiffs asked for a decree against all the defendants.

The Court of first instance found that the money borrowed on the first Rokka was undoubtedly for the benefit of the whole of the joint family but it also found that the second Rokka was executed only by Raghunandan and that it was not shown that the money covered by that Rokka was for the benefit of the joint family. In that view, the Court of first instance, after having recorded the evidence in the case, dismissed the plaintiffs' suit on the ground of multifariousness.

The plaintiffs appealed, and the lower Appellate Court did not consider whether the money borrowed on the second Rokka was for the benefit of the joint family or not but, without considering that point, it came to the conclusion that the plaintiffs' suit was clearly bad for multifariousness and in that view dismissed the plaintiffs' appeal.

In our opinion the judgment of the lower Appellate Court is wrong and cannot stand. The rule as to multifariousness will be found in Order II, rule 3. That rule provides that any plaintiffs having causes of action in which they are jointly interested against the same defendants, or the same defendants jointly, may unite such causes of action in the same suit. Now in this case the plaintiffs do allege in their plaint that they have a cause of action against the defendants jointly. Their case may be true or it may be false, but at any rate, so far as the allegations are concerned, they undoubtedly make a case that they have got a cause of action against all the defendants jointly. No doubt the Court of first instance after a complete investigation has come to the conclusion that the defendants other than Raghunandan are not liable on the second Rokka, but in our opinion that finding does not dispose of the question whether the plaint itself is bad for multifariousness. The question was debated in the case of *Ramendra Nath Ray* v. *Brojendra Nath Dass* (1). That was a case against various defendants, and Chitty, J., held that the suit was clearly bad for multifariousness and gave the plaintiff a fortnight's time to elect how he would proceed with the suit and which of the defendants he would retain upon the record. The plaintiff declined to elect and preferred an appeal from the judgment of Chitty, J. That appeal was heard by Woodroffe and Mookerjee, JJ., and they came to the conclusion that the question of the multifariousness could only be decided on the allegation made in the plaint. They point out that the real test in determining whether a suit is bad for multifariousness or not, is to see whether there is a common question to be tried between the parties. Now if it is the plaintiff's

(1) 41 Ind Cas. 944; 27 C. L. J. 158; 21 C. W. N. 794; 45 C. 111.

case that all the defendants are equally liable on the Rokka, then it seems to us that there undoubtedly is a common question to be tried between the parties. If he believed in his case and if he instituted two suits on the two Rokkas, the defendants would be the same in each suit because his case undoubtedly is that they are all liable on the Rokkas. Mookerjee, J., says at page 172* that "As regards the second test, it is clear that if different suits were instituted, at least one common question of fact will arise, namely, the exact nature of the act imputed to Brojendra Nath Das which would have to be investigated presumably on the same evidence separately adduced in the several suits", and then he points out that one of the principal tests is to see whether, if different suits were brought by the plaintiff on the different causes of action, all the defendants would, on the allegations of the plaintiff, have to be joined as defendants in each suit. If they have to be joined as defendants in each suit on the allegations of the plaintiff, then clearly no question of misjoinder of causes of action can arise. He says that such a question can only arise on the allegations made in the plaint. In my opinion the decision of Woodroffe, J., and Mookerjee, J., is clearly right on principle and we respectfully follow that decision. If the test proposed by the learned Judges is applied here, clearly there is a common question to be tried between all the defendants and, if the plaintiffs were driven to bring two different suits on the two Rokkas then, on their own allegations, they would still have to implead as defendants the same persons in each suit. We are of opinion that the plaint filed in this case is not bad for multifariousness. We would, therefore, allow this appeal and remand the case to the lower Appellate Court with a direction that that Court should remand it to the Court of first instance for disposal according to law.

The appellants are entitled to the costs of this appeal and of the appeal to the lower Appellate Court. The costs incurred in the Court of first instance will abide the result and will be disposed of by that Court.

ADAMI, J.—I agree.

Appeal accepted.

* Page of 27 C. L. J.—*Ed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2114 OF 1915.

April 28, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

NIZAM AL-HAQ AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD ISHAK AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Suit relating to public trust—Sanction—Court, whether can grant relief not included in sanction.

A suit brought under section 92 of the Civil Procedure Code must be limited to matters included in the sanction and it is not competent to the Court to enlarge the scope of the suit and to grant reliefs other than those included in the terms of the sanction. [p. 612, col. 1.]

Prem Singh v. *Labh Singh*, 89 P. R. 1901, followed.

First appeal from the decree of the District Judge, Delhi, dated the 3rd May 1915, decreeing plaintiffs' claim.

Lala *Moti Sagar*, R. S., for the Appellants.

Mr. *D. C. Ralli* for the Hon'ble Mr. *Fazl-i-Hussian*, for the Respondents.

JUDGMENT.—This was an action brought by three persons interested in the maintenance of a graveyard of the Punjabi Muhammadans situate in Shidipur, a suburb of Delhi. The reliefs for which the plaintiffs prayed were the removal of the trustee, Muhammad Ishaq, the appointment of one or more new trustees, the vesting of the property in the new trustee or trustees, the settling of a scheme, and the rendition of accounts by the present trustee. The action was directed mainly against Muhammad Ishaq, who was according to the plaintiffs managing the trust property, and had been guilty of breach of the trust.

The case was clearly one coming within the purview of section 92, Civil Procedure Code; and the allegations made by the plaintiffs in their application for obtaining the consent in writing of the Collector and other circumstances of the case make it absolutely clear that the trust is one of a public nature; and indeed, no suggestion was ever made in the trial Court that it was a private trust. The Collector, while granting sanction for the bringing of a suit for the other reliefs claimed by the plaintiffs, declined to give his consent to a suit for an account. Now, there can be no doubt, and indeed it is admitted by

Mr. Moti Sagar for the plaintiffs, that the suit must be limited to matters included in the sanction, and that it is not competent to the Court to enlarge the scope of the suit and to grant reliefs other than those included in the terms of the sanction, *vide, inter alia, Prem Singh* v. *Labh Singh* (1). The District Judge has, therefore, rightly dismissed that portion of the suit which related to the rendition of accounts.

Coming now to the reliefs covered by the sanction, we find that the learned Judge after disposing of the preliminary issues on the 13th January 1915 adjourned the case "for framing of other issues." On the 10th February 1915 Muhammad Ishaq with two other defendants, however, made an application stating that they were not in possession of the graveyard and that one Muhammad Shafi was in possession thereof; and they accordingly prayed that as against them the suit be dismissed *in toto*. The learned Judge, instead of framing issues on the pleadings of the parties, and recording such evidence as they wanted to produce, held that as the defendants had withdrawn from the management and disclaimed personal interest in the matter, "the only step now remaining is to call a meeting of the Punjabi Muhammadan community and ascertain the wishes of the members as a whole as to a scheme of management for the future and the appointment of trustees, if necessary" Accordingly after ascertaining the wishes of the Punjabi Muhammadans he appointed a committee of three trustees including Muhammad Ishaq; and directed that one of them should retire annually, and that a successor should be appointed at a meeting to be convened for the purpose.

Now, Mr. Moti Sagar for the plaintiffs contends that Muhammad Ishaq retired only temporarily from the management of the trust in order to stifle an inquiry into the allegation that he had been guilty of mismanagement and was unfit to be a trustee; and that he really intended to come back again as soon as he had succeeded in successfully shutting out all inquiry into his management of the trust property. The learned Vakil consequently contends that the District Judge has erroneously deprived his clients of an opportunity of satisfying the Court that Muhammad Ishaq was wholly unfit to discharge the duties of a trustee. After hearing arguments on both sides we are of opinion that the plaintiffs' complaint is fully justified, and that the District Judge should have framed issues arising in the case and allowed the parties to produce their evidence. It seems to us that the so called retirement of Muhammad Ishaq was a mere device in order to evade an inquiry into his conduct as a trustee, as is clear from the fact that he got himself elected as a trustee again, and that his Counsel, when questioned by us, was not prepared to say that his client would not hereafter seek election as a trustee. The District Judge should not have accepted the seemingly plausible excuse put forward by Muhammad Ishaq to put an end to the investigation demanded by the plaintiffs.

It is clear that there has been no proper trial of the case; and we must, therefore, accept the appeal and setting aside the decree of the lower Court remit the case for re-decision with reference to the foregoing remarks.

The Court-fee on the memorandum of appeal shall be refunded, and other costs shall abide the event.

Appeal accepted.

(1) 89 P. R. 1901.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 157 OF 1917.

December 20, 1918.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Shah.

HANMANT KASHINATH JOSHI AND ANOTHER—APPELLANTS

versus

GANESH ANNAJI PUJARI—RESPONDENT.

Hindu Law—Debt contracted by father—Creditor, remedies of, whether affected by death of father—Pious duty of sons, extent of—Immoral or illegal debt—Burden of proof—Trustee failing to account for trust funds—Liability, whether immoral.

Under the Hindu Law a creditor's remedies against ancestral property are as extensive while the judgment-debtor is alive as after his death. [p. 615, col. 1; p. 618, col. 2.]

HANMANT KASHINATH *v.* GANESH ANNAJI.

The pious obligation cast upon sons and grandsons by the Hindu Law to pay their father's debts admits of an exception where the debt was contracted for an illegal or an immoral purpose. [p. 617, col. 1; p. 618, col. 1.]

A Hindu father, acting as trustee under a Will, failed to account for some of the trust property, and a decree was obtained against him for the value of the property he had failed to account for:

Held, that the debt was neither illegal nor immoral and that the onus of proving that any criminality attached to the debt was upon the sons. [p. 614, col. 1; p. 616, col. 2.]

Appeal from the decision of the First Class Subordinate Judge, Satara, in Miscellaneous Application No. 51 of 1916.

Mr. *J. R. Gharpure*, for the Appellants.

Mr. *Jayakar* (with him Mr. *V. V. Bhadkamkar*), for the Respondents.

JUDGMENT.

SCOTT, C. J.—The execution proceedings in which this appeal has been preferred were instituted by decree-holders under a decree passed in the Court of the Nyayadhish of the Sangli State for Rs. 14,403-2-1 against Kashinath Ramchandra Joshi, the father of the appellants. The decree falls within the class of decrees mentioned in section 44 of the Civil Procedure Code as capable of execution in British India as if passed by a Court of British India.

The appellants applied in the Court of the First Class Subordinate Judge of Satara for the raising of an attachment which had been levied under the Sangli decree upon their ancestral family property situate in the jurisdiction of the Satara Court, on the ground that the money debt in the decree against their father was tainted with illegality and immorality and, therefore, the sons' shares were not liable in execution.

The learned Judge held that the appellants' father had been guilty of a breach of civil duty as trustee but that there was no evidence that the monies for which the liability was imposed by the decree were due on account of immorality under the decisions in *Venugopal Naidu* v. *Ramanadhan Chetty* (1), *Chakouri Mahton* v. *Ganga Proshad* (2) and *Durbar Khachar* v. *Khachar Harsur* (3). The application was on this ground rejected.

(1) 14 Ind. Cas. 705; 37 M. 458; 23 M. L. J. 61; 11 M. L. T. 427.

(2) 12 Ind. Cas. 609; 39 C. 862; 16 C. W. N. 519; 15 C. L. J. 228.

(3) 32 B. 348; 10 Bom. L. R. 297.

The first serious question in this appeal is whether the decretal debt is Avyavaharika. The debt is clearly not within the categories mentioned in Manu, VIII, 159, or Yajnavalkya, II, 47, being neither contracted for dissipation nor for a fine, tax or duty, but it is not so certain that it may not fall within the text of Usanas (See Mandlik's Mayukha, page 113) as Avyavaharika. According to the best authorities cited by Mookerjee, J., in *Chakouri Mahton* v. *Ganga Proshad* (2), Vyavaharika may mean 'sanctioned by law or custom", *Durbar Khachar* v. *Khachar Harsur* (3), 'customary or usual' (Bohtlingk-Roth, Wilson, Monier Williams) 'proper' (Mandlik), 'not repugnant to good morals' (Colebrooke). Mookerjee, J. sums up the result of the texts, page 869*: "If the provisions of all these texts are summarised, the result appears to be that the debts which a son is not under any obligation to pay may be grouped as follows: (*i*) debts due for spirituous liquor, (*ii*) debts due for lust, (*iii*) debts due for gambling, (*iv*) unpaid fines, (*v*) unpaid tolls, (*vi*) useless gifts or promises without consideration or made under the influence of lust or wrath, (*vii*) suretyship debts, (*viii*) commercial debts, and (*ix*) debts that are not Vyavaharika, *i. e.*, debts that are not lawful, usual, or customary, or, if we accept the version of Colebrooke, debts for a cause repugnant to good morals. This list, it must be conceded, is comprehensive; and as the terms used are not accurately defined, there is considerable room for divergence of opinion as is indicated by the extracts from the commentaries, quoted by Jagannath in his Digest. This divergence is faithfully reflected in the judicial decisions to which reference was made in the course of argument, and which I shall now proceed to examine." Mookerjee, J. cites seven reported cases as to the pious obligation of the son to discharge the debt of his father when such debt consists of money misappropriated by the latter: *Mahabir Prasad* v. *Basdeo Singh* (4), *Pareman Dass* v. *Bhatlu Mahton* (5), *Mc Dowell* v. *Ragava Chetty* (6), *Natasayyan* v. *Ponnusami* (7),

(4) 6 A. 234; A. W. N. (1884) 47; 3 Ind. Dec. (N. S.) 852.

(5) 21 C. 672; 12 Ind. Dec. (N. S.) 1117.

(6) 27 M. 71.

(7) 16 M. 96; 3 M. L. J. 1; 5 Ind. Dec (N. S.) 776.

*Page of 39 C.—Ed.

Kanemar Venkappayya v. *Krishnachariya* (8), *Gurunatham Chetty* v. *Raghavalu Chetty* (9), *Tirumalaiyappa Mudeliar* v. *Veerabudra* (10), and concludes that the son is only immune from liability if the money has been taken by the father and misappropriated under circumstances which rendered the taking itself a criminal offence. To the cases referred to above may be added *Venugopal Naidu* v. *Ramanadhan Chetty* (1), where the Court dealing with a case of misapplication of funds of a Devasthanam for an improper litigation accepted the conclusion of Mookerjee, J., as to the meaning of Avyavaharika and observed that:

"The third defendant clearly owed a legally valid debt to the Devasthanam even if he had really misappropriated the moneys which he had taken from the Devasthanam funds (instead of having merely sanctioned their expenditure *bona fide* on inappropriate objects) and his descendants are bound to repay that debt according to the decision in *Natasayyan* v. *Ponnusami* (7) where it is observed, 'upon any intelligible principle of morality, a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation and for the non-discharge of which, punishment in a future state might be expected to be inflicted, if in any.'"

There is thus ample authority for the conclusion of the learned Judge in the lower Court. There was no proof that the money not accounted for, for which the appellants' father was found liable, was criminally misappropriated and in these circumstances the liability of the sons would be the same as their liability for their father's debt in respect of any other sums had and received by him for the use of another.

On this appeal another point was raised which was not taken in the lower Court, namely, that the sons or their shares could not be made liable during the lifetime of their father. It was based upon certain *dicta* in a recent judgment delivered by Lord Shaw in the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (11). In that case the suit was on a mortgage executed by the father alone not for any antecedent debt. The creditor had sued and obtained a decree against the father. The sons brought the suit. The *dicta* are as follows:—

"While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing and the validity of a mortgage over the joint estate is quite another thing. Accordingly the case founded merely upon pious obligation, and so strenuously argued before the Board, fails in the present instance by reason of the fact that Bhup Singh, who contracted the debt, is still alive, and that there are concurrent findings by both of the Courts below to the effect that the plaintiffs have failed to prove that the debt of Rs. 200, for which the mortgage was granted, was incurred for any legal necessity or benefit to the estate."

This refers to the effect of a mortgage as collateral security for a contemporaneous debt, not to the personal covenant of the father which in execution proceedings on a decree in a suit within six years of the covenant might result in sale of the sons' interests in satisfaction during the father's lifetime. This is clear from the later passage:

"The importance of the case being free from complications is this: that except under

(8) 31 M. 161; 17 M. L. J. 613; 3 M. L. T. 353; 2 M. L. T. 529.

(9) 31 M. 472.

(10) 4 Ind. Cas. 1090; 19 M. L. J. 759.

(11) 39 Ind. Cas. 280; 19 Bom. L. R. 498 at p. 505; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 2?; 6 L. W. 218; 39 A. 437; 44 I. A. 126 at p. 131 (P. C.).

the mortgage all other remedies have long ago disappeared, and the appellants rear it up and claim under it now, there being no right in them to invoke the doctrine of the pious obligation to discharge the debt incurred by Bhup Singh, because that debt as such cannot be successfully sued for. Accordingly, unless the mortgage validly affects the joint family estate, the appellants must fail. In the view taken by the Board the mortgage was not granted in respect of an antecedent debt, and was invalid."

As remarked by Kumaraswami Sastriyar, J., in *Vinjanampati Feda Venkanna* v. *Sreenivasa Deekshatulu* (12), the passage "indicates that their Lordships had in view the cases where a suit on the debt evidenced by a mortgage not illegal or immoral would lie against the sons even though the mortgage was not for an antecedent debt: [*Surja Prasad* v. *Golab Chand* (13) and other cases.] If there was no pious obligation at all during the father's lifetime and the father was in the position of any other co parcener, it is difficult to see how any suit would lie against the sons except for debts incurred for necessary family purposes and it would be perfectly immaterial to the sons whether the debt is barred or not."

The judgment thus, so far from throwing doubt on the well established remedies of the creditor in execution, impliedly recognises them.

We have the highest authority for the proposition that creditors' remedies against ancestral property are as extensive while the judgment-debtor is alive as after his death. The two appeals of *Girdharee Lall* v. *Kantoo Lall* and *Muddan Thakoor* v. *Kantoo Lall* (14) arose out of a suit in which two grandsons of Kunhya Lal deceased sued *their respective fathers* and various alienees of the ancestral property to obtain possession of the lands as having been sold to pay debts of the fathers incurred through extravagance and immorality. Girdhareelal took under a sale-deed executed by the two fathers to raise money to discharge antecedent debts. Muddun Thakoor had purchased at a sale under an execution of a decree against the two fathers. The sons failed to prove that the debts of the fathers had been incurred for immoral purposes; the Privy Council, therefore, held that neither sale could be set aside. It was there laid down that "ancestral property which descends to a father under the Mitakshara Law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce:—'The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt."

In *Sripat Singh* v. *Prodyot Kumar Tagore* (15) the father against whom the decree was obtained was still alive at the date of the execution proceedings. Yet the Privy Council down without qualification that: "By that (Mitakshara) Law a judgment against the father of the family cannot be executed against the whole of the joint family property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone."

The remedies of the decree-holder against ancestral property of a Mitakshara judgment-debtor with sons are fully recognised by the Legislature in the new Civil Procedure Code which not only, as in the previous Code, includes property over which the judgment debtor has a disposing power which he may exercise for his own benefit as liable to attachment and sale, but further provides (section 53) that ancestral property in the hands of the sons shall be deemed to be property of the deceased which has come

(12) 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 334; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55.

(13) 27 C. 762; 14 Ind. Dec. (N. S.) 499.

(14) 1 I. A. 321; 22 W. R. 56; 14 B. L. R. 187 (P. C.); 3 Sar. P. C. J. 380.

(15) 39 Ind. Cas. 252; 19 Bom. L. R. 290; 21 M. L. T. 222; 32 M. L. J. 134; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 44 C. 524; 44 I. A. 1 (P. C.).

to the hands of the sons. The Code does not limit the liability of the ancestral estate to cases of concluded sales.

We dismiss the appeal with costs.

SHAH, J.—It is contended in support of the appeal, *first*, that the sons are not liable for the decretal debt of their father according to Hindu Law, and, *secondly*, that the liability of the sons does not arise during the lifetime of the father and that their shares in the property cannot be proceeded against so long as the father is alive.

It is common ground that the property attached is ancestral, and there is no suggestion that the sons are liable on the ground of any benefit to the estate or to the family.

As regards the first point, the decree and the judgment show that the defendant No. 1 acted as a trustee for the plaintiff under the Will of one Gopalbhatta. He admittedly received the property and subsequently failed to restore it to the beneficiaries. The plaintiffs sued to recover the property, which the trustee had failed to account for. The defence was that he had restored the trust property and had duly accounted for it. It was found that the defendant had not returned the ornaments which he had received and that he had otherwise failed to account for certain other property. In the result a decree was passed against him for Rs. 14,403-2-1 by the Sangli Court. The breach of trust had taken place in Kolhapur, the suit was filed in the Sangli Court and the decree is under execution in British India. It is not suggested that there was any criminal proceeding taken against the trustee at any of these places and there is nothing in the circumstances of the case to show that there was any act or omission on his part which would amount to a criminal breach of trust under the Indian Penal Code. A false plea of the restoration of property and proper accounting is not sufficient to make the retention of the property as a trustee criminal. He throughout admitted his position as a trustee and the receipt of the property. The taking of the property was perfectly lawful and proper. Under the circumstances the decretal debt must be treated in my opinion as the debt incurred by him in consequence of his having lawfully and properly received the property as a trustee and having failed afterwards to account for it. The onus of proving that there was any criminal breach of trust on the part of the father would be on the sons, who seek to establish that the debt is tainted with illegality or immorality. I do not think it can be inferred from the judgment, and certainly it cannot be assumed, that there was any criminality attaching to the debt. The *ratio decidendi* in *Natasayyan* v. *Ponnusami* (7), *Kanemar Venkappayya* v. *Krishnachariya* (8), *Gurunatham Chetty* v. *Raghavalu Chetty* (9) and *Venugopal Naidu* v. *Ramanadhan Chetty* (1) would apply to such a debt, and not the *ratio decidendi* in *Mahabir Prasad* v. *Basdeo Singh* (4), *Pareman Dass* v. *Bhattu Mahton* (5), *Mc Dowell* v. *Ragava Chetty* (6).

It is urged, however, for the appellant, that the sons are not liable for such a debt, first, as it is in the nature of a fine (*dand*), secondly, as it is a debt incurred out of anger (*krodh*), and, lastly, that it is not Vyavaharika.

The general liability of the sons and grandsons to pay the father's debt is mentioned in Yajnavalkya's verse No. 50 and Vijnanesvara's commentary thereon: and the exceptions thereto are stated in verse No. 47 and the commentary thereon (see Gharpure's Translation of the Mitakshara, Vyavahara Adhyaya, pages 76, 77 and 73 and 74).

The other Smriti texts bearing on these exceptions have been quoted by Mr. Justice Mookerjee in *Chakouri Mahton* v. *Ganga Proshad* (2): and I do not consider it necessary to quote them here.

The word 'fine' (*dand*) occurs in most of the Smriti texts bearing on the exceptions to the general duty of the sons and the grandsons to pay the father's debt. I do not think that the debt such as we have in the present case can possibly be held to be a fine.

The argument that the debt is due to anger must also be rejected. The texts of Brihaspati and Narada (Sacred Books of the East, Volume XXXIII, pages 329 and 45 respectively), the text of Katyayana (Colebrooke's Digest, Volume I, page 212) and Apararka's commentary on Yajnavalkya's verse No. 47 (Anandasrama Series, Volume XLVI, Part II, pages 647, 648 in Sanskrit) have been relied upon in connection with this argument. It is needless to consider them

in detail. The debt in the present case is in no sense attributable to anger.

As to the contention that it is not Vyavaharika, the observations of Knight, J., in *Durbar Khachar* v. *Khachar Harsur* (3) as to the meaning of Vyavaharika have been relied upon. The meaning of the word is discussed also in *Ohakouri Mahton's case* (2) by Mr. Justice Mookerjee and in *Venugopal Naidu's case* (1) by Sadashiv Aiyar, J. There has been some difference of opinion as to the exact meaning of the word Vyavaharika.

Whatever may be the true meaning of the word, the debt such as we have in this case cannot be said to be Vyavaharika. It is clear that it is quite proper for a man to accept a trust; such acceptance cannot be treated as being outside Vyavahara. And any liability directly arising out of such acceptance, and not attributable to any act or omission amounting to a criminal breach of trust cannot be held to be Avyavaharika.

In this view of the case it is needless to discuss the texts of Usanas and Vyasa on this point wherein the expression *navyavaharikam* is used to indicate generally the debts, other than fine and toll, not payable by the sons and grandsons. I may, however, refer to two general considerations, which, in my opinion, point to the propriety of interpreting the word in a restricted and precise sense as far as possible. In the first place, Vijnanesvara refers to the text of Usanas in his commentary on Yajnavalkya's verse No. 47, after explaining the meaning of the words used by Yajnavalkya indicating the exceptions. He refers to it for the purpose of establishing the proposition that the whole and not only a part of fine or toll is payable. He does not cite it for the purpose of explaining the meaning of any word used by Yajnavalkya nor for indicating that any exceptions not covered by Yajnavalkya's text and his explanation thereof is meant by Usanas. This would rather show that Vijnanesvara at least did not think that anything more than that indicated by him in explaining Yajnavalkya's verse was meant by Usanas; otherwise he would probably have proceeded to explain the meaning of the word Vyavahirakam, as is not unusual with him when he quotes an important Smriti-text.

Secondly, this exemption from the liability of the sons and grandsons to pay the father's debts is an exception to the general rule stated by Yajnavalkya in verse No. 50, and Yajnavalkya's verse No. 47 has been in terms described by Vijnanesvara as laying down exceptions to the general rule. Any word of general import used to indicate an exception ought to be strictly construed, according to the recognised rule of construction under the Hindu Law. This rule of construction has been referred to by Chandavarkar, J., in *Gangu* v. *Chandrabhagabai* (16) and in West and Buhler's Hindu Law [3rd Edition, page 880, *foot note (c)*].

The next point urged is that the share of the sons in the ancestral immoveable property cannot be attached and sold during the lifetime of the father for the satisfaction of his personal debt not tainted with illegality or immorality. In support of this argument the observations of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (11), particularly the observations relating to the obligation of the sons and grandsons to pay the debts of their father arising after the death of the father at page 131* of the report, and the observations of Sir John Stanley, C. J., relating to two propositions enunciated in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (17) quoted with approval at pages 133-34* of the report, are relied upon on behalf of the appellants. It is urged for the respondents that as a corollary of the right of the father to alienate the sons' interests in the ancestral estate, in which the sons would have a vested interest under the Mitakshara by birth, to satisfy his antecedent debts not tainted with illegality or immorality (using the expression generally to indicate the exceptions which the Smriti writers specify), so as to make the alienation binding upon the sons, it is recognised in several decisions that the creditor's right to bring the ancestral property to sale for the realisation of a decretal debt

(16) 32 B. 275; 10 Bom. L. R. 149.

17) 5 C. 148 (P. C.); 4 C. L. R. 226; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589, 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705.

* Pages of 13 I. A.—*Ed.*

which would be an antecedent debt at the date of the Court-sale, is co-extensive with the father's power to alienate the ancestral immoveable property. It is further urged that the observations in *Sahu Ram Chandra's case* (11) must be read with reference to the facts of the case and cannot be taken to have overruled these decisions.

The Indian decisions in which the creditor's right is held to be co-extensive with the father's power to satisfy his antecedent debts not tainted with illegality or immorality are based upon the earlier decisions of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (14), *Suraj Bunsi Koer* v. *Sheo Persad Singh* (17), and *Nanomi Babuasin* v. *Modhun Mohun* (18). These Indian decisions are referred to in the recent case of *Vinjanampati Peda Venkanna* v. *Sreenivasa Deekshatulu* (12) and I do not propose to refer to all of them again. I may only mention the decisions of this High Court in *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas* (19), *Chintamanrao Mehendale* v. *Kashinath* (20), *Umed Hathising* v. *Goman Bhaiji* (21) and *Govind* v. *Sakharam* (22). On the facts these decisions would be distinguishable but their *ratio decidendi* is in favour of the view, which the respondent contends for.

It is significant that the view taken in *Umed Hathising* v. *Goman Bhaiji* (21) as to procedure has received a legislative recognition in section 53 of the Civil Procedure Code of 1908. It is true that the section refers to the liability after the death of the father and not during his lifetime.

It is also significant that in several cases the Official Assignee, in whom the insolvent debtor's estate is vested, is held to be entitled to alienate the property on behalf of the creditors exactly as the debtor would be entitled to alienate the ancestral immoveable property so as to affect his son's interest: and this power of the Official Assignee is recognised quite independently of the circumstance whether the father is alive or dead at the time. [See *Fakirchand Motichand* v. *Motichand Hurruckchand* (23), *Rangayya Chetti* v. *Thanikachalla Mudali* (24) and *Nunna Brahmayya Setti* v. *Chidaraboyina Venkitaswamy* (25).] In *Rangayya Chetti's case* (24) the father was in fact alive. It may be said with reference to this class of cases that the father can be held to be "immersed in difficulties" (*vyasanavipluta*) on account of his insolvency within the meaning of Yajnavalkya's verse No. 50 and that, therefore, the sons and grandsons may be liable during the father's lifetime. That, however, is not the ground upon which these decisions are based.

Apart from these decisions, the observations in *Nanomi's case* (18) show that the sons could not set up their rights against their father's alienation for an antecedent debt or against his creditor's remedies for their debts if not tainted with immorality. The father was alive in this case, and their Lordships held that the purchaser bought the entirety of the estate 'which could lawfully be sold to him.' This shows that the Court can sell the larger interest if the debt is not tainted with illegality or immorality, as the purchaser can acquire it only if it can be properly sold; and it can be properly sold during the lifetime of the father only if the right of the decree-holder is held to be co-extensive with the father's power to deal with it for an antecedent debt not tainted with illegality or immorality.

The recent decision in *Sripat Singh* v. *Prodyot Kumarn Tagore* (15) also supports view. Their Lordships observe "that by the Mitakshara a judgment against the father of the family cannot be executed against the whole of the joint family property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone". Further, after stating the effect of a certain order, their Lordships observe: "that is what the order meant, and had it effected anything else, the result would have been

(18) 13 I. A. 1; 13 C. 21 (P. C.); 4 Sar. P. C. J. 682; 10 Ind. Jur. 151; 6 Ind. Dec. (N. S.) 510.
(19) 11 B. 37; 6 Ind. Dec. (N. S.) 24.
(20) 14 B. 320; 7 Ind. Dec. (N. S.) 674.
(21) 20 B. 285; 10 Ind. Dec. (N. S.) 820.
(22) 28 B. 383; 6 Bom. L. R. 344.
(23) 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294.
(24) 19 M. 74; 6 Ind. Dec. (N. S.) 757.
(25) 26 M. 214.

that, without any reason at all, the Judge would have deprived the execution creditor of the undoubted right that he possessed, except upon the happening of one event, which, in the result, has never arisen, to sell the entirety of the estate." In this case the father was alive. It is true that the High Court had found the debt to be binding upon the joint family and that the sale had in fact taken place. But I do not see how the *ratio decidendi*, which is apparently independent of these facts, can be affected by them.

Thus there is ample authority for allowing the creditor to attach and sell the ancestral immoveable property of the debtor including the sons' interests during the lifetime of the debtor, provided the debt is not tainted with illegality or immorality : and it is obvious that it is convenient to settle the question whether the debt is so tainted or not in execution proceedings if the sons intervene, instead of leaving it to be determined by a separate suit and of allowing the Court sale to take place before it is determined. It is to the advantage of all the parties concerned to have it determined, if possible, before the property is put up for sale.

The contention for the appellants based on the observations in *Sahu Ram Chandra's case* (11) can be allowed only if they are read as overruling the decisions above referred to. In the first place, these observations must be taken to have been made with reference to the facts of the case and the main point that was under consideration. The main point in the case related to the antecedency of the mortgage debt, the debt not having been incurred prior to or independently of the mortgage. Undoubtedly that point is decided and the conflict of decisions on that point is settled. But there was no question in that case of the remedy of a decree-holder during the lifetime of the father: and the judgment cannot be read as deciding that point in the manner suggested by the appellants. Secondly, there is no express reference to the passage in the Mitakshara which shows that under certain circumstances the liability may arise during the lifetime of the father: nor is there any reference to the decisions bearing on the question of the creditor's remedies during the lifetime of the debtor. It would not be reasonable to treat these decisions or rather their *ratio decidendi* as overruled or dissented from by their Lordships in the absence of any express reference to the point. Lastly, I do not see how such a reading of the observations in *Sahu's case* (11) as is suggested by the appellants would be consistent with the *ratio decidendi* in *Nanomi's case* (18) and *Sripat Singh's case* (15).

I am, therefore, of opinion that, in the absence of a definite and explicit pronouncement on the point, this Court is bound, in spite of the observations in *Sahu's case* (11), to follow the Indian decisions and the decisions of the Privy Council, to which I have referred, and to hold that the decree-holder's right to proceed against the ancestral immoveable property in execution during the debtor's lifetime is co-extensive with the debtor's power to alienate it under the Mitakshara for the satisfaction of his antecedent debts not tainted with illegality or immorality.

This result is justified by the provisions of section 60 of the Code of Civil Procedure. Under this section the property, over which the debtor has a disposing power which he may exercise for his own benefit, can be attached. And the expression is capable of being read as including the shares of the sons in the ancestral immoveable property, which the father under the Mitakshara has power to sell for the satisfaction of his antecedent debts. It may be that the true view according to the strict Hindu Law is that which found favour with Innes and Muttusami Ayyar, JJ., against the opinion of the majority of the Full Bench in *Ponnappa Pallai* v. *Pappuvayyangar* (26). But since then the accepted view has been that the creditor's right is co extensive with the father's power during his lifetime.

I fully recognise that the power of the father to alienate the ancestral immoveable property for an antecedent debt is an exception to the general rule of the Mitakshara that the father cannot alienate the ancestral immoveable property vested in the sons and grandsons so as to bind their interests, and that the exception should not be extended and should be

(26) 4 M. 1 (F. B.); 1 Ind. Dec. (N. S.) 839.

carefully guarded. It may be that in thus giving effect to the creditor's remedies the exception may have received an extension which is not quite justified by the Hindu Law. But just as the exception is firmly established, I think this extension of the exception must be taken to be equally established, at least so far as this Court is concerned. It may be anomalous that while the sons and grandsons are allowed to establish that the debt is tainted with illegality or immorality according to Hindu Law, they should not be allowed to show that according to that law their liability has not arisen at all. But it must be taken as a part of the anomaly involved in the exception itself.

I do not think that the provisions of Bombay Act VII of 1866 conflict in any way with this view as to the right of the decree-holder to execute the decree against the shares of the sons in the ancestral immoveable property during the lifetime of the father.

We are not concerned at this stage with the question, whether the decree-holder should first proceed only against the father's share in the ancestral immoveable estate, and then against the interests of the sons, if necessary. The point has not been argued, and I express no opinion about it.

I, therefore, agree that the appeal should be dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2744 OF 1918.

May 2, 1919.

Present :—Mr. Justice Bevan Petman.

THE FIRM RAJ MAL-BISHAMBHAR NATH, THROUGH SHANKER NATH-MALAWA MAL, RECEIVERS—PLAINTIFFS—APPELLANTS

versus

DIWAN CHAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Appeal, second—Question of fact and inference from facts—Appeal, whether competent.

Where the sole question in a case is one of fact and the inference to be drawn from facts, a second appeal is not competent. [p. 621, col. 2.]

Second appeal from the decree of the District Judge, Gurdaspur, dated the 28th June 1918, reversing that of the Subordinate Judge, 1st Class, Gurdaspur, dated the 26th November 1917.

Bhagat *Govind Das*, for the Appellants.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT.—This is a second appeal from the judgment of the District Judge of Gurdaspur, dated the 28th June 1918. For the respondents a preliminary objection is raised that no second appeal lies

Mr. Moti Sagar urges that the sole questions which arise are ones of fact and the inference to be drawn from them. The lower Appellate Court was not satisfied that the plaintiff's claim had been substantiated for the reasons stated by him, namely, that it was most improbable that large sums would have been advanced without any signature of the borrower, that the fact that Bishambar Das made no attempt to recover the alleged debt cast considerable suspicion on the whole case, that the explanation advanced by defendants' Counsel (though incapable of any definite proof) certainly fitted in with the fact and that it was easy for the Receivers to produce false evidence of the alleged loans. He also urged that the Court was entitled to draw inferences from the fact of a suit being pending against Bishambar Das for accounts. He relied on *Pharay i Mal* v. *Ilahi Bakhsh* (1), *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (2) and *Balkishen* v. *Raj Bahadur* (3). Bhagat Govind Das for the appellants submitted that a second appeal lies if evidence is ignored and if reliance is placed on evidence or matter not on the record. As to the former he urged that the Receivers sent a demand for payment to the respondent on the 8th September 1915 and the respondent sent no reply and that the lower Appellate Court had ignored this fact and should have drawn an inference adverse to the respondent.

Though the notice by the Receivers is on the record, Bhagat Govind Das is unable

(1) 40 Ind. Cas. 772; 89 P. R. 1917; 104 P. W. R. 1917.

(2) 18 C. 23 (P. C.); 17 I. A. 122; 5 Sar. P. C. J. 560; 9 Ind. Dec. (N. S.) 16.

(3) 37 Ind. Cas. 439; 3 O. L. J. 614.

to indicate how it has been proved. I must hold it unproved. Further, it has not been proved that no reply was sent. No specific ground of appeal with regard to this point is set out in the grounds of appeal.

With regard to the second point it is urged that delay in demanding repayment is not evidence of the non-existence of a debt, nor could the lower Appellate Court legally draw any inference adverse to his client from the fact of a suit having been instituted against him for accounts. Reliance is placed on *Nabendra Kishore Roy* v. *Srimati Rahima Banu* (4), *Ram Subhag Chaube* v. *Kesho Prasad Singh* (5), *Lakhichand Chatrabhuj Marwadi* v. *Lalchand Ganpat Patil* (6) and Case No. 1564 of 1916 reported as *Sher Singh* v. *Dalip Singh* (7).

Nabendra Kishore Roy v. *Srimati Rahima Banu* (4) is not in point. In that case the lower Appellate Court had assumed that certain *chittas* were public documents and it was, therefore, impossible for the High Court to say how far the lower Court was influenced by that idea.

In *Lakhichand Chatrabhuj Marwadi* v. *Lalchand Ganpat Patil* (6) the lower Court had inferred from the mere fact that the plaintiff delayed bringing his suit that he must have been receiving interest all that time and on that calculation it reached the conclusion that the debt had been fully satisfied. The High Court held that the inference in question was one not drawn from any evidence and the drawing of it was an error of law which could be rectified in second appeal. But in that case no payment of interest had been alleged and the case was decided solely on the inference. In the present case other facts are relied on and the inference drawn is not analogous.

In *Ram Subhag Chaube* v. *Kesho Prasad Singh* (5) the lower Court had gone so far as to hold that, though the oral evidence did not break down in any way, it would accept no evidence short of documentary evidence of adoption coming from the hand of the person who had a right to adopt. This ruling does not help the appellant.

Sher Singh v. *Dalip Singh* (7) is also beside the point. In that case the lower Appellate Court had not referred to or discussed the evidence and the judgment consisted of one sentence.

The preliminary objection must succeed. I dismiss the appeal with costs.

Appeal dismissed.

(4) 31 Ind. Cas. 695; 19 C. W. N. 1015.
(5) 29 Ind. Cas. 673.
(6) 45 Ind. Cas. 555; 42 B. 352; 20 Bom. L. R. 354.
(7) 42 Ind. Cas. 282; 100 P. L. R. 1917; 89 P. W. R. 1917.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 109 OF 1918.

May 16, 1919.

Present:—Mr. Lyle, A. J. C.

DURGA PRASAD—PLAINTIFF—APPELLANT

versus

DEBI PRASAD—DEFENDANT—RESPONDENT.

Attestation, effect of—Witness, whether affected with knowledge of contents of document—Appeal, second—Question of knowledge of contents of document, whether can be raised.

The attestation of a document does not involve the witness in any knowledge of the contents of the document, nor affect him with notice of its provisions. [p. 622, col. 2.]

The question whether the attestation of a document implies assent to the terms of the document is a question of fact and must be determined with reference to the circumstances of each case, and the High Court cannot entertain such a question in second appeal. [p. 622, col. 2.]

Appeal against the order of the Subordinate Judge, Unao, dated the 17th December 1917, upholding that of the Munsif, Unao, dated the 15th March 1917.

Mr. *A. P. Sen*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for the Respondent.

JUDGMENT.—One *Musammat* Muna executed a sale-deed of certain property in favour of the plaintiff on the 6th March 1916. In the sale-deed it is recited that if for any reason the purchaser loses possession of the property owing to claims made by any heirs of the vendor, then the purchaser will be entitled to recover the purchase price and any profits which he may be compelled to pay from Debi Prasad, his surety, and from his property hypothecated as surety. The plaintiff came into Court alleging that the defendant

Debi Prasad executed a surety bond in his favour in pursuance of the agreement mentioned in the sale-deed, but that surety bond was not registered and that Debi Prasad thereupon executed a second surety bond. The plaintiff brought his suit for specific performance of the contract of surety.

The Court of first instance held that though the first surety bond had been executed, the story of the execution of the second surety bond was false. It has further held that the first surety bond was in possession of the plaintiff and there was nothing whatsoever to prevent him from presenting it for registration and having it registered under the provisions of the Registration Act, that the plaintiff could have compelled the defendant Debi Prasad to have the deed registered and relying on the ruling in *Venkatasami* v. *Kristayya* (1) has held that the plaintiff's suit was not maintainable.

The lower Appellate Court has found that the defendant Debi Prasad never executed any surety bond at all, that he was unaware of the indemnity clause contained in the sale-deed and that it was inserted in the sale deed without his knowledge.

In second appeal it is argued that there was a contract of security and that the plaintiff-appellant is entitled to specific performance. The plaintiff-appellant came into Court alleging that two separate security bonds were executed and the lower Appellate Court has found as a fact that these allegations are false. The learned Counsel for the appellant, while accepting the finding of fact with regard to the alleged security bonds, would fall back upon the indemnity clause in the sale deed itself and would argue that although he has failed to establish the allegations made in the plaint, yet he is entitled to a decree for specific performance. But the lower Appellate Court has also found that the indemnity clause contained in the sale-deed was inserted in the sale-deed without the knowledge of the defendant-respondent. It is urged that the defendant-respondent has admitted that the sale was negotiated by him and that in view of this admission and of the fact that the defendant-respondent himself attested the sale-deed, the lower Appellate Court should have held that there was a contract of security and should have given a decree for specific performance of that contract. In the case of *Nanda Lal Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (2) their Lordships of the Privy Council have held that attestation of a document does not involve the witness in any knowledge of the contents of the document, nor affect him with notice of its provisions, and in the case of *Lakhpati* v. *Rambodh Singh* (3) it has also been held that the question whether attestation of a document implies assent to the terms of the document is a question of fact and must be determined with reference to the circumstances of each case and the High Court cannot entertain such a question in second appeal. The lower Appellate Court has taken the fact of attestation into consideration and has held that the indemnity clause in the sale deed was inserted without the knowledge of the defendant-respondent. It has also held that the contract which it is now sought specifically to enforce was never entered into by the respondent. This is a finding of fact which cannot be interfered with in second appeal.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 16 M. 341; 3 M. L. J. 169; 5 Ind. Dec. (N. S.) 945.

(2) 36 Ind. Cas. 420; 14 A. L. J. 1103; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 44 C. 186; 43 I. A. 249; 10 Bur. L. T. 177 (P. C.).

(3) 29 Ind. Cas. 218; 37 A. 350; 13 A. L. J. 616.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 472 OF 1919.

April 30, 1919.

Present:—Mr. Justice Broadway.

ASMATULLAH—DEFENDANT—APPELLANT

versus

MAJID KHAN—PLAINTIFF—

Musammat MARYAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Costs, question of—Decision of case

on technical point—Expression of opinion on other points—Appeal, second, whether competent.

A second appeal is competent on a question of costs.

Moshingan v. *Mozari Sajad*, 12 C. 271; 6 Ind. Dec. (N. S.) 184 and *Fazal Nur* v. *Muhammad Hassan*, 45 Ind. Cas. 948: 97 P. W. R. 1918, followed.

In deciding an appeal on a technical point the District Judge expressed opinions on various points that had arisen but on which the decision of the appeal in no way depended. The defendants preferred a second appeal objecting to these opinions:

Held, that a second appeal was not competent.

Second appeal from the decree of the District Judge, Delhi, dated the 30th December 1918, affirming that of the Munsif, 2nd Class, Delhi, dated the 27th June 1918, dismissing the suit, the parties being left to bear their own costs.

Lala *Moti Sagar*, R. S., for the Appellant.

Lala *Shamair Chand*, for the Respondents.

JUDGMENT.—The plaintiff respondent instituted this suit against the defendants-appellants claiming certain rents from them.

The learned District Judge, on appeal to him, dismissed the suit on a technical point which went to the root of the case as it stood. At the same time he expressed his opinion on various other points that had arisen but on which the decision of the appeal in no way depended in view of the decision on the technical point. He also directed the defendants to pay the plaintiff's costs on appeal, holding that the defence raised was false.

The defendants-appellants have preferred this appeal, complaining of the order as to costs and also objecting to the opinions expressed on the other points in the case. As to these opinions it is clear that no appeal is competent. They are mere expressions of opinion and were not strictly necessary in the circumstances.

Mr. Shamair Chand for the respondents contended that no second appeal was competent on the question of costs and he cited *Ma Lon Ma* v. *Maung Tun U* (1), *Dwarka Nath Missir* v. *Pralhad Ram Tewari* (2) and *Muzaffar Khan* v. *Ghulam Muhammnd Khan* (3).

Ma Lon Ma v. *Maung Tun U* (1) certainly supports this contention, but in *Dwarka Nath Missir* v. *Pralhad Ram Tewari* (2) the High Court of Calcutta merely declined to interfere and did not hold that the appeal was not competent In *Muzaffar Khan* v. *Ghulam Muhammad Khan* (3) the competency of the appeal was not decided.

Such an appeal was held to be competent in *Moshingan* v. *Mozari Sajad* (4) and Shah Din, J., took a similar view in *Fazil Nur* v. *Muhammad Hassan* (5). The appeal, therefore, must be regarded as competent.

The order of the learned District Judge appears to me to be somewhat harsh in the circumstances. Both sides appear to have attempted to bolster up their cases with evidence that has been held unreliable and the fairest order would, I think, have been to leave the parties to bear their own costs.

I accordingly accept the appeal and I direct that the parties bear their own costs in this and in the lower Appellate Court.

Appeal accepted.

(1) 15 Ind. Cas. 429; 5 Bur. L. T. 104.
(2) 13 Ind. Cas. 201.
(3) 28 Ind. Cas. 455; 62 P. R. 1915; 83 P. L. R. 1915; 137 P. W. R. 1915.
(4) 12 C. 271; 6 Ind. Dec. (N. S.) 184.
(5) 45 Ind. Cas. 948; 97 P. W. R. 1918.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 620 OF 1918.

March 25, 1919.

Present:—Justice Sir Ernest Fletcher, Kt., and Mr. Justice Cuming.

ALIJAN BIBI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Srimati SAFIA BIBI, WIDOW OF MOHAMED YOUSUF—PLAINTIFF AND OTHERS—RESPONDENTS.

Muhammadan Law—Dower—Widow in possession of estate in lieu of dower, whether liable to account for profits.

A Muhammadan widow in possession of her deceased husband's estate in lieu of the dower-debt due to her is not liable to account for the profits of the estate in her hands, if the income of the estate does not exceed the amount growing due for interest on the arrears of dower. [p. 624, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Burdwan, dated the 11th December 1917, affirm-

ing that of the Munsif, 3rd Court at that place, dated the 19th December 1916.

FACTS appear from the judgment.

Moulvi *A. K. Fuzlul Huq*, for the Appellants.—The defendants are the appellants. The plaintiff sued us for her dower-debt, which she was entitled to be paid from her deceased husband's estate, with interest thereon. The defence was that as the dower-debt was paid by the usufruct of the property which is in her possession, she was bound to account for the income of the property which is in her possession. She cannot get any interest for the dower-debt.

[FLETCHER, J.—Is interest payable according to Muhammadan Law?]

No, they do not generally take interest. But where interest is allowed it is done under the ordinary law of the country. She must account for the profits received. See *Sabjan Bewa* v. *Ansaruddin* (1).

Moulvi *Nuruddin Ahmed* (with him Moulvi *A. S. Akram*), for the Respondents.—The whole of the property of her husband is not in the widow's possession. Reads *Sabjan Bewa* v. *Ansaruddin* (1). There is nothing in the Muhammadan Law which prohibits a Mohamedan from taking interest. She would have been accountable for the profits enjoyed by her, had she been in possession of the whole of her husband's property.

Moulvi *A. K. Fuzlul Huq*, in reply.—My grievance is that the Judge has laid down that the widow is not liable to account for the profits received by her. This, I submit, is a wrong principle.

JUDGMENT.—The only question in this appeal is whether the statement of the law as made by the learned Judge of the lower Appellate Court is correct. What is found is this: The plaintiff-respondent is a Mahomedan widow. She is entitled to a dower from her late husband's estate. She is in possession of a small piece of land of about 7 *bighas*, and the Judge seems to consider that the income of that land would not exceed the amount growing due for interest on the amount of arrears of the dower. In that view of the case, the learned Judge declined to decree the appeal before him or to direct the plaintiff-respondent, the widow, to account for the profits that she received from the land. I think that is right. Of course, the appellants have their matter in their hands. They can pay to the widow her dower and get rid of her and the sooner they pay the dower the quicker they get rid of her. That is the only remedy for the appellants to pursue, that is, to pay off the widow and to get the land.

The present appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) 9 Ind. Cas. 1031; 35 C. 475 at p. 480; 13 C. L. J. 427.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 62 OF 1916.

May 28, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

Musammat SHABBAN BIBI—PLAINTIFF—APPELLANT

versus

Babu KHALIQ SHAH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Marriage, proof of—Cohabitation, long—Presumption—Dancing girl, position of.

Where a person in the position of a dancing girl of questionable antecedents, whose connection with her employee was illegitimate from its inception, sets up a valid marriage at a particular time and place, such marriage cannot be inferred from mere circumstantial evidence, nor from evidence of long-continued and exclusive cohabitation on the ostensible footing of a lawful wife. [p. 635, cols. 1 & 2.]

First appeal from the decision of the Subordinate Judge, Azamgarh, dated the 29th September 1915.

JUDGMENT.

PIGGOTT, J.—In this case the two defendants are the brother and nephew of the late Raja Muhammad Salamat Khan of Azamgarh, who died on April 3rd, 1912. He had made an arrangement in his lifetime intended to secure the succession of his nephew, the younger defendant, to his title and the bulk of his estates: this arrangement seems to have been given effect to, with the sanction of Government, as regards the title. The plaintiff, *Musammat* Shabban Bibi, claims to be the sole surviving widow of the

late Raja; she brings this suit to recover her dower debt stated at Rs. 40,000 and claims at the same time subsidiary relief by way of declaration as to the property from which this dower-debt is recoverable. She reserves her claim to possession of one-fourth of the estate, as an heir of the deceased under the Muhammadan Law, for a separate litigation. The defendants replied that the plaintiff was never married to Raja Muhammad Salamat Khan, and consequently no dower was ever fixed for her, or could be due to her; she was merely a dancing girl who had secured the favour of the late Raja and had been "kept in a separate house" by him. They pleaded further that, as long ago as February 22nd, 1856, Raja Muhammad Salamat Khan had made full provision for the plaintiff by executing in her favour a deed of gift conveying to her his proprietary rights in village Salamatgarh, of which the plaintiff was still in possession and enjoyment. At the same time, the Raja had taken the precaution of obtaining from the plaintiff a deed under which the latter formally relinquished all claims against the estate of Raja Muhammad Salamat Khan. With respect to this deed of relinquishment, the plaintiff's rejoinder was that she had never executed it, or at any rate had never set her name to it with any knowledge or understanding of its contents. It has also been contended, with reference to the terms of this document, that it has in any case no bearing on the claim for dower debt, whatever might be its effect on a claim to a share in the inheritance. The learned Subordinate Judge framed a number of issues, the majority of which he did not find it necessary to decide. On the main question in dispute he has held that "it has not been proved that the plaintiff is the married wife of the deceased Raja Muhammad Salamat Khan." With regard to the deed of relinquishment of February 22nd, 1856, he has held that it would not, on its terms, operate to bar a suit for dower supposing, of course, that the plaintiff were a lawfully married wife and that a dower had been fixed for her and remained unpaid. He finds, however, that the plaintiff did execute this document "after hearing and understanding it," but declines to determine a technical objection as to the validity of its registration. He holds that the plaintiff would not, in any event, be entitled to obtain in this suit a declaration as to the property from which her dower-debt, if proved, could be realized.

In her memorandum of appeal to this Court the plaintiff challenges all the findings of the Court below which are against her; but, of course, the main questions before us are whether the plaintiff was or was not married to Raja Muhammad Salamat Khan, and, if so, what was the amount of her dower-debt. The plaintiff attempted to prove her case on both these points by direct evidence. She was herself examined, on commission, and she caused to be examined, also on commission, two witnesses, Nawab Shujayat Ali Khan and Sayyid Izhar-ud-din Ahmad, residents of Patna; these depose to a marriage at Patna in or about the year 1862 A.D. between the plaintiff and Raja Muhammad Salamat Khan at which a sum of Rs. 40,000 was fixed as the dower-debt of the former. The plaintiff also relies on a mass of circumstantial evidence as proving cohabitation between herself and the late Raja, ostensibly on the footing of lawful marriage; she also undertakes in this connection to prove acknowledgments on the part of the said Raja, both express and by implication, of her status as his wife. The defendants on their side could scarcely be expected to produce much in the way of direct evidence in proof of their negation of the marriage; they impugned the veracity of the plaintiff's witnesses and suggested explanations of the circumstantial evidence relied on by the latter. They also put forward certain circumstances as supporting their contention that the position of the plaintiff in the late Raja's household was rather that of a favoured mistress or concubine than of a wedded wife. On one point, however, and one of considerable importance, they joined issue with the plaintiff in the most direct fashion and produced a body of evidence directly contradicting that of the plaintiff and of her witnesses. The plaintiff's account of herself is that she is the daughter of one Sadiq Husain Khan, originally a resident of Delhi, who removed (at some period not very clearly specified) to the city of Patna. She was [illegible] about the age of eighteen

to one Abad Husain, a Saiyid by race, and lived with him for a little more than two years, when he died, leaving her with an infant son, who received the name of Nanhe Khan. Some three or four years after the death of her first husband, her parents arranged for her second marriage with Raja Muhammed Salamat Khan. This took place at Patna, but the Raja took her home with him to his ancestral Fort at Azamgarh, introduced her there as his honourable wife and she lived with him as such for very nearly fifty years up to the time of the Raja's death. She makes a particular point of the kindly treatment of her son Nanhe Khan by his step-father, Raja Muhammad Salamat Khan, and of the affection evinced by the latter for Afzal Khan, son of the said Nanhe Khan. On the other hand, the case for the defendants is that the plaintiff is the daughter of a disreputable woman of the name of Chhuttan, who was originally a Brahmini, but was converted to Muhammadanism, adopted the profession of a prostitute and lived for many years in Azamgarh in the keeping of one Nanak Bakhsh (a Hindu, apparently a Khatri by caste) to whom she bore a number of children, including the plaintiff. The latter first attracted the notice of Raja Muhammad Salamat Khan when she was appearing in public as a dancing girl and was presumably also following the less reputable branch of her mother's profession. There was an illicit connection between the plaintiff and the Raja which continued for some years before the Raja took this favoured mistress to live with him in his Fort. The conflict of evidence on this point has a twofold importance. The witnesses Shujayat Ali Khan and Izhar-ud-din Ahmad have committed themselves to the support of the plaintiff's own account of herself, her family and her antecedents; if on these matters they have deliberately elected to give evidence which is false in fact, which they probably know to be false and which they most certainly do not know to be true, the Court must necessarily find it very difficult to accept their testimony as sufficient to prove that the plaintiff's dower-debt really amounted to Rs. 40,000. In the second plea, much of the circumstantial evidence relied upon by the plaintiff takes on different colours and is susceptible of divergent interpretation according as the Court is satisfied that the plaintiff first met Raja Muhammad Salamat Khan as a young widow of a respectable family and unblemished antecedents or as a dancing girl and the illegitimate daughter of a prostitute.

Before dealing with the evidence on this point, I wish to make a few preliminary remarks as to the manner in which the case for the plaintiff-appellant was argued in this Court. I do not think the case could have been more delicately and skilfully handled than it was by Mr. O'Conor for the appellant. His opening struck me as a very subtle piece of advocacy. He went straight to the main issue of marriage or concubinage; and proceeded to argue his client's case almost entirely on the circumstantial evidence. I think I am not doing him an injustice when I say that it was only under some pressure from the Court that he even read to us the evidence of Shujayat Ali Khan and Izhar-ud-din Ahmad at all. On the question of the dower-debt he practically asked us to assume that a verdict in favour of the plaintiff must follow, as it were automatically, upon a finding that the marriage was proved. He laid stress on the fact that the defendants, denying that there had ever been any marriage at all, were of necessity precluded from setting up any alternative sum as the amount of the dower debt. He put it to us that the plaintiff's evidence on this point was the only evidence we have to go upon and might be said to hold the field. If I am not mistaken, he went so far as to claim that the finding of the trial Court was in his favour on this point. I have thought it necessary to lay stress on this point. I have thought it necessary to lay stress on this presentation of the case for the appellant in order to repudiate it emphatically and to explain my reasons for approaching the consideration of the evidence on totally different lines. The decision of the Court below requires to be appreciated as a whole. In finding against the plaintiff on the question of marriage the learned Subordinate Judge has necessarily rejected the evidence of Shujayat Ali Khan and Izhar-ud-din-Ahmad and has disbelieved the plaintiff's sworn statement as to the circumstances of her wedding ceremony and the fixing of the dower debt. He has expressed

himself a little clumsily in recording his finding on the issue as to the dower-debt; but what he says amounts in reality to no more than this, that if he had believed Shujayat Ali Khan and Izhar-ud-din Ahmad about the marriage, he could have given no valid reason for disbelieving them as to the amount of the dower-debt. His finding is in substance and effect against the plaintiff on both points. Now, in spite of Mr. O'Conor's ingenious advocacy, it is after all sufficiently obvious that a careful examination of the circumstantial evidence might lead the Court to the conclusion that there must have been, at sometime or other, a lawful marriage between Raja Muhammad Salamat Khan and the plaintiff, without such a finding enhancing in the very slightest degree the credit of the witnesses Shujayat Ali Khan and Izhar-ud-din Ahmad. The Court might feel quite certain that the marriage took place considerably later than the year 1862 A. D., that it did not take place at Patna and that these witnesses were not present at the ceremony. To put the point quite bluntly, Mr. O'Conor's circumstantial evidence may or may not satisfy the Court that there must have been a marriage; but it can scarcely be said that it even begins to prove the amount of the dower-debt. The claim before us is one for dower debt, and not one for a share in the inheritance as widow of the late Raja. There is no presumption in favour of a sum of Rs. 40,000; the plaintiff does not say that Raja Muhammad Salamat Khan always fixed his wife's dowry at this amount, or that he did so as a special act of favour towards herself. What she says is that in the very respectable family from which she came the females were never given in marriage unless the bridegroom consented to a dower-debt of Rs. 40,000. The Court will believe or disbelieve her on this point according as it accepts or rejects her account of her own antecedents generally. On the other side, the defendants have preferred evidence, which I see no reason to distrust, that the dower-debt of Raja Muhammad Salamat Khan's first wife was Rs. 5,000 and that in their family this was the amount which the bridegroom ordinarily consented to give. I do not think this commits them to any admission that the plaintiff, if married to the late Raja at all, must have been married for a dowry of Rs. 5,000; they deny both the marriage and the dowry, and it is quite conceivable that a gentleman like the Raja of Azamgarh might marry a favourite mistress, a former dancing girl and prostitute, without fixing the dower-debt at the sum customary in his family in the case of an ordinary bride from a family of good position and repute.

I propose, therefore, in the first instance, to take up and discuss the evidence on the question of the plaintiff's parentage and antecedents. From this I can pass on to estimate the credibility of the witnesses Shujayat Ali Khan and Izhar-ud-din Ahmad, and to come to a finding as to whether it is proved that the plaintiff's dower-debt was fixed at Rs. 40,000. When this question has been disposed of, it will be time enough to consider whether any further finding is necessary to the decision of this appeal.

The account which *Musammat* Shabban Bibi gives of herself has been already indicated. If her statement stood alone, it would be open to comment on at least three points. About the migration of her family from Delhi to Patna the plaintiff was vague and self-contradictory; she seemed not to be sure herself whether it was her father or her father's father who first came to Patna. This might be excusable enough in an old lady of eighty; but it so happens that more than a year before the date of Shabban Bibi's examination the defendants had pressed for definite details as to the plaintiff's case regarding her parentage and history. They were given certain names in reply, and were told definitely that the plaintiff's father was a resident of a certain Mohalla of the city of Patna; nothing was said about any migration from Delhi. One is left with a certain suspicion that the story of this migration was introduced at a later stage to frustrate the result of the inquiries which the defendants had in the meantime been making at Patna. It is certainly unfortunate for the plaintiff that she should have contradicted herself on the precise question of this migration and that she should have been unable to name any surviving relative of her father or of her first husband. Secondly, it seems to me difficult to read

the plaintiff's account of the manner in which her marriage with Raja Muhammad Salamat Khan came about and not feel dissatisfied and suspicious of the good faith of the story told. On a fair comparison of dates it would seem that Shabban Bibi must have been just about twenty-five years of age at the time of her alleged marriage with the Raja at Patna. She was living there at her father's house, the young widow with a child four years old or more. On her own showing, she had had singularly little to do with her first husband, Saiyid Abad Husain, and I should have liked some further explanation as to why that gentleman's family took no further interest in his widow, what became of the dower debt of Rs. 40,000 fixed at the time of this marriage and so on. What chiefly strikes me, however, is that I should like to know how Raja Muhammad Salamat Khan came to know of the existence of this eligible young widow, how the question of a marriage between them was first mooted and how Shabban Bibi's consent was obtained. The plaintiff admits that she does not know what connection Raja Muhammad Salamat Khan had with Patna. She does not know if he ever visited her father's house, but she remembers having heard that correspondence was going on between the Raja and her father. She deposes:—"I do not know the contents of the letters, but I heard that letters were received from the Raja Sahib. When the day for marriage was fixed, I heard that the marriage had been settled with the Raja Sahib." I cannot persuade myself to believe that this is the way in which the marriage of a widow of twenty-five is arranged, the family of the first husband ignored and the lady herself offered no option in the matter and only told about it when the very date of the proposed marriage had already been settled. Thirdly, the defendants succeeded in obtaining from the plaintiff a number of admissions which go far to support their case. The plaintiff deposed that her father had a mistress or concubine whom she calls "Chhutkan." This woman he kept for eight years or so in a separate house; but eventually she "became displeased" with him and went away to Azamgarh where she lived with "a man named Nanak Bakhsh." To this Nanak Bakhsh she bore two sons and a daughter, whom the plaintiff calls Hashmat Ali, Babar Ali and Masuma. These people visited Shabban Bibi while she was at the Fort as the wife of the Raja and the latter took Hashmat Ali and Babar Ali into his service This curious story is not improved in cross-examination. The plaintiff represents herself as asking the Raja, "Has Chhutkan come here?" (meaning to Azamgarh), and on his returning an affirmative answer, receiving his permission for Chhutkan to visit her at the Fort. On the plaintiff's version of the facts, I cannot understand her interest in this runaway mistress of her father's or how she could come to speak to the Raja about "Chhutkan" as if she were naming a person necessarily known to both of them, or why the Raja should befriend the family of this disreputable woman merely because she had once been the mistress of his wife's father, especially when she had quarrelled with him and run away from his keeping. For corroboration of her story as to her parentage and antecedents the plaintiff has to rely entirely on the evidence of the two Patna witnesses already mentioned. Far and away the most reputable and satisfactory witness on her side on the question of marriage is the Pleader, Shah Salimullah (P. 4A *et seq.*); but he knows nothing of her antecedents. I have to discuss these two witnesses more in detail presently, but it may be said at once that on the question of Shabban Bibi's parentage and antecedents the witness Shujayat Ali Khan palpably broke down. He began by committing himself to a detailed support of all the plaintiff's assertions, professing throughout a first hand knowledge of the family of Sadiq Husain and was deposing to his own presence at the first, as well as at the second, marriage of the plaintiff. In cross-examination he committed himself to the following statements. He (the deponent) had never been to Patna in his life until he came there on the occasion of his first marriage; it was then that he settled down in the house of the father of the lady whom he married in the Diwan Mohalla of Patna city. Shabban Bibi's marriage with Raja Muhammad Salamat Khan took place "nearly a year after" the aforesaid first marriage of the deponent, and four or four-and a-half years after the Mutiny *i. e.*, in 1861-2 A. D. Therefore, this witness first came to Patna about 1860 A. D. Now,

it is an essential part of the plaintiff's case that Shabban Bibi's two marriages were separated by an interval of at least five years, and that her alleged first marriage with Saiyid Abad Husain took place before the Mutiny; it cannot be dated later than 1856 A. D. It follows that this witness cannot have been present at the plaintiff's marriage with Abad Husain, in that the plaintiff had been a widow for at least two years when the witness first came to Patna, and that he can have had little or no first hand knowledge of the facts to which he had cheerfully sworn in examination-in-chief. I really think that if Nawab Shujayat Ali Khan had been undergoing examination in open Court, in a suit tried with the aid of a Jury, the defendant's Counsel might well have shrugged his shoulders, glanced at the Jury and sat down, as soon as his cross examination had reduced the witness' evidence to the hopeless tangle in which it stands at about the bottom of page 20A of our printed record. I am confident that he would have done so, if not at this point, then about one page further on, when he had tied up the witness into another hopeless knot over the question of the age of the plaintiff's child by her first husband. The witness Izhar-ud-din Ahmad, being a permanent resident of Patna, was not liable to attack on these lines. The question of the general credibility of this witness I reserve for discussion at a later stage: for the present the position I arrive at is that the plaintiff's account of her parentage and antecedents rests upon her own testimony, plus that of this one witness, Izhar-ud-din Ahmad, another witness on the same point having palpably broken down, and the plaintiff's evidence being liable to the comments already made.

In turning to the defendants' evidence on this point, I may say at once that they have, in my opinion, done their case a good deal of harm by want of candour on one question of detail. I take it that some one has been frightening them about the inference of lawful marriage which the Court might draw from long continued and exclusive cohabitation, they have accordingly made up their minds to refuse to admit that there was ever any exclusive cohabitation, in the strict sense of these words, between the plaintiff and the late Raja. They asked the Court to believe that Shabban Bibi was a light of love of Raja Muhammad Salama Khan in the days when she followed the profession of a dancing girl and common prostitute, and that the Raja only received her into his house and made provision for her there, out of pity, at a time when the lady and himself were so advanced in years and in such a declining state of health that there could be no question of sexual intercourse between them. The theory involves many improbabilities and cannot be fitted into the established facts of the case. It has compelled the defendants to speak of Shabban Bibi as now about a hundred years *old*, whereas the date given in the passport at page 46A fits in very well with the rest of the evidence and fixes the date of Shabban Bibi's birth at about 1837 A. D. I have no doubt the lady herself was pretty near the mark in speaking of herself as "a little below eighty years of age", when she was examined in the month of July 1915. This is all of a piece with another error committed by the defendants, and sufficiently exposed in the judgment under appeal, in putting forward another lady (said to be long since deceased) as the first permanent mistress or concubine of Raja Muhammad Salamat Khan. It is unfortunate that the defendants should not have elected to be perfectly candid and straightforward in the presentation of their case; but after making every reasonable allowance for these considerations, I am satisfied that they have produced a very formidable body of evidence as to the parentage and antecedents of *Musammat* Shabban Bibi. The defendant Babu Khaliq Shah deposes that he knew *Musammat* Chhuttan as the kept woman of Nanak Bakhsh, Khetri, living in a certain quarter of the town of Azamgarh. This woman had two sons and two daughters besides the plaintiff; their names he gives as Babar Ali (*alias* Babban), Hashmat Ali (or Hashmat), Masnma (also called Mamman) and Hamidan (*alias* Zubaida). He professes to remember the plaintiff, Shabban Bibi, as an ordinary dancing girl, appearing in public entertainments at which he was present. He says she attracted the notice of Muhammad Salamat Khan somewhere in the years 1861 to 1865 A. D., [illegible] was an illicit connection

between them for ten or twelve years and that the Raja finally received the woman into his Fort and assigned her quarters there, under circumstances already suggested. He gives a mass of details about Chhuttan's children, and especially about her son Babban, many of which are borne out in a striking manner by evidence presently to be noticed. At a late stage of the argument in our Court it was made matter for strong criticism against the deponent that he propounded no theory as to the parentage of the plaintiff's son Nanhe Khan; what strikes me as really significant on this point is that he was not asked a single question on the subject in the course of a lengthy cross-examination. The defendants caused to be examined on commission the widow of another brother of Raja Muhammad Salamat Khan, named Sakina Bibi. She says that the plaintiff was to her knowledge the daughter of *Musammat* Chhuttan and that she and her mother were professional dancing girls and prostitutes, when the late Raja made her acquaintance and eventually brought her into his Fort and assigned her quarters there. She says Nanhe Khan came with his mother, and was at that time about eight years of age. Of course, this witness asserts that Shabban Bibi was never received by the other ladies of the family on the footing of a lawful wife; but I do not attach much importance to this part of her evidence. She has stultified herself by professing ignorance on the subject of the plaintiff's journey to Mecca; and I should not be much surprised to learn that a certain amount of reserve had marked the social intercourse between an ex-dancing girl and the other ladies of the household, even though the former might have succeeded in wheedling the Raja into a marriage. The other oral evidence for the defendants on this point consists of the depositions of Sayyid Zair Husain, son in-law of the elder defendant; of a household servant named Baqridee and an ex servant named Sabir Khan; of Sharif Khan, a nephew of Raja Muhammad Salamat Khan's first wife; of Sheikh Bakhtawar, a cloth merchant of Azamgarh city, and of Mathura Parsad Singh, a land-holder of the neighbourhood. Some of this evidence is obviously partial, and portions of the statements of the various witnesses are no doubt open to criticism; but I am bound to say it seems to me to constitute, as a whole, a formidable body of evidence in support of the propositions that the plaintiff Shabban Bibi lived for sometime in Azamgarh as the daughter of *Musammat* Chhuttan, and that she herself had danced in public before Raja Muhammad Salamat Khan withdrew her into the seclusion of his Zenana. The cross-examination of Mathura Prasad Singh, for instance, elicited nothing calculated to shake his testimony on these specific points; the appellant's Counsel was reduced to making the most of a somewhat remarkable admission by the witness at the end of his cross-examination, to the effect that he "had been fined once or twice in connection with murder and fishing forcibly". In the absence of further details regarding these curiously asserted and inadequately punished crimes, I cannot say that the witness stands discredited in my estimation by the admission. It so happens, however, that the defendants are able to produce documentary evidence as to statements made, long before the commencement of the present dispute, by a person, since deceased, who undoubtedly possessed special means of knowledge as to the matters in question. It has been stated that this woman Chhuttan had a son by Nanak Bakhsh called Babar Ali or Babban. Incidentally, I note a document printed at pages 54 and 55R, which shows beyond doubt that in the year 1906 this man described himself as "Sheikh Babban" in certain proceedings before the Revenue Courts, and that his mother's name was entered in certain village papers with the appellation "Tawaif" quite frankly added as a description of her profession. When Shabban Bibi in the course of her examination stated that she did not know that Babar Ali was also called Babban, I am confident that she was not speaking the truth and her want of candour on this point impresses me unfavourably. Now it appears that this Babar Ali or Babban married a woman of the name of Sakina, and that in the year 1877 there was a scandal in connection with the alleged abduction of this Sakina by the servants of the Raja of Jaunpur;

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Babar Ali deposed that the woman was seized while going along the streets in a closed palanquin, that the abduction took place close to Raja Salamat Ali Khan's house and that Nanhe Khan (the son of the plaintiff of whom we hear so much in the evidence) was one of the eye-witnesses and was himself wounded in an attempt to rescue the woman. It is clear that the accused in the case made it part of their defence that this Sakina was no more than a common prostitute, and they cross-examined Babar Ali severely as to his own parentage and antecedents. He had to admit that his mother (Chhuttan) was not married to his father and he gives us the interesting details that she was originally of the Brahman caste, but was converted to Muhammadanism before becoming the mistress of Nanak Bakhsh. I attach no particular importance to the fact that he denied that she had ever been a professional prostitute, a man may be excused for stretching the truth a bit in defence of his own mother's character. The really interesting part of Babban's statement is to be found where he comes to speak about his sister. He says he had three sisters of whom only one was alive in October 1877, the date of his deposition. Two of these sisters he names as "Masuma" and "Zubaida" and alleges that they were married into respectable families. Then he goes on:—

"My third sister's name is Shabban She is married to Raja Salamat Shah. Nanhe Khan is Shabban's son. She was married 22 or 23 years ago. Nanhe Khan was not born then."

It must be remembered that this remarkable statement was made in a case in which this same Nanhe Khan was being put forward as the principal witness for the deponent, and in connection with an affair of which Raja Muhammad Salamat Khan cannot possibly have been ignorant. The pleadings and evidence in the present suit make it quite certain that Shabban Bibi was not married to the Raja as early as 1854-5 A. D., yet this date is approximately that given by the plaintiff and her witnesses for her alleged first marriage. No later date could be given in a case in which it was proposed to produce Nanhe Khán before the Court, but it could be contradicted by the man's apparent áge. Nor does Babban say in so many words that Nanhe Khan was the son of Raja Muhammad Salamat Khan, still less that he was his heir presumptive, born in lawful wedlock. Nevertheless, he does swear that Shabban Bibi is his own sister, that she is married to Raja Muhammad Salamat Khan, and that this "marriage" took place before the birth of Nanhe Khan.

Now as regards this question of the parentage of Nanhe Khan, I am afraid of saying either too much or too little. It is no one's case in this suit that he was the son of Raja Muhammad Salamat Khan; and it is quite certain that he was not born to the said Raja in lawful wedlock. Yet, in the discussion of various items of evidence in this case, all sorts of arguments were addressed to us in which the question of the parentage of Nanhe Khan was indirectly involved. Amongst the items of circumstantial evidence relied upon on behalf of the appellant, a good many were concerned with the late Raja's treatment of this Nanhe Khan and also of Afzal Khan, son of the said Nanhe Khan. Both these men were allowed to arrogate to themselves the designation of "Babu", commonly used in this family for the younger sons of the house, as, for instance, the first defendant himself. There are letters on the record in which Raja Muhammad Salamat Khan displays a remarkable fondness for Afzal Khan as a young child; and it is proved that as this young man grew up, the late Raja went out of his way to push him forward into positions of responsibility and public dignity. From all this we are asked by the appellant to infer, not merely that she herself must have been the lawful wife of the Raja, but that Nanhe Khan must have been born to her in lawful wedlock by her marriage with a respectable gentleman whom she calls Saiyid Abad Husain. Now, I am quite satisfied that the second of these inferences is wholly excluded by any fair consideration of the weight of the evidence. The direct oral testimony on behalf of the defendants as to the parentage and antecedents of *Musammat* Shabban Bibi

far outweighs the evidence of that lady herself and of her witness Izhar-ud-din Ahmad, and all the circumstantial evidence is against the plaintiff. I would almost go so far as to say that, if there were nothing else in the case, I should be prepared unhesitatingly to act on my firm belief that "Nanhe Khan" is an impossible name for any legitimate son of "Saiyid Abad Husain." The name, on the face of it, claims a Pathan origin, inconsistent with the alleged "Saiyid" parentage. Moreover, if Shabban Bibi had borne Nanhe Khan in lawful wedlock to a respectable Saiyid gentleman, there was no earthly reason why Babar Ali should not have said so in October 1877, instead of venturing upon an audacious falsehood as to the date of his sister Shabban's "marriage" with Raja Muhammad Salamat Khan. It follows, that there must be some other explanation of the late Raja's attitude towards Nanhe Khan and Afzal Khan, not based upon the respectability of Nanhe Khan's parentage. That explanation, in face of the reticence observed by both parties, cannot be given with certainty; I can do no more than venture on a suggestion in summing up what I hold to be the established facts on this part of the case.

I am quite satisfied that the plaintiff was the daughter of *Musammat* Chhuttan, the mistress of Nanak Bakhsh and mother of Babar Ali *alias* Babban, the lady frankly described as a professional prostitute in the village papers. It does not follow that her father was Nanak Bakhsh; indeed, I incline to the opinion that the plaintiff has correctly given her own father's name, the difference being that she was born to Sadiq Husain Khan of his mistress Chhuttan, and not of his lawful wife, if he had one. I hold it proved that the plaintiff was living in Azamgarh as the daughter of *Musammat* Chhuttan, while the latter was there under the protection of Nanak Bakhsh, Khatri, and carrying on the profession of a dancing girl. I accept as true the evidence for the defendants that Shabban Bibi was trained as a dancing girl and first came under the notice of Raja Muhammad Salamat Khan while appearing in public in this capacity. I have no doubt that the date of this may be fixed, on the strength of Babar Ali's statement, as about 1854 A. D. I am satisfied that the connection between the plaintiff and Raja Muhammad Salamat Khan was in its inception nothing more than ordinary illicit intercourse between the Raja and a dancing girl who had taken his fancy. I take it that Nanhe Khan was born under circumstances which made it impossible for anyone to feel quite certain as to his paternity; reading between the lines of the evidence I strongly suspect that Raja Muhammad Salamat Khan came gradually to believe that the child had really been his own and that his subsequent attitude towards the plaintiff, towards Nanhe Khan and towards Afzal Khan was largely governed by this belief. That he did take Shabban Bibi to live with him in his Fort is admitted; that he did so after illicit intercourse between them had continued for some years I hold to be proved. On the other hand, I find it also proved that he provided her with respectable quarters in his Fort, that he corresponded with her on terms of extraordinary confidence and intimacy; that he allowed her to be spoken of as his "wife," and that he put her forward on several occasions, in matters involving public and official correspondence, under the designation of "my second wife." Nevertheless, it cannot be shown that he ever himself spoke or wrote of her as his "Rani", or that he ever committed himself to the statement that she was his "wedded wife." As to the date on which Shabban Bibi passed under the exclusive protection of the late Raja, becoming a veiled lady inside his ancestral Fort, the evidence leaves me in some little doubt. It was certainly anterior by several years to Babar Ali's statement of October 1877; it may have taken place as early as 1861-2 A. D., the date given by the plaintiff for her marriage at Patna; but it was probably about 1866-8 A.D. according to the statement of the first defendant, who puts it "ten or twelve years" after the commencement of the illicit connection.

In recording these conclusions, I have anticipated the result of the further analysis which I undertook to make of the statements of the plaintiff's witnesses Shujayat Ali Khan and Izhar-ud-din Ahmad. I

quite definitely disbelieve these two witnesses. It is not merely that I consider their testimony heavily outweighed by direct and circumstantial evidence on the other side, my opinion is that a careful consideration of their statements shows them to be unworthy of credit.

I am afraid I must begin by saying that I am very little impressed with the arguments addressed to us regarding the respectability and social position of these witnesses. I do not want to hurt their feelings or anyone else's; but when we are told in argument that it is inconceivable that gentlemen of such independent position should come forward to bolster up a false claim, we are obliged to consider precisely what this argument is worth. Izhar ud-din Ahmad is an ex-Sub Inspector of Police, who somehow found it expedient to resign his post, after seventeen years' service, without pension or gratuity. Nawab Shujayat Ali Khan is a needy scion of the ancient royal family of Oudh living on a pension of twenty-five rupees a month: his own assertion that he is and has always been in a position to live in comfort and affluence by the sale of his ancient hoard of family jewels deserves no particular attention. How the evidence of these witnesses was obtained and why they support the plaintiff's case must remain matter for conjecture, but *Musammat* Chhuttan had been the mistress of a respectable Muhammadan gentleman of Patna and there is a great deal of free-masonry amongst ladies of her profession. The witnesses were examined under circumstances singularly unfavourable to the elucidation of the truth; and for this I am satisfied that they themselves, and those responsible for the conduct of the plaintiff's case, are wholly to blame. The first application on behalf of the plaintiff was that they should be examined on commission at Patna, and this was very properly rejected by the trial Court. The witnesses were admittedly served in Patna with summonses directing them to attend and give evidence before the Court at Azamgarh. Thereupon they both discovered some flimsy excuse for removing themselves to Calcutta, out of reach of the process of the Azamgarh Court, and compelled the trial Court to direct their examination on commission at that place. Of the manner in which that examination was conducted I find it difficult to speak with patience. The Counsel representing the defendants adopted in his cross-examination a bullying tone, which may have been justified by his instructions and might possibly have been effective before a Jury, but which certainly did no good under the circumstances. The learned gentleman who represented the plaintiff before the Commissioner in Calcutta is not subject to the disciplinary jurisdiction of this Court. I cannot call upon him for an explanation of his conduct and I, therefore, refrain from characterizing it in the terms which it seems to me to deserve. The only conclusion I can draw from it is that he had instructions that the witnesses could not stand cross-examination and must be protected at all hazards from any question calculated to elicit the truth.

The cross-examiner in our Indian Courts suffers under one grave disadvantage in that he has to regulate his questions by the pace at which the answers can be taken down in long hand. It has often occurred to me to wonder how many of the classical instances in which false witnesses have been exposed in the English Courts under the stress of really able cross-examination could have been successfully duplicated before a Subordinate Judge out here, distracted by the paramount necessity of compiling a "record" as the basis for a future appeal. Nevertheless, I have known a good cross-examiner work wonders even under this handicap; but to give him any chance at all, he must at least be allowed to exercise his art under the protection of a Court capable of enforcing the ordinary decencies of professional conduct on his learned opponent. As a sample of what took place in this suit before the helpless (and, I have no doubt, disgusted) Commissioner, I take the following from page 21A of our record.

Nawab Shujayat Ali Khan was asked whether, at the marriage of Shabban Bibi with Saiyid Abad Husain, he had heard the formula known as the "Sigha" recited in Arabic. The question was objected to: the utter futility of the objection was disclosed a moment later when the question was allowed to be repeated in this form, whether any Sigha was recited at this marriage. The question as originally put was not only a proper one, it was

quite clear. The witness stood committed to the statement that this marriage with the gentleman of Saiyid race took place in the Sunni form; and the "Sigha" is recited at Shia, but not at Sunni, weddings; when therefore this legal gentleman interposed with his groundless, but by no means purposeless, objection, he might just as well have stood up and shouted to the witness: "Be careful how you answer that; there is a catch in the question." He would not have done the thing twice in the Court of any Judicial Officer fit for the position of a Subordinate Judge; but before the unfortunate Commissioner he did it again at page 22A, again at page 23A, and twice more under aggravated circumstances in the course of the cross-examination of Izhar-ud-din Ahmad at page 34A; though it is interesting to note that on the second occasion he was just too late, the witness had put his foot in the trap before he could be stopped.

One can only wonder what opinion they hold in Calcutta regarding the competence and intelligence of the Courts in these provinces, if they really suppose us capable of decreeing a claim for Rs. 40,000 on the practically unsupported testimony of two witnesses whose cross-examination was conducted under these conditions.

After having said this, it is really idle for me to discuss further details in this evidence. I might comment on Izhar-ud-din's remarkable statement that he is positive as to the amount of the dower-debt in this case because no woman is married in Behar for any lesser dowry; or point out that, according to his admissions on page 34A, he either knows nothing about the three gentlemen named as having acted as "Kazi" and formal witnesses to the plaintiff's marriage with Raja Muhammad Salamat Khan, or else really believes them to be still alive and residing in Patna city, whereas it is an essential part of the plaintiff's case that they are dead. Nor need I insist on the witness' obvious belief (before he hastily corrected himself, page 36A) that there was railway communication open between Azamgarh and Patna at the date of the alleged marriage. I am, therefore, not particularly impressed with the fact that this ex-Police Officer was clever enough (also page 36A) to turn on his cross-exminer, by asserting that it was not any agent of the plaintiff's who had arranged with him about the evidence he was to give, but, on the contrary, the general attorney of the defendants had brought him their compliments and a polite request not to give evidence in the case. Once the witness had been named, the defendants knew quite well that he would have to give evidence; if they had decided to tamper with him, their request would have taken a very different form.

I have given reasons enough for concurring with the Court below in rejecting the direct evidence for the plaintiff on the subject of her marriage at Patna in 1861-2 A. D. This involves the failure of the claim for Rs. 40,000 on account of dower-debt. It has not been suggested before us in argument that we are bound to come to some finding on the question of marriage or concubinage in order that, if we find a marriage of unknown place or date established by the circumstantial evidence, we might decree in favour of the plaintiff the minimum dower-debt prescribed by Muhammadan Law. One reason why the point was not taken may be the provision made for the plaintiff by the deed of February 22nd, 1886, which is very far in excess of the minimum dowry. I feel serious doubts whether we ought to discuss further the circumstantial evidence in favour of the proposition that a marriage must have taken place, on some date or other, and probably inside the Fort at Azamgarh, between the plaintiff and the late Raja Muhammad Salamat Khan. The plaintiff has elected to reserve the question of her claim to a share in the estate to a separate litigation; in such a litigation she would have to take the opinion of the Court as to the effect of her deed of relinquishment of February 22nd, 1886 (P. 44R) and also as to the validity of the dispositions of his property effected by the late Raja in his lifetime. If the plaintiff desires to carry the matter further, even a finding in favour of the marriage in the present suit would not operate so as to conclude the litigation. In the case now before us, the plaintiff stands committed to the plea that her

marriage with Raja Muhammad Salamat Khan took place inside the house of Sadiq Husain Khan, in the city of Patna, in or about the year 1861-2 A. D. My finding is that no such marriage took place. The circumstantial evidence relied on by Mr. O'Conor is evidence that a marriage took place somewhere, perhaps before 1877, or 1880 A. D. but certainly before the plaintiff went on pilgrimage to Mecca in 1887 A. D. ostensibly as the "second wife" of Raja Muhammad Salamat Khan. The evidence about this pilgrimage is a strong point in the plaintiff's favour; read in connection with the evidence of Shah Salimullah (P. 4-A), who strikes me as a truthful witness, it becomes even stronger. This gentleman's father was a religious teacher of some local renown; he had made disciples of the late Raja and of his mother, as well as of the plaintiff. The pilgrimage to Mecca must have taken place under the influence of this conversion and, so to speak, under the auspices of this spiritual guide. It seems equally hard to believe that Raja Muhammad Salamat Khan would have deceived his spiritual guide as to the plaintiff's position, or that the latter would have allowed him to make the pilgrimage in the company of his mistress, passing her off as his wife, yet there are arguments on the other side, and more particularly the wording of the Raja's deed of February 22nd, 1886. It is true he once more calls *Musammat* Shabban Bibi "my second wife", but he avoids calling her his "Rani" or his "wedded wife," and the whole tone of the document is inconsistent with the idea that he regarded her as heir to a substantial share of his estate under the ordinary rules of Muhammadan Law.

I do not propose to pursue this matter further. It is one thing for a lady in the position of this plaintiff to ask the Court to infer from evidence of long continued and exclusive cohabitation, on the ostensible footing of a lawful wife, that there must at some time or other have been a valid marriage between herself and the late Raja Muhammad Salamat Khan; it is not quite the same thing to set up a marriage at a particular time and place, and then to fall back on the circumstantial evidence when the case actually set up has been disproved. Moreover, when once the Court has come to a clear finding, as I think we must do in this case, that the connection between the parties was in its inception an illegitimate one, it is a very difficult matter to infer a subsequent marriage from the sort of evidence which we are asked to rely upon in this case. On the evidence as it stands, I think the proper course is to dismiss the appeal upon a finding that neither the marriage set up by the plaintiff, nor the dower debt claimed by her, is proved by the evidence.

WALSH, J.—I agree that this appeal must be dismissed. I am satisfied that the story of the Rs. 40,000 dower debt is a myth, and that the plaintiff's claim in this suit must fail.

It would, I think, be unfortunate if we were to leave our own opinion on the question of the plaintiff's marriage in doubt after this protracted and expensive litigation. It may be that our view will not in law irrevocably bind the parties. But I think that the parties, after all the able argument to which we have listened, are at least entitled to my opinion for what it is worth. If the documents and the admitted facts of the case, such as the acceptance of the plaintiff as a disciple and the subsequent pilgrimage to Mecca, stood alone, I should unhesitatingly find it proved beyond doubt that at some time or another the Raja eventually married this woman, but that, being the class of woman she was, she freely and with full understanding relinquished all her rights in exchange for the present transfer which was made to her, and which gave her a certain independence. But I have come to the conclusion, having regard to the false case of the Patna marriage, and the extravagant dower which she has foolishly set up in her old age, that she is unable to prove anything better, and that any Court ought to hold that such a ridiculous story is hopelessly inconsistent with the existence of an honest one, or of any real marriage at all.

I would add that I entirely agree with all that my brother has said about the general conduct of the examination of the Patna witnesses before the Commissioner at Calcutta. Such proceedings only bring the law into discredit and contempt. They

react upon those who are responsible for them. The impression left upon my mind by the proceedings adopted for getting the evidence of these witnesses on to the record, and by the conduct of the plaintiff's representative while they were under examination, is that the evidence given by these two men is quite worthless.

BY THE COURT.—The appeal is dismissed with costs, including fees in this Court on the higher scale.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 818 OF 1917.

May 3, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Dundas.

SRI RAM—DEFENDANT—APPELLANT

versus

K. SORABJI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 17—Arbitration—Agreement to refer dispute to arbitration—Refusal of one arbitrator to act—Power to appoint another—Failure of arbitrators to give award within specified time—Agreement, whether can be filed in Court.

An agreement to refer a dispute to arbitration does not become incapable of performance by the refusal of one of the arbitrators to act, where there is a distinct provision authorising a party to appoint another arbitrator in his place. [p. 637, col. 1.]

Mohan Lal v. *Damodar Das*, 44 Ind. Cas. 866; 71 P. R 1918, distinguished.

The mere fact that the award is not given within a specified time is not a sufficient reason for refusing to file the agreement in Court, especially where there is a provision in the agreement allowing an extension of time. [p. 637, col. 2.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Lahore, dated the 1st March 1917, directing that an agreement to refer to arbitrators be filed in Court.

Lala *Moti Sagar*, R. S., for the Appellant.

Lala *Shamair Chand* for Bhagat *Govind Das*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the Senior Subordinate Judge of Lahore under clause (17), Schedule II, Civil Procedure Code, directing that an agreement to refer to arbitrators be filed in Court. The agreement is printed at pages 3 to 6 of the paper-book. Rai Moti Sagar on behalf of the defendant-appellant has raised four points in arguing the appeal:—

(1) That one of the arbitrators Lala Mul Chand named in the agreement having declined to act, the agreement cannot be made a rule of Court.

(2) That the award was to be given within a month of the arbitrators entering upon the reference [clause 6 (*ii*) (*b*) of the agreement] and that as it was not filed within that time, the agreement has become inoperative.

(3) That plaintiff respondent has not carried out the stipulation entered in clause (3) of the agreement, and, therefore, is not entitled to ask that it should be filed in Court.

(4) That the letters of the 12th and 13th June (pages 8—11 of the paper-book) should in any case be filed along with the agreement.

In support of the first point Counsel relies upon *Mohan Lal* v. *Damodar Das* (1), which followed the case reported as *Ma Ba U* v. *Mauny Pe Lan* (2). It was held there that an agreement to refer the matter in dispute to several specified arbitrators becomes incapable of performance when one of those arbitrators dies, and if such death takes place before an application is made under clause 17, Schedule II of the Code of Civil Procedure, this is sufficient reason for refusing to file the agreement in Court and the Court could not make an order of reference under sub-clause (4) of the said clause. In the present case, however, there is a distinct provision [see clause 6 (*ii*) (*b*) of the agreement] that in case of disability, resignation or death of any arbitrator, the party which had selected such arbitrator would be competent to appoint another in such arbitrator's place. It is stated in the present case that one Ram Richhpal has been appointed as arbitrator in the place of Mul Chand, but whether this be so or not, it is clear that some one can be appointed in Lala Mul

(1) 44 Ind. Cas. 866; 71 P. R. 1918.
(2) 42 Ind. Cas. 911; 11 Bur. L. T. 160.

Chand's place, and, therefore, it cannot be said that the agreement to refer the dispute to certain arbitrators has become void and of no effect. No doubt, if the agreement was to refer to certain specified arbitrators, one of whom died or resigned, and there is no provision for appointing any one in his place, then the agreement would become void and the decision reported as *Mohan Lal* v. *Damodar Das* (1) would be in point. Under the circumstances of the present case, however, we hold that the agreement has not become void by reason of the resignation of Lala Mul Chand.

With regard to the second point, it was no doubt provided that the arbitrators should make their awards in writing within one month after entering upon the reference or after having been called upon to act by notice in writing by any party to the submission or on or before any later day to which the period for making the awards had been enlarged. Now it does not appear to us that any notice in writing was given within the meaning of clause 6 (*ii*) (*b*) of the agreement. Attempts were made to get the arbitrators together and they were got together in Lahore towards the end of October 1915, but there is evidence on the record to show that they never entered upon the reference within the meaning of the agreement. Lala Mul Chand (page 30 of the paper-book) says: "I did not begin arbitration proceedings." Again at page 32, line 23, Rai Bahadur Lala Narsingh Das, one of the arbitrators, states: "We did not begin the proceedings for which we were appointed arbitrators, but we made new proposals to bring about a compromise." At line 33 of the same page he says: "The parties did not press for the beginning of proceedings for award on the original agreement and they were pleased with the new proposals." The third arbitrator, Nussarwanji Jamasji's statement will be found at pages 36 *et seq.* In his answer to question No. 12 of the interrogatories (page 39) he no doubt says: "We entered upon the reference in about end of October 1915", but on page 41 in answer to question No. 25 he states: "We were working as mediators and not as arbitrators. We were doing our best to bring about settlement with the consent of both parties."

From the above it is quite clear that the arbitrators never entered upon the reference but merely tried to make the parties agree to some terms proposed by them. In any case we think that the mere fact that the award was not given within a month of the arbitrators entering upon their duties would not be a sufficient ground for refusing to file the agreement in Court, especially in view of the provision in the agreement that the period within which the award might be made could be extended.

With reference to the third point, the plaintiff has not supplied Rs. 40,000 worth of wines and liquors as stipulated in clause (3) of the agreement. We do not consider that this would be any reason for not filing the award. The duty of the arbitrators in respect to wines and liquors supplied was that in case of a dispute as to their value they were to make an award on the point. Some Rs. 25,000 worth of wines and liquors are said to have been supplied and the arbitrators can make an award as to the value of these.

As to the fourth point, we consider that there was no necessity to file the letters in question in Court. These letters contained proposals prior to the agreement which was based upon and superseded them. The last clause of the agreement is that the points not expressly herein or hereinafter referred in writing to arbitration by both parties shall not be adjudicated upon by the arbitrators or the umpire. This shows that the agreement is conclusive and supersedes all previous agreements.

We are, therefore, of opinion that there is no force in Mr. Moti Sagar's contentions and that the lower Court's order filing the agreement in Court is correct. The appeal fails and is dismissed with costs.

Appeal dismissed.

FAZAL AHMAD *v.* RAHIM BIBI.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 21 OF 1916.
December 5, 1917.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

Sheikh FAZAL AHMAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat RAHIM BIBI AND OTHERS—PLAINTIFFS AND OTHER DEFENDANTS—RESPONDENTS.

Muhammadan Law—Maraz-ul-maut, *what is—Gift in favour of heir during* maraz-ul-maut, *validity of—Applicability of doctrine to sales and* wakfs.

Where a man, who had been suffering from consumption for more than a year, made a gift of certain property in favour of his mother, and it was found that there had been a rapid increase in the disease about the time when the gift was made and that the deceased was under apprehension of the near approach of death:

Held, that the rule of *maraz-ul-maut* applied to the transaction and that the gift, being in favour of an heir of the deceased, was altogether void. [p. 642, col. 1.]

The doctrine of *maraz-ul-maut* is founded on the Koran, which ordains that the heirs must inherit. It does not apply to a sale. [p. 642, col. 2]

A *wakf* created during *maraz-ul-maut* is valid only to the extent of one-third of the entire estate of the deceased. [p. 642, col. 2.]

A gift made during *maraz-ul-maut* in favour of one of the heirs of the deceased is altogether void. [p. 642, col. 2.]

First appeal from the decision of the Subordinate Judge, Pilibhit, dated the 4th January 1916.

Mr. *B. E. O'Conor*, *Sir Sundar Lal* and Dr. *S. M. Sulaiman*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, Messrs. *Preo Nath Banerji* and *Iqbal Ahmed*, for the Respondents.

JUDGMENT.—This and the connected appeals arise out of two suits which related to certain property, moveable and immoveable, which belonged to one Manzur Ahmad, who died on the 2nd of September 1912. Manzur Ahmad, although he had been married (four times it is stated), never had any children. His heirs were, first, Fazal Ahmad (his paternal uncle), secondly, his mother *Musammat* Rahim Bibi, and thirdly, his two widows *Musammat* Qamarunnissa and *Musammat* Jilani Begam. Under the Muhammadan Law of inheritance Fazal Ahmad would have been entitled to 10 *sihams* out of 24, Rahim Bibi to 8 *sihams* and the two widows to 6 *sihams* between them. Fazal Ahmad was not only uncle to the deceased but he was also the father of *Musammat* Jilani Begam, his youngest wife. Before his death Manzur Ahmad was possessed of a considerable amount of property. He had deposited in the house of Lala Khub Chand (banker) the sum of Rs. 16,876. He had also in cash in his house the sum of Rs. 8,500 and 4,000 sovereigns (equal to Rs. 60,000) which was buried in a house which was occupied by Jilani Begam. He had also Rs. 58,000 on fixed deposit with the Allahabad Bank. Besides this cash, the deceased was possessed of some house property and a considerable amount of Zemindari property, including two villages called Mauza Bithaura Kalan and Mauza Amkhera. These two villages were worth about two lakhs of rupees. The property of the deceased was worth probably between 5 and 6 lakhs (if jewellery, ornaments etc., be included).

Very shortly before his death, Manzur Ahmad had transferred the two last mentioned villages to his mother *Musammat* Rahim Bibi. He had also given her the 4,000 sovereigns. He caused the Rs. 16,876 deposited with Lala Khub Chand to be transferred to her name. The Rs. 8,500 in cash had also been brought to the house of Lala Khub Chand and placed to the credit of *Musammat* Rahim Bibi. It thus appears that the deceased transferred, very shortly before his death, property and money to the extent of Rs. 2,85,376.

After the death of Manzur Ahmad there was litigation in the Revenue Court as to mutation of names with regard to the two villages to which we have referred, with the result that Fazal Ahmad succeeded in having his name recorded as one of the heirs of Manzur Ahmad, and he was appointed Lambardar. This suit was thereupon instituted in the Civil Court and *Musammat* Rahim Bibi claims against the other heirs that she is entitled to the villages by virtue of a deed, dated the 29th of August 1912. In the other suit Fazal Ahmad is plaintiff and seeks therein (amongst other things) his share of the four thousand sovereigns, of Rs. 16,876 and of Rs. 8,500.

The defendants in the suit brought by Rahim Bibi pleaded (1) that Manzur Ahmad was so ill that he knew nothing about the transfer at all, (2) that if he was capable of understanding the transaction, it was in truth and in fact a gift and that the gift being to an heir, was void, having regard to the Muhammadan Law of Maraz-ul-maut.

Rahim Bibi answered these pleas by contending (1) that the transaction was not a gift but a sale, in which case "Maraz ul-maut" did not apply, (2) that having regard to the nature of the illness which was long protracted, the doctrine of Maraz-ul-maut did not apply, and (3) that even if the doctrine of Maraz-ul-maut did apply, the transaction was a *waqf* and was valid to the extent of one-third of the entire property of Manzur Ahmad. In answer to the suit brought by Fazal Ahmad, Rahim Bibi pleaded that the gift of the money was valid because Maraz-ul-maut did not apply and that the money was transferred not as a gift but in discharge of a debt due by the deceased to her.

Both suits were tried together upon the same evidence. We have come to the conclusion, for reasons which we shall state later on, that the transfers of the villages and of the money, etc., to Rahim Bibi were in truth and in fact gifts to Rahim Bibi, made by the deceased because he wished to benefit her more than his other heirs. In this view of the case, the all-important issue is whether or not the illness of Manzur Ahmad was such as to render the gifts void according to Muhammadan Law that gifts made in Maraz-ul-maut are invalid. Rahim Bibi has, since Manzur Ahmad's death, attempted to make a *waqf* of the property (perhaps more or less illusory) and she has given away most of the money to her own relatives who are not heirs of Manzur Ahmad. We may mention here that the learned Counsel for Fazal Ahmad in the appeal before us abandoned the contention that the deceased did not know and understand what he was doing when he made the transfer and learned Counsel laid no stress on the evidence of Fazal Ahmad or his witness.

We propose, in the first place, to deal with the evidence relating to the illness of Manzur Ahmad. He was a man of vicious habits. He lived at a place called Dhundru, about six miles from Pilibhit. Dr. Nil Ratan Banerji was Civil Surgeon at Pilibhit in the year 1909, and in that year Manzur Ahmad was treated by him. Manzur Ahmad was then suffering from urinal complaints due to venereal disease. Dr. Banerji operated but the operation was not altogether successful. Some of the urine continued to come through the wound instead of the natural channel. The deceased continued to suffer from fistula but he was much better and he dedicated some property as a thank offering for his recovery, (making himself, however, the Mutwalli). In 1912 Dr. Banerji was transferred to Bara Banki (a long way from Pilibhit) but the deceased came to him on the 26th of June 1912 and remained under the doctor's care till the 7th of August preceding his death. Deceased was then suffering from an abscess or fistula in the anus and consumption had commenced. Dr. Banerji later in his evidence says that consumption had clearly developed. Dr. Banerji again operated and the wound caused by the abscess in the anus had nearly healed, but not quite, when the deceased returned home on the 7th of August. Between the 26th of June and the 7th of August consumption made rapid progress; and, when the deceased left for home, the second stage of the disease had almost passed. The doctor says, "when I sent off Manzur Ahmad from Bara Banki his case was hopeless." The doctor says that he had not impressed upon Manzur that he would not recover but "he (the deceased) had come to understand that he would not recover." When he went to Pilibhit from Bara Banki he was hopeless of his recovery. "He could not get up himself.....He required assistance to rise or to sit."

Dr. Banerji gave Manzur Ahmad, when he was leaving, a certificate, stating that he was not suffering from any contagious or infectious disease. The doctor gave him this certificate so that he might not be troubled on the journey by reason of the authorities thinking he was suffering from Plague or some such disease. Dr. Banerji was a witness for Rahim Bibi. He appears to have given his evidence in a straightforward manner, and we consider that reliance may safely be placed upon what he says.

From Bara Banki Manzur Ahamd proceeded to Pilibhit, a journey of about 10 hours in the train. At Pilibhit he stopped for a few hours at the house of Alauddin, a brother of Rahim Bibi, and thence he proceeded to his own house at Dhundru, a journey of about six miles. Within a

few day he suffered from a pain in his side, and he sent for another doctor who was then Civil Surgeon at Pilibhit, named Baldeo Singh. Even before Manzur Ahmad left Bara Banki, he had felt this pain and complained of it to Dr. Banerji. Dr. Baldeo Singh considered that he had an abscess near the kidneys but he was not very certain about the locality. He advised him to come in to Pilibhit to be operated upon. The deceased was lying on a bed when Dr. Baldeo Singh saw him at Dhundru. On the 14th of August Manzur Ahmad was brought back to Pilibhit in order to be attended to by Dr. Baldeo Singh. He came again to the house of Alauddin, his mother's brother. Dr. Baldeo Singh assisted by another doctor (Dr. Chatterji) operated upon him on the 15th of August. No less than two pounds of very evil smelling pus was taken from the abscess. The deceased was very weak and Dr. Baldeo Singh continued to treat him for some days. The wound was dressed daily, and the operation seems to have been fairly successful. Dr. Baldeo Singh ceased to treat the deceased after some days; first, because Manzur Ahmad would not take the medicines he directed and, secondly, because the doctor became seriously unwell himself. Dr. Baldeo Singh was also a witness for Rahim Bibi.

Another witness for Rahim Bibi was Dr. Chatterji, whom we have mentioned above as assisting Dr. Baldeo Singh. When he gave his evidence he was Civil Surgeon at Pilibhit. He continued in attendance upon the deceased after Dr. Baldeo Singh had ceased to attend him. He says that after the operation Manzur Ahmad never gained sufficient strength to move about. On the 2nd of September he died. Dr. Chatterji says that he and Dr. Baldeo Singh, before they operated upon him, found that he was suffering from consumption, that his heart was weak, and they accordingly performed the operation without chloroform. He says that when he first saw Manzur Ahmad, the apex of his lung was affected. Before he died about one-sixth of both lungs was affected. The consumption had extended to his throat and the deceased was suffering from tubercular laryngitis, his voice had become hoarse and he eventually died from asphyxia, being unable to breathe in consequence of the laryngitis.

During all this time, and when the deceased died, he was staying in the house of Alauddin. In the same house also lived Wisaluddin, a nephew of Rahim Bibi, that is to say, the son of her deceased brother. Wisaluddin and his brothers are the persons in whose favour Rahim Bibi has since parted with the greater part of her property and they were not heirs of Manzur Ahmad.

As already stated, while the deceased was staying in this house, he had sent to Dhundru to have the four thousand sovereigns dug up from the house of Jilani Bibi in order that they might be reburied in the house of his mother Rahim Bibi. Directions were also given to bring the Rs. 8,500 to Khub Chand, banker. The latter money duly reached Khub Chand, but the sovereigns, after being dug up, were stolen (half were afterwards recovered). This happened about the 20th of August or a little later. On the 29th of August the deceased executed a deed of transfer in favour of his mother Rahim Bibi in the following form:—"I, while in a sound state of body and mind, have absolutely sold of my own free will the entire 20 *biswas* Zemindari property in Mauza Bithaura Kalan, Parganah and District Pilibhit, and the entire 20 *biswa* Zemindari property in Mauza Amkhera, including the hamlets called Zahurganj, Manzurgunj, Samaria, and Makruli, Pargana Richa, Tahsil Baheri, District Bareilly, and with all the appurtenances and interests appertaining thereto, without the exception of any right or share, to my mother, *Musammat* Rahim Bibi, wife of Sheikh Zahur Ahmad, Sheikh, resident of Mauza Dhundru, Pargana Jahanabad, District Pilibhit, for two lakhs of rupees, half of which is one lakh of rupees, and made over the possession of both the properties sold to the vendee. Now neither I nor any of my representatives have any right in the above mentioned properties sold. Out of the entire sale consideration I have received Rs. 10,000 in cash, and have left Rs. 1,90,000 with the vendee with my directions, in order that she may spend it with her own authority and at her own discre-

tion for good purposes for the benefit of my soul in the next world. Hence I executed this document as a sale deed giving authority in respect of the sum held in deposit for charity, on a stamp paper of Rs. 2,000 under Article 23 and on a stamp paper of Rs. 15 under Article 7, Schedule I, Act II of 1889, so that it may serve as evidence." Registration was duly effected and the deed has the following endorsement:—

"Let it be known that the executant is ill and he submitted a certificate of his illness given by the Assistant Civil Surgeon, Pilibhit, who is now Civil Surgeon in charge of Pilibhit, with his application for issue of a commission, which is in the office."

The certificate is as follows: "I came to dress Sheikh Manzur Ahmad of Dhundru at the time when the deed was presented and execution admitted by him before the Sub-Registrar. I found his mental faculties unimpaired and he answered to every question referring to the deed quite correctly."

The deed was registered between 5 and 6 o'clock in the evening on the 29th of August 1912. This certificate was given by Dr. Chatterji at 5-30 in the evening. At 9-30 in the morning of the same day, Dr. Chatterji had given another certificate as follows: "Certified that I examined Sheikh Manzur Ahmad, Zemindar of Dhundru, this morning at the request of the Sub-Divisional Magistrate and found his mental faculties not affected yet, although his general condition is extremely weak."

It is pretty clear that the Sub-Registrar had some hesitation in registering the deed, having regard to the condition of the deceased, and notwithstanding the explanation which Dr. Chatterji gave when giving his evidence, we think that his first certificate shows that the deceased's condition was very critical on the morning of the 29th of August. The certificate was given in English and Dr. Chatterji understands English. The words "found his mental faculties not affected yet" are significant. Immediately after the execution of the deed men were sent off post haste to make collections at the two villages and to apply for mutation of names. It was not the time of year at which collections are made, and the collections which were in fact made were more or less of a formal character obviously the intention was to show that the deed had been acted upon and possession taken. Certainly those steps were taken with the least possible delay.

Rahim Bibi also examined Abdul Jabbar, a Hakim, who says that he had occasionally to see Manzur Ahmad one or two years before his death, and that he had been suffering from syphilis and gonorrhœa. The importance of the evidence of this witness is to show that the deceased had been suffering from consumption for a considerable period. The witness would not be in a position to speak of the deceased suffering from consumption from any scientific examination of the sputum. There was no blood in the sputum. Any suspicion he might have about consumption would be the consequence of his observation of the general state of health of the deceased and the fact that he suffered from fever. The fever from which Manzur Ahmad suffered might no doubt be attributed to consumption, but it also might be attributed to the other diseases deceased suffered from and his weak state of health. Dr. Chatterji no doubt says that the progress of the consumption was slow, but we think that this statement is negatived by the evidence of Dr. Banerji, which shows that even between the 26th of June 1912 and the 7th of August of the same year consumption was making rapid progress. We also think that the statement of Dr. Chatterji about the progress of the disease is negatived by the facts that he himself has deposed to. At first the apex of the lungs was affected, that is about the 15th of August, and by the time he died one-sixth of both the lungs was affected. Moreover, the disease had spread to his throat and tubercular laryngitis had set in. Signs are not wanting in the evidence or examination and cross-examination of Dr. Chatterji that he had become to some extent a partisan (see his attempt to wittle down the significance of his certificate in which he says that "the mental faculties of the deceased had not yet been affected, although his general condition is extremely weak.") The witness seems to have lent himself a little to an attempt which was being made to suggest that the illness of Manzur was of long duration without any rapid increase. The

doctrine of Maraz ul-Maut does not apply to cases of lingering and protracted illness.

The conclusion that we have come to is that the illness of Manzur Ahmad all along rapidly progressed and increased between June and the 2nd of September when he died, and that it cannot possibly be said that he suffered from a lingering disease. There is no very satisfactory evidence when consumption commenced, but even if we assume that the seeds of the disease were present for some time, the progress of the disease was rapid between June and 2nd September. We believe Dr. Chatterji when he says that when Manzur Ahmad left him on the 7th of August the deceased was under the apprehension of death—and if this view be correct, nothing which subsequently happened was at all likely to lessen that apprehension. The sufferings of the deceased continued steadily to increase. The evidence of Rahim Bibi herself shows that the deceased apprehended death and that she was frequently trying to console him and remove his apprehension. We think that the two certificates which Dr. Chatterji gave show that those about Manzur Ahmad believed that he was going to die, and that this apprehension was shared by the Sub-Registrar. That those who were about him (near relations of Rahim Bibi) believed he was going to die is also shown by the very great haste there was in sending off men to make the collections at the two villages and filing an application for mutation of names on 30th August. What other people thought who were daily seeing the deceased is not without some bearing on what the deceased was likely to think himself. The learned Judge referring to the evidence of Abdul Aziz, a witness for Fazl Ahmad, says that the deceased told the witness that he was better and that as soon as he would recover he would show him the villages that required water. This is not quite what the witness said. Witness said that the deceased said "if he recovered." The learned Advocate for Rahim Bibi admitted that if there was a rapid increase in the disease about the time when the "gift" was made, and if the deceased was under apprehension of the near approach of death, the rule of Maraz-ul-Maut would apply, even though the deceased had been suffering from consumption for more than a year before he made the gift. In our opinion, the illness of the deceased was not a lingering disease and he was under the apprehension of near approaching death and if the transfers of the money and of the land ought to be regarded as "gifts" to Rahim Bibi, they were void under the Muhammadan Law as having been made when the donor was suffering from his death illness. The doctrine of Maraz ul-Maut is founded on the Koran which ordains *that the heirs must inherit.* Even though our sympathies may be to some extent more with Rahim Bibi, the affectionate mother of the deceased, we are bound to administer the law.

The next question we propose to deal with is, what was the real nature of the transaction. If the transaction was a sale the doctrine of Maraz ul Maut does not apply. If the transaction was the creation of a Waqf by the deceased, the transaction would be good to the extent of one-third of the entire estate of the deceased. If it was a gift to Rahim Bibi, one of the heirs, it was altogether void. On the face of it the deed is a sale-deed. But it is abundantly clear that Rahim Bibi had nothing like 2 lakhs of rupees wherewith to purchase the property. At the time the deed was registered the sum of Rs. 10,000 was produced before the Sub-Registrar, but we are absolutely convinced that this Rs. 10,000 did not belong to the *Musammat.* It was brought from the house of Khub Chand, banker, and was beyond all question money which had belonged to the deceased, at least up to the time that the money had been changed from the account of the deceased to the account of Rahim Bibi in the books of the firm of Khub Chand, and this change took place while the deceased was lying ill in the house of Ala-ud-din. It is said that the deceased owed money to his mother and that the sale was made in consideration of the discharge of this debt. In the first place, we must point out that the sale does not purport to be in consideration of the discharge of a debt. It is made in consideration of 2 lakhs of rupees, Rs. 1,90,000 being left with the vendee. In the nex place, Rahim Bibi tried to make out that the debt due to her by her son represented a fortune which she had received many years before

(at the time of her marriage) of Rs. 40,000. She says that her husband kept this Rs. 40,000, that after his death it was handed over to her eldest son to be invested, and upon his death in the year 1906 it was handed over to Manzur Ahmad and that Manzur Ahmad owed her the original amount of her fortune together with a large sum accumulated during the lives of her husband and two sons. The learned Judge in the Court below is careful to say when he finds certain matters in favour of Rahim Bibi, that he must not be at all taken as endorsing this story of hers. We altogether disbelieve the story. There is no evidence worthy of name to support the allegation that Rahim Bibi ever had a gift of Rs. 40,000 which had been kept intact for her by the male members of the family. It is true that Rahim Bibi also states that she had some Zamindari property and that the deceased used to collect the profits, handing over to her from time to time small sums which she required, retaining the balance for her. We find that in the year 1892 after the death of Zahur Ahmad, the husband of Rahim Bibi, an award was made under which she got a village called Purenia which brought in profits of about Rs. 1,'00 per annum. In the year 1896 she got Rs. 2,000 a year in lieu of the village Purenia and in the year 1906 on the death of her eldest son she got property which brought her in about Rs. 4,500. (This was not in addition, it must be remembered, to what she had previously.) We find that the *Musammat* had an establishment of her own. She has been four times to Mecca. She had a number of relatives of her own to whom she would probably make gifts from time to time. She would also perhaps make some charitable gifts. Bearing in mind that the *Musammat* was the widow of a rich man and the mother of rich sons, we think that her means were no more than sufficient for her own support and maintenance and that certainly there was no room for large accumulations. The probabilities are that one year with another she got from her son at least the amount of the profits of her property, probably a good deal more

There are no accounts to show that her son had any monies of hers in his hands. The only important evidence to support the allegation that the deceased owed his mother money is a deposition which Manzur Ahmad made on the 25th of August 1912, that is to say, at or about the very time when he was transferring a large amount of property to his mother. In this deposition Manzur Ahmad says that whilst he was lying ill in the house of Ala ud-din, he had sent one Amir Khan (his mother's *karinda*) to take possession of the four thousand sovereigns on her behalf and that he had also told Amir Khan to get the Rs. 8,500 to deposit in the Kothi of Khub Chand to credit of his mother. In the deposition he says: "I said to Amir Khan that I owed money to my mother." It is contended that this admission by Manzur Ahmad of his indebtedness to his mother is very strong evidence that he owed her money. The deposition came to be made under the following circumstances. After the sovereigns were unearthed, they were made away with by the servants who were sent to get them. The Rs. 8,500 were duly deposited with Khub Chand but the sovereigns were stolen. For some time the loss of the sovereigns was kept from Manzur Ahmad, because it was thought that the news would have a very serious effect upon him in his delicate state of health. In the end, however, when the criminal law was set in motion against those alleged to be responsible for the theft, it was decided to get a deposition from Manzur Ahmad. The weight to be attached to the statement by Manzur Ahmad that he owed his mother money is greatly lessened by the fact that he had a motive for making the statement, even if it was untrue. Moreover, the statement was made at the very time he was handing over to his mother a large portion of his estate and when he knew (as we believe) that he was about to die. Manzur Ahmad did not even say he owed his mother money. He says that he told Amir Khan that he owed the money.

As to the question of Waqf, the deed does not say that the villages were to be held as Waqf property. If the deceased wanted to dedicate the villages, there is no reason why he should not have expressly dedicated them as he did the property in 1906 on the occasion of his previous illness. If he did not think he was going to die, he might have named

himself as Mutwalli as he did in 1909 or he might have named his mother Mutwalli. The deed only says that Rs. 1,90,000 of the price (which was not and could not be paid) was to be applied for charitable purposes at the discretion of his mother. Looking at the evidence of Ala-ud-din, of Rahim Bibi herself, the condition of the donor and the surrounding circumstances, we have come to the conclusion that the handing over of the sovereigns and the transfer of the Rs. 8,500, Rs. 16,876 and of the two villages were in truth simply gifts made by the deceased to his mother and the provision in the deed that Rs. 1,90,000 should be applied in charity at the discretion of Rahim Bibi was a somewhat ingenious device to give the transaction the appearance of a sale so as to evade the Muhammadan Law, which forbids a Musalman in his death illness to make a gift to one heir at the expense of the others. It will be seen from the evidence of Ala ud-din and Rahim Bibi that they did not think that a Waqf was being made of Rs. 1,90,000, said to be left with Rahim Bibi. We may mention here that neither side relied on the evidence of witnesses other than those we have mentioned. On both sides there was, as the learned Judge says, a considerable amount of hard swearing. Fazal Ahmad not only alleged but stated in his evidence that the deceased did not even know the contents of the deed; while we think that the deceased was in a very weak condition when he executed the deed, we agree with the Court below that he understood what he was doing. This is borne out by the fact that on the 25th of August he was able to make a deposition about the loss of the sovereigns. If Fazl Ahmad had confined himself to exaggerating the condition of the deceased, it might be said that one side was as bad as the other. But a litigant must be held responsible for the witnesses he produces to support his case and Fazl Ahmad produced a doctor who stated that he had examined the deceased shortly before his death. This witness was named Warris, who states that he is the most senior practitioner in Lucknow. He states that he saw the deceased at Pilibhit after the operation for the abscess in the intestines. He went to visit him early in the morning without informing Dr. Baldeo Singh or Dr. Chatterji. He removed the bandage, probed the wound, came to the conclusion that the case was quite hopeless and decided to have nothing more to do with the patient. He left Pilibhit without seeing either of the Doctors. He gives a most extraordinary account of his journey from Bareilly to Pilibhit and from Pilibhit back to Bareilly by *road*. The learned Judge was of opinion that this witness had never visited the deceased at all, and we fear there are grave reasons for thinking that the learned Judge was right. It is almost unbelievable that a Doctor who had taken his degree at Edinburgh University, would have visited the deceased without informing the Doctors, who had just operated upon him. It was even more extraordinary that he should have interfered with the wound. His account of his journey by road in the height of the rains looks rather like as if he was afraid to say he came by train, because it should have been proved that he did not. The learned Judge comments upon the evidence given by another witness produced by Fazl Ahmad. "Maulvi Bashir-ud-din, Vakil, is guilty either of perjury or its abetment or of gross misconduct as a legal practitioner. No one would believe him that with the knowledge of forgery and incapacity in the executant he acted as a Vakil for Rahim Bibi and supported her title on the invalid forged deed. He is condemned on his own admission. I need not waste time in commenting on his evidence beyond saying that he fully deserves prosecution. His story is that he was brought to Pilibhit to fair out the sale-deed, but he refused to take part in the forgery after looking at Manzur Ahmad who was senseless." Maulvi Bashir-ud-din undoubtedly gave the evidence to which the learned Subordinate Judge refers. He had undoubtedly previously acted for Rahim Bibi and we find (see page 70 of the respondent's book in First Appeal No. 21 of 1916) that he actually sent to Rahim Bibi a paper containing on one side a number of questions which he as her Vakil intended to ask her on examination and re-examination. On the other side he dictated the answers which she was to give to the questions

which he intended to ask. We need only refer to two of these questions. One was "what was the condition of Manzur Ahmad's senses at the time?—Answer—they were very good.—Question—up to what time did Manzur Ahmad remain in his proper senses?—Answer—he was in his senses till he breathed his last." It thus appears that the witness was prepared to come into Court and swear that the deceased was so bad that he refused to have anything to do with the deed, and with this knowledge he told Rahim Bibi to answer his questions exactly to the contrary.

We have come to the conclusion that this appeal must be allowed. But to mark our strong disapproval of some of the evidence adduced on behalf of Fazl Ahmad we disallow all costs of witnesses in the Court below. The order of the Court is that the appeal is allowed, the decree of the Court below set aside and the claim of Rahim Bibi dismissed with costs in both Courts, save as mentioned above. Costs in this Court will include fees on the higher scale.

We direct the Receiver to prepare and bring in as soon as reasonably possible a final account with a view to his being discharged.

Appeal allowed.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 808 OF 1918.

August 5, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

BHAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JAGAT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887), s. 158 (2) (xvii)—Jurisdiction of Civil and Revenue Courts—Partition, suit for, by tenant for fixed term, whether cognisable by Civil Court.

Under section 158 (2) *(xvii)* of the Punjab Land Revenue Act a Civil Court has no jurisdiction to entertain a suit for partition of agricultural land brought by a tenant holding for a fixed term. Such a claim must be made in a Revenue Court. [p. 646, col. 1.]

Miscellaneous second appeal from the order of the Additional District Judge, Amritsar, at Gurdaspur, dated the 15th December 1917.

Dr. *Gokal Chand Narang*, for the Appellants.

Mr. *Lal Chand Khosla*, for the Respondents.

JUDGMENT.—Sawan Singh, one of the joint owners of certain land, leased his share to the plaintiffs for six years. The plaintiffs got a decree for joint possession and obtained formal possession in execution. In the present suit they ask for a decree for actual possession by partition. The lower Courts have concurred in holding, that the Civil Court has no jurisdiction, and the question is, whether that decision is correct.

The contention on behalf of the plaintiffs appellants is that they are neither owners of the land nor occupancy tenants and, therefore, cannot apply to the Revenue Officer for partition under section 111 of the Land Revenue Act, that their only remedy is to sue in the Civil Court, and that the claims for partition referred to in section 158 (2) *(xvii)* of the Land Revenue Act, in regard to which the jurisdiction of the Civil Court is ousted, mean only such claims as a Revenue Officer can dispose of.

We agree that plaintiffs are not owners of the land since they are tenants under Sawan Singh, and the term "landowner" as defined in section 3 (2) of the Land Revenue Act does not include a tenant.

But as regards the second point, there is nothing in clause *(xvii)* of section 158 (2) to show that that clause includes only those claims for partition which a Revenue Officer is empowered to deal with under Chapter IX. The words used are "any claim for partition of an estate, holding or tenancy" without any qualification.

The appellants' contention appears at first sight to be supported by the words "and in particular", which occur just before sub-section (2). Sub-section (1) provides that a Civil Court shall not have jurisdiction in any matter which the Local Government or a Revenue Officer is empowered by this Act to dispose of, or take cognizance of the manner in which the Local Government or any Revenue Officer exercises any powers vested in it or him by or under

this Act. Then come the words "and in particular" followed by sub-section, (2), "a Civil Court shall not exercise jurisdiction over any of the following matters, namely," etc.

If the words "and in particular" implied that the specific matters enumerated in the various clauses of sub-section (2) are all included in the general class mentioned in sub-section (1), the appellants' contention would be correct. But we think that this was not the meaning. Had the intention been to subordinate the words "a Civil Court shall not exercise jurisdiction over any of the following matters" and the 23 clauses which follow to sub section (1), it would have been natural to include them in that sub-section. The fact that they were not so included, but form a separate sub section, would show that they are to be treated as independent of, and not as subordinate to sub-section (1). Although cases coming under most, if not all, of the clauses of sub-section (2) would ordinarily also fall within the general category described in sub-section (1), it is not necessary that they should do so.

With regard to partition cases in particular, we think it would be very improbable that it could have been intended that, whilst a claim for partition of agricultural land when made by a landowner or an occupancy tenant should be dealt with only by a Revenue Officer, the Civil Court should have jurisdiction to dispose of such a claim when made by a tenant holding for a fixed term. The reason for the omission to provide in section 111 that an application for partition might be made to a Revenue Officer by a tenant holding for a fixed term was probably, not that it was thought proper to reserve to the Civil Court jurisdiction in respect of a claim made by such a tenant, but that it was considered that such a tenant should not be entitled to apply for partition at all.

We, therefore, hold that the Courts below are right in deciding that the Civil Court has no jurisdiction in the present case and we dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 244 OF 1915.

April 6, 1918.

Present :—Mr. Justice Piggott and Mr. Justice Walsh.

Musammat FATIMA BIBI AND OTHERS —DEFENDANTS—APPELANTS

versus

RAM NARAIN SAHU AND OTHERS— PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. XLI, r.* 22—*Cross-objections, whether can be preferred against co-respondents.*

Plaintiff instituted a suit upon a mortgage-deed, purporting to have been executed by four males and two ladies and to convey an 8-anna share out of 16 annas in 3 villages and certain house property and a grove, the share of the ladies in the property being 2/5ths of the whole and of the male executants 3/5ths of the whole; the suit was for realisation of the mortgage-debt from an 8-anna share of the defendants in a single village and also from the house and the grove. The trial Court, finding that the execution of the deed by the ladies was not proved, gave a decree against the male executants for the sale of an 8-anna share on the ground that, after deducting the share of the ladies, they owned between them more than an 8-anna share out of the entire 16 annas. The defendants against whom the decree was passed appealed, the plaintiff and the ladies being made respondents. The plaintiff filed a petition of cross-objections, contending that execution was proved against the ladies. The defendants-appellants objected that the plaintiff was not entitled to challenge the order of the Court below dismissing the suit against the ladies, by way of a petition of cross-objections:

Held, that it was open to the plaintiff, as respondent to the appeal, to support the decree of the Court below, in so far as that decree ordered the sale of a share of 8 annas, upon a ground that had been decided against him by the trial Court, namely, upon the allegation that the document in suit had been executed by the ladies, and that as soon as an appeal was filed on the plea that in any event only 3/5ths out of an 8-anna share should be ordered to be sold, the plaintiff had a ground for asserting his original claim, and it was within the competence and discretion of the High Court to permit the petition of cross-objections to be heard, even as against those defendants to the suit who were arrayed as respondents to the appeal. [p. 648, col. 1.]

First appeal from the decision of the Sessions and Subordinate Judge, Jaunpur, dated 30th March 1915.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Dr. *S. M. Sulaiman*), for the Appellants.

Mr. *B. E. O'Conor* (with him Mr. *Gokul Prasad*), for the Respondents.

JUDGMENT.

PIGGOTT, J.—This is a suit on a mortgage of the 17th of September 1900. The execut-

ants of this deed were six persons. Jamil Ullah and Jalil Ullah, the two sons, and *Musammat* Khatun Bibi, the surviving widow of one Khalil Ullah, deceased, were the first three. The other three executants, Johra Bibi, Mohammad Shibli and Muhammad Makki, were members of the same family, connected more or less distantly according to a pedigree which is to be found at page 2 of the printed record. The only point I desire to make about these three executants at present is that the pedigree does not show that they could have inherited any property from the deceased Khalil Ullah so as to be liable for payment of any portion of that gentleman's debts. The suit as brought is against the executant Jamil Ullah in person and the heirs of the remaining five executants, all of whom are since deceased. The Court below has found execution proved as against the four male executants and not proved as against the two ladies, Khatun Bibi and Johra Bibi. The mortgaged property as specified in the deed in suit consists of shares in three villages and certain house property and a grove, but the present suit is for realisation of the entire mortgage-debt from an 8-anna share of the judgment-debtors in a single village, the name of which is variously written as Gowai or Gowaipur, and also from the dwelling house and the grove. We have no information before us as to the respective shares of the various executants of the deed in the dwelling house or in the grove; but as regards the principal item involved in the plaintiffs' claim, namely, the share in village Gowaipur, an extract from the register of proprietary rights is printed at page 60R. This shows that in the village in question the six executants of the deed owned in the year 1900 an entire Mahal of 16-annas and that they owned the same in certain specified shares. For our purposes it is sufficient to note that the shares of the two ladies came to 2/5ths of the whole and the shares of the four male executants to 3/5ths of the whole. The deed in suit purports to mortgage an 8 anna share out of the whole 16 annas, the said mortgaged share being the property of all the executants, but without any further specification. Now the learned Subordinate Judge, while finding it not proved that the two ladies, *Musammat* Khatun Bibi and Johra Bibi, had executed the deed in suit, has nevertheless given a decree for the sale of an 8-anna share, on the ground that the male executants of the deed in suit did own between them more than an 8-anna share out of the entire 16 annas, even after excluding the shares owned by the two ladies.

We have before us an appeal by those defendants against whom the suit was decreed, and a petition of cross-objections under Order XLI, rule 22, Civil Procedure Code, has been filed by the plaintiffs. The appeal raises in the main three points:—

Firstly, it is contended that execution of the deed in suit is not proved as against any of the executants other than Jamil Ullah.

Secondly, it is contended that, even if execution be proved against any or all of the other executants, there has been no valid registration of the document as against any of the executants other than Jamil Ullah.

Thirdly, it is contended that, in any event, the decree should have been for the sale of 3/5ths of an 8 anna share and not an entire 8-anna share.

The remaining pleas in the memorandum of appeal are either summed up in the three contentions above stated or have not been seriously pressed.

In the memorandum of cross-objections the plaintiffs contend that execution was proved as against the two ladies Khatun Bibi and Johra Bibi and that effect should be given to this contention, if allowed, in any decree which this Court may pass.

It will be convenient to state at once that this petition of cross-objections was met at the outset by those defendants who represent the estate of Khatun Bibi and Johra Bibi, by a plea that the plaintiffs were not entitled to challenge the order of the Court below dismissing the suit as against the representatives of these ladies by way of a petition of cross-objections. The point is that the representatives of these ladies are arrayed along with the plaintiffs as respondents to this appeal. They were content to accept the decree of the Court below as passed and have not themselves appealed against it. In support of this contention reliance is placed upon a decision of this Court in *Kallu* v. *Manni* (1),

(1) 23 A. 98; A. W. N. (1900), 212.

in which the principle contended for is laid down in broad terms. As a matter of fact the position has since been re-considered by this Court in *Abdul Ghani* v. *Muhammad Fasih* (2). We have been referred also to decisions of other High Courts to be found in *Bishun Churn Roy Chowdhry* v. *Jagendra Nath Roy* (3), *Shabiuddin* v. *Deomoorat Koer* (4), *Jadunandan Prosad Singha* v. *Koer Kallyan Singh* (5), *Nursey Virji* v. *Alfred H. Harrison* (6), *Munisami Mudaly* v. *Abbu Reddy* (7). It may be noted at once that it was in any event open to the plaintiffs, as respondents to the appeal, to support the decree of the Court below, in so far as that decree ordered the sale of a share of 8 annas, upon a ground which had been decided against them by the trial Court, namely, upon the allegation that the document in suit had, contrary to the finding of the Court below, been duly executed by Khatun Bibi and Johra Bibi. It was impossible, therefore, to close the mouth of the learned Advocate for the respondents or to refuse to re-consider this question of execution by the two ladies. As a matter of fact, under the peculiar circumstances of this case, it seems clear that the plaintiffs could not be blamed for acquiescing in the decree of the trial Court so long as that decree entitled them to bring to sale a full 8-anna share; but they had ground for re-asserting their original claim as soon as an appeal was filed on the plea that in any event only 3/5ths out of an 8-annas share should be ordered to be sold. Under the circumstances we think it was within the competence and discretion of this Court to permit the petition of cross-objections to be heard, even as against those original defendants to the suit who were arrayed as respondents to this appeal. If we had found the contentions urged in the petition of cross-objections to be well-founded in fact, we should have been prepared to give effect to them in our decision.

(2) 28 A. 95; 2 A. L. J. 667; A. W. N. (1905), 200.
(3) 26 C. 114; 13 Ind. Dec. (N. S.) 677.
(4) 30 C. 655.
(5) 13 Ind. Cas. 653; 16 C. W. N. 612; 15 C. L. J. 61.
(6) 21 Ind. Cas. 7; 37 B. 511; 15 Bom. L. R. 781.
(7) 27 Ind. Cas. 323; 38 M. 705; 27 M. L. J. 740; (1915) M. W. N. 45.

It is as well to take up at once this question of the execution of the deed in suit by Khatun Bibi and Johra Bibi. They were illiterate and *pardanashin* ladies and they do not purport to have executed the document in suit by signing it or by making their mark, or by means of their thumb-impressions. On behalf of *Musammat* Johra Bibi her name as executant of this deed purports to have been written by her son Naim Ullah; on behalf of *Musammat* Khatun Bibi, by her son Bashir Ullah. The question in issue is simply whether these two young men had authority to execute the deed on behalf of their respective mothers. Naim Ullah is dead, but Bashir Ullah was put into the witness-box on behalf of the defendants.

He admitted having written his mother's name as executant of the deed in suit, but refused to admit that he had her authority for so doing. He professed to have acted on assurances given him by Jamil Ullah, whom he regarded as the head of the family. Jamil Ullah, on the other hand, was put into the witness-box by the plaintiffs. He deposed that the document in suit was duly executed in his presence and that Naim Ullah and Bashir Ullah wrote the names of their respective mothers as executants "with the permission" of the said ladies. He was very reluctant to commit himself to any definite assertion as to the manner in which that permission had been obtained, but so far as it goes, the effect of his statement is as given above. Further, the plaintiff Behari Lal went into the witness-box and called 2 out of the 3 surviving marginal witnesses, the names of the witnesses called being Sitaram and Debi Prasad. We have had to consider all this evidence carefully in connection with the various admitted facts of the case and the inferences derivable from such facts. It is clear that the mortgagees in this case accepted as their security a document the validity of which, as regards the shares of the lady executants, depended on their being able to prove the authority of Naim Ullah and Bashir Ullah to sign for their respective mothers. Moreover, the document was registered, as we shall have presently to consider, upon an admission of execution made by Jamil Ullah in his own behalf

and on behalf of all the other executants. We, therefore, lack in this case the sort of direct safeguard of the interests of a *pardanashin* lady which is ordinarily provided by the procedure laid down in the Registration Act. If the plaintiffs in fact suffer any appreciable loss by reason of this defect in the nature of the security accepted by them and in the procedure adopted at registration, they are after all a good deal to blame, because they could certainly have insisted on the thumb-impressions of the two ladies, or at least their marks, being taken at the time of execution, and they could also have insisted on the registration of the document being effected only after direct admission of execution had been obtained from the ladies themselves. We are concerned simply with the question whether the evidence produced is sufficient to prove execution affirmatively as against the representatives of the two ladies. The evidence of Jamil Ullah has been attacked on both sides and cannot be relied on by either. Having committed himself before the Registration Officer to an admission of execution on behalf of the two ladies, he could scarcely say less than he has done in favour of the plaintiffs without running the risk of a criminal prosecution; on the other hand, he does seem to have been fairly careful to say nothing more in favour of the plaintiffs than he could help. So far as his own interests are concerned, he stands to gain rather than to lose by a decision in favour of the plaintiffs on the question of execution by the two *pardanashin* ladies. His evidence can best be dealt with by being put on one side altogether. We then have left the depositions of the plaintiff Behari Lal and the two attesting witnesses. The learned Judge of the Court below has come to the conclusion that this evidence does not satisfactorily prove that the two ladies were actually present, at the time of execution, in a room adjoining that in which the document was executed by the male executants, or that they were consulted at the time about the question of execution or gave the alleged authorisation to their respective sons to sign for them. There are undoubtedly serious discrepancies in the evidence and difficulties in the way of accepting it as it stands. There are passages in the deposition of the plaintiff Behari Lal which certainly suggest the inference that he was personally of opinion that Naim Ullah and Bashir Ullah had authority to execute such a document as the mortgage in suit on behalf of their respective mothers under the arms of the power-of-attorney on the strength of which the registration was subsequently effected. If this was his impression it is an erroneous one, for the document in question does not confer any such general authority on the two young men. At the same time the existence of such an impression in the plaintiff's mind might well account for his having accepted the signatures of the two young men as sufficient, without any of the elaborate precautions which at the trial he endeavoured to prove that he had in fact taken. There are undoubtedly circumstances in the case from which a general inference might be drawn in favour of the statement that the two ladies in question must have known of this mortgage transaction and must have given at least a tacit permission to their sons to act on their behalf. At the same time I feel very strongly that the direct evidence by which the plaintiff has sought to prove an authorisation given verbally at the time of execution, after the deed had been read over and explained to the ladies, is quite unreliable. It has been rejected by the Court which heard it and I certainly do not feel prepared to reverse the finding at which the trial Court has arrived on this point. I think, therefore, that this finding must stand and that the execution of this deed by Khatun Bibi and Johra Bibi is not satisfactorily proved. It is not necessary, therefore, so far as these ladies are concerned, to go into the question whether there was a valid registration on their behalf.

The points raised in the memorandum of appeal may be more briefly disposed of. The first question is, whether execution is proved as against the male executants other than Jamil Ullah. Here I feel able to concur without hesitation in the conclusion arrived at by the learned Subordinate Judge. The evidence given by Jamil Ullah himself, by the plaintiff

Behari Lal and by the two marginal witnesses does prove that the parties concerned in this transaction came together in the male apartments of the residential house of the mortgagors, that a draft deed was produced and the mortgage deed in suit faired out accordingly and that the male executants did sign the document then and there in the presence of the attesting witnesses. The plea, therefore, fails. It is worth noticing further in this connection that the bulk of the consideration consisted of a cash payment made to Jamil Ullah and of antecedent debts due from Khalil Ullah, while the property in suit had come to the lady executants from their own family and not from Khalil Ullah at all.

As regards registration, it has already been remarked that the document was presented for registration by Jamil Ullah alone. This he had a right to do, so that there was no invalidity about the presentation of the document. The only question is, whether Jamil Ullah was an authorised agent for the purpose of admitting execution on behalf of the male executants, within the meaning of section 34 of the Indian Registration Act. There has been a great deal of controversy about the power-of attorney under which Jamil Ullah purported to act. The original of this document has not been produced. The learned Subordinate Judge has admitted secondary evidence, on the ground that the original is somewhere in the possession or control of one or other of the defendants and that the plaintiffs seemed to have made all reasonable efforts to get the original before the Court. He has pointed out that there was one oversight on the part of the plaintiffs in the matter of service of notice on one possible person in whose possession the original of this document might conceivably have been; but on an examination of the record as a whole I can see no reason whatever for holding that the Court below was not well within its discretion in admitting secondary evidence. The secondary evidence is of the most satisfactory character; a certified copy has been obtained from the registration department. There is a great deal of evidence tending to show that this document was, as a matter of fact, acted upon as a genuine and valid document by all the parties concerned in it for a period of years. The execution of the power-of-attorney was certified by the Registering Officer to have been made in his presence as required by section 33 of the Indian Registration Act. He seems, as a matter of fact, to have taken the trouble to get it re-executed at the time of his visit to the house in which the lady executants were residing, even though it had previously been executed by all the persons concerned. On the whole, as regards the male executants of the mortgage-deed in suit at any rate, I can see no good reason for holding that Jamil Ullah was not their authorised agent under this power-of-attorney to admit execution on their behalf. There has, therefore, been sufficient proof of execution and of valid registration as against all the male executants.

The only point on which the appeal must succeed is the third point. The reasons given by the learned Subordinate Judge for ordering the sale of an entire 8-anna share, after his finding against the validity of the execution of the mortgage deed by Khatun Bibi and Johra Bibi, will not bear examination. He has dragged in the provisions of a section of the Transfer of Property Act which are obviously inapplicable to the state of facts before us. Moreover there is in the pleadings on this record something quite decisive against the plaintiffs. It has been pointed out that the executants of the deed in suit owned the entire 16 annas of this particular Mahal in village Gowaipur. Eight annas were mortgaged to the plaintiffs by the deed in suit. The remaining 8 annas, according to the plaint itself, had since been mortgaged to certain other persons who were impleaded as defendants Nos. 24 to 27 and 28. With regard to these defendants the plaintiffs themselves contended that the 8-anna share in respect of which the present suit was brought must be treated as wholly distinct from the 8-annas share mortgaged to these other defendants. We have been told in the course of argument that, as a matter of fact, this point is *res judicata* as between the plaintiffs and the other mortgagees in connection with a certain other litigation. There has been some negligence on the part of the defendants-appellants in laying proper materials in support of this contention before this Court, but

under the circumstances it is not necessary to go further into the point. On the mortgage deed in suit, read in connection with the entries in the register of proprietors, the fair inference would be that each of the executants of the deed in suit had mortgaged one-half of his share in the entire Mahal of 16 annas; and this was the contention which the plaintiffs themselves in paragraph 4 of their plaint asked the Court to accept. It follows, therefore, that, whatever additional shares the male executants of the mortgage-deed may have possessed in the other half of the Mahal, that is to say, in the 8-anna share mortgaged to defendants Nos. 24 to 27, those shares are not subject to the plaintiffs' claim in the present suit. The plaintiffs are only entitled to realise their mortgage debt against the total of the shares of the male executants in the 8-anna share covered by the deed in suit, that is to say, in 3/5ths out of the said 8-annas. The result is that this appeal should succeed to this extent only, that the order for sale be not for the sale of an 8 anna share but for the sale of 3/5ths out of the share of 8-annas claimed in the plaint; otherwise the appeal fails. The appellants will pay and receive costs in this Court, including fees on the higher scale, in proportion to failure and success. The cross-objections are dismissed with costs, including fees on the higher scale.

WALSH, J.—I agree in the order proposed. The case with regard to the execution of the deed by the two ladies is undoubtedly a difficult one. The evidence of Bashir Ullah is evidence upon which no Court ought to rely except as regards admissions and statements made by him against himself. According to his own statement on oath repeated more than once, he made a perfectly shameless confession of having forged his mother's name. Not merely having forged his mother's name but having done so at the request of what he calls his elder brother, in fact his cousin, with the intention of defrauding the creditor. The lower Court has made no reference to his evidence in its judgment. If I had been trying the case I should, at its conclusion, have directed his prosecution for an offence under section 463, and it seems to me a case which ought not to be left where it is. Offences of this kind shamelessly proclaimed in Courts of law eat at the foundation of commercial credit in any community, and I see no reason why, as long as Courts of justice pass them by in silence, they should not flourish and abound. The direct evidence with regard to the execution is no doubt exaggerated, conflicting and unsatisfactory but men have been sent to transportation on evidence not less contradictory, and it is evidence which, after all, points in the same direction, that is to say, there is no evidence worthy of the name to negative it. The position of the family, the nature of the transaction and the surrounding circumstances make it *prima facie* not improbable that the ladies consented to and authorised this transaction. The Court below, however, has found otherwise. Although I am not sure whether, if trying the case, I should have come to the same conclusion, I find myself unable to say that the Court below was necessarily wrong. On the other points I agree with my brother.

BY THE COURT.—The order of the Court is that this appeal should succeed to this extent only that the order for sale be not for the sale of an 8-anna share but for the sale of 3/5ths out of the share of 8 annas claimed in the plaint; otherwise the appeal fails. The appellants will pay and receive costs in this Court, including fees on the higher scale, in proportion to failure and success. The cross-objections are dismissed with costs, including in this Court fees on the higher scale.

Appeal accepted.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 3273 OF 1916.

July 13, 1918.

Present :—Mr. Justice Wilberforce.

Musammat UTTAM DEVI—DEFENDANT—APPELLANT

versus

DINA NATH—PLAINTIFF—RESPONDENT.

Probate and Administration Act (V of 1881), s. 64—Letters of Administration, whether can be granted to person who was member of joint Hindu family with deceased - Hindu Law—Joint family—Survivorship.

A member of a joint Hindu family with a deceased person is not competent to apply for Letters of Administration to that person's estate. In such a

case the estate passes by survivorship and there is nothing left to administer.

Miscellaneous first appeal from the order of the District Judge, Gurdaspur, dated the 24th August 1916.

Messrs. *Beni Pershad* and *Balwant Rai*, for the Appellant.

The Hon'ble Pandit *Sheo Narain* and Bakshi *Tek Chand*, for the Respondent.

JUDGMENT.—The appellant is the widow of one Sham Lal, a retired Tahsildar. Letters of Administration of his estate have been granted to his nephew, Dina Nath, who also alleges himself to be a member of the joint Hindu family with the deceased and his adopted son. There were many disputed questions in the case and a large amount of time was wasted in taking evidence which in the end has not been utilized for the basis of any decision. The decision of the case, so far as is necessary to describe it for the purposes of this appeal, was that Letters of Administration should be granted to the applicant as he was the most suitable person to administer the estate. Whether he was also a member of a joint Hindu family with the deceased, or an adopted son or not, the lower Court gave no finding on these disputed points. The further question arising was whether Letters of Administration should be granted in respect of a sum of Rs. 10,000 desposited in the Alliance Bank of Simla in the names jointly and severally of Sham Lal and his wife or survivor. The lower Court granted Letters of Administration in respect of the sum but left open the question whether the widow was rightly entitled thereto or not.

On appeal the first point argued is that the applicant having claimed that he and Sham Lal were members of a joint Hindu family, no application under Act V of 1881 was competent, there being no estate in respect of which such an application could be made. It is manifest that if Sham Lal and applicant were members of a joint Hindu family, there was no estate of Sham Lal to be administered, the estate having vested by survivorship in the applicant. The appellant relies on the above arguments and on *Mathura Prasad* v. *Durgawati* (1). This authority deals with a case under the Succession Certificate Act but the law and principles of law concerned are exactly similar.

(1) 24 Ind. Cas. 182; 36 A. 380; 12 A. L. J. 525.

Counsel for the respondent argues that this objection cannot be taken by the appellant on the ground that the appellant refuses to admit Dina Nath and Sham Lal to have formed a joint Hindu family. As, however, the applicant himself stated in his application that he and Sham Lal formed a joint Hindu family, he cannot be allowed to resile from this position, nor even before me has any suggestion been made that the facts stated in the application were in any way incorrect. The lower Court was in error in granting Letters of Administration merely on the ground that the applicant was the nephew of Sham Lal, for a surviving member of a joint Hindu family is necessarily also a relation of a deceased member. Counsel for the respondent also argues that there is no legal bar to the granting of Letters of Administration to the surviving member of a joint Hindu family if he is willing to pay the Court-fees required. He relies especially on *In re Dasu Manavala Chetty* (2). This authority, however, deals only with the question of Court-fees payable and any remarks favourable to respondent are *obiter*.

I hold that applicant, being a member of a joint Hindu family with deceased according to his own statement, was not competent to apply for Letters of Administration. I accept the appeal and grant costs in both Courts to appellant (Rs. 80 Pleader's fee in each Court). The order regarding payment of costs for adjournment by appellant will stand, no reason being advanced against this order.

Appeal accepted.

(2) 4 Ind. Cas. 1064; 33 M. 93; 6 M. L. T. 286; 19 M. L. J. 591.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1134 OF 1917.

January 16, 1919.

Present:—Justice Sir Ernest Fletcher, KT., and Mr. Justice Walmsley.

JADAV CHANDRA MOULIK—PLAINTIFF—APPELLANT

versus

MANIK SARKAR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r,

DARBARI MAL *v.* KANSHI.

27, *O. XLVII, r.* 1—*Appeal, second—Judgment delivered in former suit, whether can be admitted as additional evidence—Review—Procedure.*

A suit for rent, in which the matter in dispute was the rate of rent, was decided by the lower Appellate Court on 1st March 1917 without knowing that a judgment in a former suit between the same parties had been delivered by the High Court in second appeal on the day previous, by which the Court decreed the rate of rent claimed by the plaintiff. The plaintiff wanted to have that judgment of the High Court admitted in the second appeal which he preferred against the decision of the lower Appellate Court:

Held, that the proper course for the plaintiff was to have applied to the Judge of the lower Appellate Court for a review of his judgment on the ground of discovery of new and important matter, but that he could not have the whole proceedings set aside and get additional evidence admitted in second appeal.

Appeal against the decision of the District Judge, Rungpur, dated the 1st March 1917, affirming that of the Munsif at Kurigram, dated the 28th January 1915.

Babu *Debendra Narain Bhattacharjee*, for the Appellant.

Babu *D. N. Bagchi*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the plaintiff against a decision of the learned District Judge of Rungpur, dated the 1st March 1917, confirming a decision of the Munsif at Kurigram. The plaintiff sued the defendant for rent. The matter in dispute between the parties was the rate of rent. There was a former litigation between the parties on the same point which came up to this Court and this Court, on the 28th February 1917, took the view of the plaintiff on the matter. On the 1st March 1917 the learned Judge in the lower Appellate Court delivered his judgment, without knowing that the judgment in the former suit had been delivered by this Court on the day previous, following the decision of the lower Appellate Court in the former suit. The plaintiff now comes on appeal here. It appears that the records before the lower Appellate Court did not contain the judgment of this Court of the 28th February 1917. It is quite obvious that the proper course to adopt in the circumstances was to apply to the Judge of the lower Appellate Court for a review of his judgment on the ground of discovery of new and important matter, namely, the judgment of the High Court, which was delivered on the 28th February 1917 which reversed the judgment of the lower Appellate Court in a former suit and having failed to apply for a review of judgment, he cannot now have the whole proceedings set aside and to have additional evidence admitted in second appeal. In think that in a case in which the plaintiff deliberately abstained from applying for a review of judgment, we ought not to interfere with the judgment of the Court below.

The present appeal, therefore, fails and must be dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 700 OF 1917.

August 1, 1918.

Present:—Mr. Justice Broadway.

DARBARI MAL—RECEIVER—PETITIONER

versus

KANSHI—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), *O. XXI, r.* 57—*Attachment, determination of*—Sapurddar, *liability of, extent of.*

A *sapurddar* of attached property has no warrant or justification in making over the property to the judgment-debtor upon an attachment of the property coming to an end by virtue of Order XXI, rule 57 of the Civil Procedure Code. Inasmuch as the property is made over to his care by the Court, he is responsible to the Court for its production and if he is unable to produce it when called upon to do so, he is liable to pay its value.

Revision from the order of the Munsif, 1st Class, Chunian, District Lahore, dated the 19th May 1917.

Mr. *Lal Chand Khosla*, for the Petitioner.

Mr. *Badri Nath*, for the Respondent.

JUDGMENT.—Certain property having been attached in execution of a decree, it was made over to Darbri Mal as *sapurddar*. Various objections were then made by different persons, who claimed that the attached property was theirs. These objections were decided one after the other in favour of the decree-holder, who, however, failed to put in an appearance at a hearing of the execution proceedings, with the result that the application to execute the decree was dismissed in default.

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On application it was restored and an order was passed for the sale by auction of the property that had been attached.

Darbari Mal, the *sapurddar*, then came forward as an objector and alleged:—

(1) that he had made over the property to the judgment-debtor because the attachment ended when the application was dismissed in default ;

(2) that no sale could be ordered till the property had been re-attached.

His contentions are correct up to a certain point. No doubt, the attachment came to an end by virtue of Order XXI, rule 57, Civil Procedure Code, and before sale the property must be re-attached, but his action in making over the property to the judgment-debtor is without warrant or justification. The property had been made over to his care by the Court, and he is responsible to the Court for its production—if he is unable to produce it when called on to do so, he is liable to pay the value. I accordingly return the case to the executing Court, who will proceed according to law and recover the value of the property from Darbari Mal if he is unable to produce the property. No order as to costs.

Case returned.

CALCUTTA HIGH COURT.

INSOLVENCY JURISDICTION.

APPEAL No. 214 OF 1912.

December 10, 1918.

Present:—Mr. Justice Rankin.

Re SURESH CHUNDER GOOYEE AND OTHERS.

Presidency Towns Insolvency Act (III of 1909), s. 36 —Order directing person to deliver property belonging to insolvent—Procedure—Official Assignee, remedies of —Costs of unsuccessful motion how to be met.

Where the Official Assignee applies to the Court under section 36 of the Presidency Towns Insolvency Act for an order against a person to deliver up property in his possession belonging to the insolvent, the only course open to him is to take by itself the examination of that person and ask the Court for an order that is justified by the admissions made or evidence given by that person and without looking to any further evidence at all. [p. 655, col. 1.]

Where the Official Assignee desires to proceed against a third person to recover from him property belonging to the insolvent, there are two courses open to him. The one is to start an action against that person and the other is to proceed against him in insolvency. In the latter case, the Court has a discretion to refuse to deal with the matter by motion and to direct that it be dealt with by an action. The presenting of petitions and obtaining Rules in bankruptcy makes procedure more complex. [p. 655, col. 1.]

As a general principle, the costs of an unsuccessful motion brought by the Official Assignee, however careful he may have been, must be borne by himself but he may obtain an indemnity from those in whose interests the motion is made before he starts proceedings. [p. 655, col. 2; p. 656, col. 1.]

Mr. *B. C. Ghose*, for the Official Assignee.

Mr. *Langford James*, for the Respondent.

JUDGMENT.—I think it will be desirable that I should give judgment in this matter. In this bankruptcy it appears that there was a question as to whether a certain business belonged to the insolvent and his wife or belonged to the respondent. By a petition filed on the 21st April 1918 the Official Assignee, who had already examined some five or six witnesses under section 36 of the Act, applied and obtained an order for leave to institute the necessary proceedings for the purpose of recovering the property referred to in paragraph 6 and to engage Counsel and Attorney for that purpose and to pay the costs and expenses therefor out of funds to the credit of the estate. That order was made, and thereupon the proceeding that was commenced was this, that first of all a petition was filed on the 7th May 1918 in which the statements were verified to the best of knowledge, information and belief by the Official Assignee, and the petition asked for an order "that the respondent do make over and deliver possession of the business, stock in trade, assets and liabilities to your petitioner as such assignee as aforesaid and that the costs of and incidental to the examination of the respondent and other witnesses be paid by the respondent." I will say nothing about the latter part of that application. On that a Rule apparently was granted: "Upon reading a petition of the Official Assignee and hearing (various people) it was ordered that the respondent do show cause before this Court why an order should not be passed against him directing him to hand over the grocer's business carried on at such address." I understand that the matter was mentioned to my brother Greaves, J., on a previous occasion and he expressed his

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intention to hear the witnesses examined before he dealt with this matter. It comes on before me to day and I am going to deal with it *de novo* and to take the matter from the commencement. If the Official Assignee desires to proceed under section 36, the only way in which he can do that is to take the examination of the respondent by itself and ask the Court for an order that he is justified by the admissions made or evidence given by the respondent and without looking to any further evidence at all. I do not understand that any such admissions by the respondent were made in this case as would enable the Official Assignee to get what he wants under section 36. The next thing I desire to say is that if people would avoid presenting petitions and obtaining Rules in bankruptcy, the procedure would be a great deal simpler. If in this case simply a notice of motion had been sent to the respondent stating the grounds of the application together with an affidavit filed giving the necessary evidence in support of it, that application would have come on before the Court and the Court would have been in a much better position to deal with it. There were two courses open to the Official Assignee. The one was to start an action and the other was to proceed against the respondent in insolvency. By the second course, if adopted, it is open to the Court in its discretion at the hearing of the motion to refuse to deal with the matter by a motion and direct that the matter be dealt with by an action. The Official Assignee is not able to go on and prove his case by evidence to day, and there seems to be a question as to another respondent being necessary and though this matter has been going on since May up to the present, these proceedings are not in such a position as would justify me in leaving this motion any longer open. Therefore, I am disposed to bring this whole proceeding, this motion, to an end on the best terms I possibly can. If in the future the Official Assignee considers that his evidence is so clear, and the matter is so short that he wants to apply again in the ordinary way by notice of motion to the Court against the proper respondents, I will not prevent him from doing that; alternatively he can bring an action if he is so advised. For the present the only course open to me is to discharge this Rule and to make no order on the motion, *i.e.*, on the present petition. As regards the costs, the order that was obtained was that those are to be paid out of the funds of this estate. All I can do is to make an order against the Official Assignee for the costs and in that case he will recover them out of the assets of this estate. I must give the order in favour of the respondent, but it must be so expressed as not to prevent proper proceedings being taken in the future as regards the ownership of this business, whether by motion or by action.

(Later after argument as to costs.)

This is a proceeding by the Official Assignee against a respondent, and what has happened is this: the Official Assignee prior to starting the proceeding has been most careful to come to Court to satisfy the Court that the proceeding was one which was proper to undertake. He has got the leave of the Court to do it, and he has further got an order that he be at liberty out of the assets in his hands belonging to the estate to pay the costs and expenses of the proceedings so to be instituted as aforesaid. So there can be no possible question in this case as to the Official Assignee being in any sense in default. Assuming that the Official Assignee is not in any possible way in default, here is a motion which has been brought by the Official Assignee for the benefit of the creditors and which has been unsuccessful. The respondent has got certain costs against which he ought to be indemnified; what is the Court to do? The suggestion is that what the Court ought to do is to make an order that the assets of the estate, so far as they go, and they only, shall bear the respondent's costs. In my opinion that will be entirely wrong. The correct proceeding is to make an order that the Official Assignee do pay the respondent's costs. Having protected himself by obtaining leave from the Court, he has got his right of indemnity, for what it is worth, against the assets of the estate, but if in a case of this sort assets of the estate are

insufficient to give a proper indemnity to the Official Assignee, then the Official Assignee, before starting these proceedings, must approach the creditors or somebody and get a guarantee or an indemnity from the people on whose behalf the motion is to be brought: but it is quite impossible that a person against whom an unsuccessful motion has been brought by the Official Assignee should be left in the ordinary course in a position that he has to look to an insufficient fund and take his chance of that being sufficient. I have no doubt at all that the Court would have power to make such an order. I have no doubt at all that in some cases I shall make such order where I think the respondent has done something for which the Court can visit him with penalty or even in other cases, but I do want to lay it down straightway that if the Official Assignee brings an unsuccessful motion, however careful he may have been, the order that will be made will generally be that he pay the respondent's costs, and he will have the right of indemnity given him by the previous order of the Court. If he is not content with that, he must obtain an indemnity from the people in whose interest the motion is brought before he starts proceedings. I want that to be laid down as a general principle, and if there is anything wrong with that general principle, I shall wait for a higher Court to tell me the procedure.

Order accordingly.

MADRAS HIGH COURT.

CIVIL APPEAL No. 171 OF 1918.

February 12, 1919.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Kumarasawmi Sastri.

THE RAJAH OF PITTAPURAM—CLAIMANT No. 8—APPELLANT

versus

THE REVENUE DIVISIONAL OFFICER, COCANADA, GODAVERI DISTRICT—REFERRING OFFICER—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 23, 24—Compensation, determination of—Landlord and tenant—Occupancy rights—Method of computation.

Where occupancy or other rights are claimed in land notified to be acquired under the Land Acquisition Act, the correct rule to be observed is to value the land in the first instance, including all interests in it, and to apportion the amount so ascertained among the parties interested according to their interests.

The difference between the market-value and the value of the tenant's interest represents the landlord's interest.

Appeal against the award of the District Court, Godaveri at Rajahmundry, in Original Petition No. 16 of 1916, dated 4th February 1918.

Mr. *A. Krishnasawmi Aiyar*, for the Appellant.

Mr. *V. Ramesam* (Government Pleader), for the Respondent.

JUDGMENT.—We think the correct rule in cases like this has been laid down by Sir Lawrence Jenkins, in *Collector of Belgaum* v. *Bhimarao* (1), *viz.*, the land to be acquired has to be valued in the first instance including all interests in it, and that the amount so ascertained has then to be apportioned among the parties interested according to their interests. This was followed by Batchelor, J., in *Trustees for the Improvement of the City of Bombay* v. *Jalbhoy* (2). Similarly it was held in Calcutta in *Collector of Dacca* v. *Hari Das Bysak* (3) that the proper way of dealing with lands like this is, in the first instance, to leave out of consideration the value of the occupancy rights, and to ascertain what would be the market value of the land if it were put to the most lucrative use, having regard to its condition, etc., the value of the occupancy rights of the tenants settled on the land being left to be ascertained afterwards. The fact that neither the landlord nor the tenant can utilise the land for building purposes without the concurrence of the other makes no difference. The difference between the market value and the value of the tenant's interest represents the landlord's interest. These authorities are not referred to in the judgment in Appeals Nos. 371 and 372 of 1916, to which the District Judge has referred.

We must set aside the award in so far as it relates to the appellant and remand the case for disposal according to law.

Costs will abide the result.

M. C. P.

Award set aside; Case remanded.

(1) 10 Bom. L. R. 657.
(2) 3 Ind. Cas. 757; 33 B. 483; 11 Bom. L. R. 674.
(3) 14 Ind. Cas. 163.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 425 OF 1918.

March 3, 1919.

Present:—Sir Basil Scott, KT., Chief Justice, on difference of opinion between Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR—APPELLANT

versus

SABITKHAN BAHADURKHAN—ACCUSED—RESPONDENT.

Confession of co-accused, evidentiary value of—Corroboration, nature of.

Heaton, J. (*Scott, C. J.*, concurring)—The rule as to the use to be made of the confession of a co-accused is, that a man ought not to be convicted solely on such confessions, nor upon such confessions together with evidence of the ordinary kind which is trivial or unimportant. But where there is a body of evidence and circumstances enough to support a conviction if the evidence is accepted, such confessions may be taken into consideration together with the evidence and the circumstances. [p. 658, col. 2.]

Shah, J.—Before acting upon such confessions the Court should insist upon independent corroboration from other evidence in the case in material particulars, particularly as to the identity of the accused. [p. 660, col. 1.]

The evidence, which is supposed to afford independent corroboration, must be in itself reliable and not doubtful evidence, which is treated as reliable in consequence of the confession; otherwise it will not be independent corroboration. [p. 660, col. 2.]

Scott, C. J.—Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. [p. 665, col. 1.]

Appeal by the Government of Bombay, from an order of acquittal passed by the Acting Sessions Judge, Kanara.

FACTS appear from the following judgment of

HEATON, J.—Three men were tried for murder by the Sessions Judge of Kanara with Assessors. He convicted two of them, accused Nos. 2 and 3, and acquitted Sabitkhan *valad* Bahadurkhan who is accused No. 1 in the case. The convicted accused appealed and their appeals were dismissed by this Court some time ago. The Government of Bombay have appealed against the acquittal of Sabitkhan and that is the appeal now before us.

My learned brother and myself are unable to agree as to disposal of this appeal, and, therefore, the matter will, as required by section 429 of the Criminal Procedure Code, have to be laid before another Judge of this Court.

In dealing with the appeal against the acquittal, we have to consider the evidence in the case and there are also confessions made by accused Nos. 2 and 3. On the strength of that evidence and those confessions and also the decision of this Court in the appeals of accused Nos. 2 and 3, there is no doubt that those accused did take part in the murder of Mahammadkhan. If we assume that Mahammadkhan was murdered shortly after leaving his village of Alkerry on or about 25th September last by accused Nos. 2 and 3 and possibly one or more others, and if we then believe all the circumstances deposed to by the witnesses, it follows as a natural, though not perhaps as an inevitable, inference that Sabitkhan also took part in the murder. But for this we must believe all the incidents deposed to.

These incidents are set out by the Sessions Judge as follows:—

"Now this Mahammad was a bachelor; but he had a younger brother, named Sabitkhan, who had a wife and family and was penniless. This Sabitkhan conceived himself to have a claim upon the generosity and good offices of his elder brother; and this claim he urged with importunity, both in season and out of season.

"Mahammadkhan did not take the same view of an elder brother's obligations. It was his opinion that Sabitkhan should earn his own living and he asked the Ranger to give the same advice.

"Many of the villagers have heard the brothers' quarrel.

"Last year the feast of *Ganesh Chaturthi* came to an end upon the 24th of September. It was at this feast that Mahammadkhan was last seen alive. The man was then in poor health. He intended to go to Calgutgie for a cure: and he invited one Bussia (Exhibit 8), who was thought to be suffering from the same malady, to bear him company.

"Bussia was willing and he agreed to go. But that same evening Sabitkhan sought out this Bussia and dissuaded him from the undertaking. 'I myself will fetch you physic', said Sabitkhan: and Bussia, willing to be spared the labour of a long journey, renounced his project, and allowed Mahammadkhan to take the road alone. This Bussia saw Sabitkhan, who is the first accused, going next morning along the road which Mahammadkhan was to take and with him went the other two prisoners. Half an hour later he saw Mahammad-

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April. They retracted their confessions and previous statements at the trial before the Sessions Court. The result of tha trial is already stated.

It is not disputed now, and it is indisputable, that Mahammadkhan was murdered; and it must be taken for the purpose of this appeal that acused Nos. 2 and 3 were concerned in the murder.

The learned Sessions Judge reluctantly acquitted the accused No. 1 as the evidence outside the confessions of the co-accused was weak as regards him, and as his conviction could not be based principally on the confessions of the co accused.

On a consideration of the evidence in the case and the confessions of the co-accused, I am of opinion that the conviction of accused No. 1, if at all, must rest principally upon the confessions of the co-accused. I think such a conviction would be neither legal nor proper. I do not consider it necessary to discuss in this appeal the value of the confessions of the accused as matter which may be taken into consideration against the co-accused under section 30 of the Indian Evidence Act. I have stated my opinion with reasons in *Emperor* v. *Gangapa Kardepa* (1) on that point. It will serve no useful purpose to repeat the same here. I only desire to state that the limitation laid down as to the use to be made of the confessions of the accused against a co-accused is not created by the High Courts, but is based upon what they hold to be the true meaning of the provisions of the Indian Evidence Act and, if I may respectfully add, upon sound sense. The rule, as I understand it, requires that before acting upon such confessions the Court should insist upon independent corroboration from other evidence in the case in material particulars, particularly as to the identity of the accused. If this rule be applied properly, personally I do not think that there would be any practical difference in the result whether the rule be accepted in the form in which I have stated it, or whether it is taken to be, as stated by Jenkins, C. J., in *Emperor* v. *Lalit Mohan Chuckerbutty* (2) that "the Court can only treat a confession as lending assurance to other evidence against a co-accused." But whether that is so or not, I am willing to take the rule in the form more favourable to the prosecution under the circumstances of this case, and to consider whether the other evidence in the case affords such independent corroboration.

I also take it that there is no rule as to what would constitute sufficient independent corroboration in a particular case. That must depend upon the circumstances of that case. I desire to refer, however, to two considerations at the start: first, the evidence, which is supposed to afford independent corroboration, must be in itself reliable and not doubtful evidence, which is treated as reliable in consequence of the confessions: otherwise it will not be independent corroboration. Secondly, the value of the confessions of the accused against a co-accused, when those confessions are retracted at the trial, is very low, as pointed out in *Yasin* v. *King-Emperor* (3) and in *Lalit Mohan's case* (2) at page 588* of the report.

I shall now deal with the evidence. It is urged for the Crown that the following circumstances afford independent and sufficient corroboration to the confessions of the co-accused in this case :—

(1) that the accused No. 1 dissuaded the witness Bussia from accompanying the deceased on the morning of the 25th September, though the witness had agreed in the first instance to go with the deceased to Devikop for treatment ;

(2) that accused No. 1 was seen going with accused Nos. 2 and 3 that morning on the same path foliowed by the deceased a short time after ;

(3) that the accused was on terms of enmity with his brother and in need of money and had a motive in getting rid of his brother ; and

(4) that his subsequent conduct in dealing with the property of the deceased, in failing to make any inquiry about him, in giving evasive and unsatisfactory replies and in receiving a letter, which must have been a forged letter, purporting to have

(1) 21 Ind. Cas. 673; 38 B. 156; 15 Bom. L. R. 975; 8 Bom. Cr. C. 143; 14 Cr. L. J. 625.

(2) 10 Ind. Cas. 1582; 38 C. 559 at p. 588; 15 C. W. N. 593; 12 Cr. L. J. 286.

(3) 28 C. 689; 5 C. W. N. 670.

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been written by his brother, indicates a guilty knowledge of his brother's murder.

As regards the first two circumstances, they depend entirely upon the evidence of Bussia. His evidence is important. The learned Sessions Judge did not consider it safe to rely upon this evidence. I consider it unsafe to rely upon his testimony for the following reasons:—In the first place he is speaking of incidents which took place nearly six months before he first mentioned these matters to any one: and the incidents in themselves are so ordinary that he would not be expected to remember them. Secondly, he does not appear to me to be a witness who can be credited with anything like clear and reliable memory; he mentions his age as 8 or 9 when he is probably 25 years old. Thirdly, it does not appear from the record as to when and how this evidence came to be known to the investigating officer for the first time, which is a matter of importance under the circumstances. Lastly, he does not appear to have asked the accused No. 1 for the cure which he is said to have promised to procure for him at the time of dissuading him, nor does he appear to have shown any concern for a long time after the disappearance of Mahammadkhan even though, if his evidence were true, he would be clearly interested in knowing whether the treatment which he at one time wanted to have, had done Mahammadkhan any good. I must, therefore, hold that the first two circumstances relied upon as affording an independent corroboration to the confessions are not proved.

The other circumstances relating to motive and conduct generally speaking are proved. There is reliable evidence that the relations of the two brothers were strained, and that the accused No. 1 was in needy circumstances. As regards the subsequent conduct, though I regard the details with some suspicion, broadly speaking, the conduct attributed to him is proved. But it is easy to overrate its importance. It is the conduct of a callous and indifferent brother but not necessarily the conduct of a murderous brother. As to the letter, his conduct would be much the same if any enemy had sent him a letter of that kind or if any person interested in tracing the whereabouts of Mahammadkhan had written to him with a view to see what use he would make of the letter. Apparently he did not use the latter in any way. I am not satisfied that the circumstances justify our treating the accused to be a man of such intelligence as to be able to resort to a plan which requires so much forethought and cleverness. I have not thought it necessary to discuss the evidence on this point in detail, as taking it at its best I am satisfied that the evidence as to motive and conduct affords neither independent nor sufficient corroboration to the confessions. It is independent in the sense that it is proved by evidence outside the confessions but the facts connected with the motive and conduct generally would be known in the village and to the people at Kiravatty who knew the two brothers: and if any one was interested in getting accused Nos. 2 and 3 to mention the name of accused No. 1 falsely or if for any reason accused Nos. 2 and 3 were inclined to mention his name falsely, this knowledge is just the thing which would render the inculpation of accused No. 1 easy. It would be plausible and apparently credible to state that accused No. 1 was concerned in the murder. Accused Nos. 2 and 3 knew Mahammadkhan well and as they were the murderers, they would know the whole story generally: and under the circumstances the inculpation of accused No. 1, even if incorrect, would be easy. It is because a false inculpation is easy, that the need for closely examining the nature of circumstances affording independent corroboration is great. It is obvious that it would be insisting upon no independent corroboration to treat matters of such common knowledge among the persons concerned as affording that kind of corroboration. In the present case the evidence as to the investigation is rather meagre or at any rate not full. We do not know as to how and when accused Nos. 2 and 3 were found ready to confess. Apparently Nos. 2 and 3 were found by the Sub-Inspector ready to give out the whole story. The Range Forest Officer says that he first heard the rumour that accused Nos. 1 and 2 and another had murdered Mahammadkhan on the 30th March. Thus we do not know when and to whom accused Nos. 2 and 3 first mentioned the name of accused No. 1, and as to who gave the information to the

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Range Forest Officer that accused Nos. 1 and 2 and another were the murderers. Thus the circumstances under which the name of accused No. 1 came to be mentioned by accused Nos. 2 and 3 are left in obscurity. It would be very unsafe to treat the facts proved as to motive and conduct as an independent corroboration. Even treating it as affording some corroboration, I do not think it is sufficient under the circumstances.

It is true that the proved circumstances in the case are consistent with the guilt of accused No. 1 ; they may create a certain amount of suspicion against accused No. 1; but do not prove anything as to his participation in the crime. It may be that accused No. 1 was concerned in the murder, but that is obviously insufficient. I have to consider whether it is proved that he was so concerned. I am of opinion that the confessions of the co-accused are not sufficiently corroborated by independent evidence and the conviction of accused No. 1 must, therefore, rest, if at all, principally upon the confessions of the co-accused. I am clear that such a conviction would not be legal, and that in any event it would not be proper.

I doubt whether the Assessors could realise the limitation, subject to which the confessions could be used against a co-accused; and it does not appear whether the learned Sessions Judge had explained the point to them. I am, therefore, unable to attach that weight to their opinion which I would do in an ordinary case.

The learned Sessions Judge has rightly apprehended the rule as to the value of the confessions of the accused against a co accused and has fairly applied it in appreciating the evidence.

I am not concerned with his other observations which do not touch the conclusion in any way, but which may have a bearing upon the question whether the rule, which he felt himself bound to follow, ought to exist or not.

There is only one point to which I may properly refer. While speaking of an appeal against acquittal, the learned Sessions Judge has referred to the possibility of this Court ordering a re-trial in order that accused Nos. 2 and 3 may be examined as witnesses now. The learned Government Pleader has not asked for a re trial. In my opinion there is no reason whatever to order a re-trial. The trial was valid and proper. It was open to the Crown, if so minded, to have secured the examination of accused Nos. 2 and 3 as witnesses by asking for the separate trial of accused No. 1 at the proper time. The joint trial was not objected to: and the trial Court apparently did not think that in the interests of justice a separate trial was necessary.

I would, therefore, dismiss the appeal.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

Mr. *S. V. Palekar*, for the Accused.

JUDGMENT.

SCOTT, C. J.—The case against the accused is that in concert with Honya and Umya he murdered his brother Mahammadkhan on or about the 25th September 1917 about 8 or 9 in the morning in the forest near Alkeri in Kanara. Honya and Umya were tried jointly with the accused by the Sessions Judge of Kanara and two Assessors. Honya and Umya were found guilty upon their own confessions, but the accused Sabitkhan was acquitted, and the Government of Bombay have appealed against his acquittal.

The evidence before me is that which was recorded by the Sessions Judge at the joint trial It establishes that Mahammadkhan was the owner of the most of the land and houses, only eight or nine in number, in the village Alkeri which is situated less than a mile and a half from Kirwatty, Kirwatty being on the main road from Yellapur to Kalgutgy, and about twelve miles from the latter place. The relations between Sabitkhan and Mahammadkhan the deceased were very strained. Mahammadkhan had neither wife nor children, and was not disposed to support his brother Sabit and his family. Sabit consequently was obliged to work as a coolie in the Forest Department, and was continually importuning the deceased for assistance which was continually refused, and although the two brothers lived in the same building they did not associate and all their intercourse was unfriendly. On or about the 24th of September 1917, the deceased who was suffering from pains in his stomach decided to go to Kalgutgy for treatment and requested a neighbour named Busia in the presence of another inhabitant of Alkeri

named Day Munna to accompany him, as Bussia was also suffering from pains in the stomach. On the 25th of September the deceased left Alkeri in the morning alone. At all events, he was never seen after that time at Alkeri. He had left a bin of rice in front of his house upon which he had asked a neighbour Day Munna to keep an eye, saying he would be back in a few days. About a fortnight after his departure the accused began to make free with the grain. When Day Munna asked him what he was doing with the rice, Sabit asked what business it was of his. According to witness Juncu, Sabit said when asked that Mahammadkhan would not be back soon and on several occasions gave rice from the bin to Honya and Umya, the convicts at the first trial. Three months after the *Ganesh Chaturthi*, the accused told Bcojang, a shopkeeper of Kirwatty, that Mahammadkhan had gone for medical treatment to Miraj. He began after the crops had been got in to ask the tenants of Mahammadkhan to pay their rents to him. Four months after the departure of Mahammadkhan, namely, on the 4th of February 19.8, the Ranger of the Forest, having heard that Sabit was trying to collect the rents of Mahammadkhan, sent for him and asked him if he had heard from Mahammadkhan and what had become of him. He replied that Mahammadkhan had gone to Miraj and that no letter had come. Later in February at Kirwatty when Postmaster Wycunt delivered him a letter in the presence of Anant, a shopkeeper, Sabit tore it open and asked Anant to read it to him. Both Anant and Wycunt depose to the contents of the letter. Their versions are not verbally identical, but are to the same effect. The letter which was unsigned and undated purported to come from Mahammadkhan from Belgaum, and stated that he was getting better and proposed to go to Miraj. It directed Sabit to collect the rents and pay the assessment and said that if Mahammadkhan wanted money he would let Sabit know. The letter was returned to Sabit. Three of the witnesses who lived at Alkeri deposed to Sabit demanding rent from them and stating that he had a letter from Mahammadkhan. At the end of March the convicts Honya and Umya disclosed a spot in the forest between Alkeri and Kirwatty in which the remains of Mahammadkhan were buried. It was found that his ribs had been broken. Bussia of Alkeri, who has already been mentioned in connection with Mahammadkhan's proposed journey to Kalgutgy, stated that he had been persuaded by Sabit not to go with Mahammadkhan, and that on the day following, *i. e.*, the 25th September, he had, while driving cattle towards Kirwatty near the village Tank, seen Sabit together with the two other accused taking the path from Alkeri to Kirwatty, and half an hour later had seen Mahammadkhan take the same path. The muster roll kept by the Forest Officer shows that Sabit was absent from his work on the 25th and following days of September. The learned Judge says he has no reason to disbelieve Bussia, but he doubts if Bussia could remember exactly the day on which he saw Sabit and the two convicts go along that path because there was no impressive concomitant circumstance. There is no doubt that Mahammadkhan never went to Belgaum and never reached Kalgutgy and that the letter opened by Sabit in Kirwatty is a false document which might explain the absence of Mahammadkhan and justify Sabit's attempts to collect his rents. If there were no other evidence in the case, and if the evidence of Bussia were discarded, it seems to me there would still be a strong case of suspicion against Sabit as being concerned in the murder of Mahammadkhan.

The Sessions Judge, however, had before him not merely this evidence, but also the detailed confessions of Honya and Umya (who had reasons for disliking Mahammadkhan), who state that Sabit participated with them in the murder of Mahammadkhan and engaged their services on a promise of payment in grain, and that the body was buried with a spade provided by Sabit, the spade which was found in Sabit's house after the confession. These confessions must be taken into consideration against Sabit according to the provisions of section 30 of the Indian Evidence Act. But the learned Judge seems to have been afflicted by a certain paralysis of his judicial faculty owing to a perusal of reported cases, which lay down that a man should not be convicted upon the uncorroborated confession of his

co-accused, and reading these cases in conjunction with an observation occurring in the judgment of the Calcutta High Court in the case of *Emperor* v. *Lalit Mohan Chuckerbutty* (2), to the effect that "the Court can only treat a confession as lending assurance to the other evidence against a co-accused," he considers himself unable to make use of the confessions at all, because there is not a perfect enough case against the accused without them, although as he states he has no doubt whatever that the accused committed the murder. He puts it thus: "It is not enough that the other evidence should support the confessions. It is the confessions which must support the other evidence, which 'must afford a basis broad enough and firm enough to sustain a conviction if the superstructure be steadied by some adventitious and subsidiary prop,' such as the confessions." The learned Judge in the above quotation from *Lalit Mohan's case* (2) has omitted the concluding words: "Thus to illustrate my meaning, in the view I take, a conviction on the confession of a co-accused alone would be bad in law." The rule which the learned Judge conceives to be binding on him is affirmed by Jackson, J., in *Queen* v. *Chunder Bhuttacharjee* (4) in this form, "that, when, as against any such person, there is evidence *tending* to his conviction, *the truth or completeness of this evidence being the matter in question*, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him should be taken into consideration as bearing upon the truth or sufficiency of such evidence." It is also affirmed in the judgments of Jackson and McDonell, JJ., only out of the Full Bench of five Judges in *Empress* v. *Ashootosh Chuckerbutty* (5), where the third question referred was: "Whether such a confession made by one such person may be used as the basis of proof of the offence charged as against the other, and if corroborated, may sustain a conviction; or whether it is necessary, in order to sustain a conviction, to use such confession only as itself corroborative of other independent evidence." The answer of the Chief Justice to this question was: "If the confession is corroborated by other evidence, I do not think it matters whether, in proving the case at the trial, the confession precedes the other evidence, or the other evidence precedes the confession. The course of proof in each case is a question of convenience for the prosecution; and they have a right to bring forward the evidence in any order they may think fit."

This question has not, so far as I am aware, been considered in any Bombay case. The passage from the judgment in *Lalit Mohan's case* (2) is only quoted by Shah, J., in *Emperor* v. *Gangapa Kardepa* (1) in support of the conclusion that no matter which can be taken into consideration only under section 30, *if there is no evidence other than such matter*, can form the basis of a legal conviction.

I propose to take the judgment of Garth, C. J., in *Empress* v. *Ashootosh Chuckerbutty* (5) as a correct statement of the law: it gives effect without qualification to the words of section 30 that "the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

The question here is not as in *Emperor* v. *Gangapa Kardepa* (1), whether the Court may convict solely on the confession of a co accused. The Sessions Judge has not done so, nor have either of the High Court Judges whose difference has led to this reference.

The question is rather one of appreciation of evidence. I have to consider whether on the facts established there is corroboration of the story of the confessing co-accused so far as it affects Sabit. I will only make this further remark with regard to *Emperor* v. *Gangapa Kardepa* (1) that I think Macleod, J., went too far when he said in that case (page 176*): "The confession of a co-accused stands on quite a different footing to the testimony of an accomplice, which the Evidence Act treats as having a higher probative value than similar evidence has according to English Law." I think it will be apparent to any one who peruses

(4) 24 W. R. Cr. 42 at p. 43.

(5) 4 C. 483 at pp. 487, 491 (F. B.); 3 C. L. R. 270; 1 Shome L. R. Cr. R. 79; 2 Ind. Dec. (N. S.) 307.

*Page of 38 B.—*Ed.*

the judgment of Lord Reading, L. C. J., in *Rex* v. *Basherville* (6), that except in regard to corroboration of an accomplice by accomplice evidence, there is no difference between the law in England and the law in India.

As regards the confessions of co-accused the Indian Law has no counterpart in England, but it seems to me that for the purpose of admissibility such confessions stand on the same footing as accomplice evidence and that their weight must depend on the circumstances of each case. I propose, therefore, to apply to the question of corroboration of the confessions the same rules as are applicable to the corroboration of accomplice evidence. In *Rex* v. *Baskerville* (6), a criminal appeal heard by a Court of five Judges specially constituted to lay down rules for future guidance, it was said "there are propositions of law applicable to corroboration which are beyond controversy. For example, 'confirmation does not mean that there should be independent evidence of that which the accomplice relates or his testimony would be unnecessary' [*Reg.* v. *Mullins* (7)]. Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony." In the same case it was held that "evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him—that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it." "The corroboration need not be direct evidence that the accused committed the crime: it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence" being *Reg* v. *Birkett* (8). A good Indian illustration of circumstantial evidence corroborative of the confessions of co-accused is to be found in the judgment of Phear, J., in the *Queen* v. *Naga* (9).

Does then the testimony independent of the confessions affect the accused by connecting or tending to connect him with the crime? I start with the fact that Mahammadkhan was murdered and buried in the forest within a mile of his house. Evidence that when that man has been murdered and buried within a mile of his house, his brother and his enemy seeking to profit by his disappearance tells a false story as to his whereabouts, affirming him to have gone to Miraj, a town distant 100 miles or more, for medical treatment, tends to connect the brother with the crime. So does evidence that the brother has been seen on several occasions giving grain to the confessed murderers to whom he had no ostensible reason to be charitable. So does evidence that when trying to collect rents due to the murdered man he calls the tenants and tells them a false story that he has received a letter of authority from his brother.

No Judge who has considered the evidence has expressed a doubt as to the credibility of the witnesses who depose to these events. But the trial Judge and Shah, J., are not satisfied that Bussia can remember the day when he saw Mahammadkhan leave preceded by Sabit, Honya and Umya. Shah, J., also appears to have doubted the story of the letter received in Kirwatty. I do not share these doubts, for the date of Mahammadkhan's departure from his village on the day after the Vansha would be known to all the residents, and I see no reason to doubt the truth of the story told by Wycunt and Anant about the letter: it is entirely consistent with the other evidence of the false story spread by Sabit that his brother had gone to Miraj for treatment, although we do not know by what agency Sabit got the letter written and sent to Kirwatty.

I concur in the conclusion arrived at by Heaton, J. I find the accused guilty of the murder of Mahammadkhan and sentence him to transportation for life.

Appeal allowed.

(6) (1917) 86 L. J. K. B. 28; (1916) 2 K. B. 658; 115 L. T. 453; 80 J. P. 446; 25 Cox C. C. 524; 60 S. J. 696.

(7) (1848) 3 Cox. C. C. 526 at p. 531.

(8) (1839) 8 Car. & P. 732.

(9) 23 W. R. Cr. 24.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION No. 541 B OF 1918.
January 13, 1919.
Present:—Sir Daniel Twomey, KT., Chief Judge.
TUN YA—APPLICANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 360—Evidence Act (I of 1872), s. 80—Deposition not read over to witness in presence of accused or his Pleader, effect of—Proof of deposition.

Accused was a witness in a Sessions trial, at the close of which the Sessions Judge directed his prosecution for giving false evidence. He was brought to trial, but it was found that his deposition in the Sessions Court was not read over to him in the presence of the accused or his Pleader as required by section 360 of the Criminal Procedure Code. The Magistrate held the deposition to be inadmissible in evidence and discharged the accused. Subsequently the District Magistrate took up the case, set aside the order of discharge and ordered further inquiry under section 437 of the Criminal Procedure Code. Accused moved the Chief Court in revision:

Held, that the deposition should not have been treated as a nullity merely because of the irregularity in not reading it over to the deponent in the presence of the accused or his Pleader: it could be proved by other evidence, as, *e g.*, by evidence that the witness admitted it to be correct when it was read over to him, and the evidence of the Judge or Magistrate who recorded it. [p. 668, col. 2.]

Section 80 of the Evidence Act contemplates that the deposition, which it is proposed to use as evidence, should have all the guarantees of authenticity which the law prescribes, one of them being that the Magistrate shall have signed it only after it has been read over to the witness in the presence of the accused or his Pleader, in order that the witness and the accused may have an opportunity of pointing out mistakes. [p. 668, col. 1.]

Mr. *Ba Dun*, for the Applicant.

JUDGMENT.—The applicant Nga Tun Ya was a witness in a Sessions trial. At the close of the trial the Sessions Judge directed his prosecution for giving false evidence and he was brought to trial before a Magistrate. In the course of the trial it appeared that Tun Ya's deposition in the Sessions case, instead of being read over to the witness in the presence of the accused or his Pleader, as required by section 360, Code of Criminal Procedure, was read over to him in the verandah of the Court building out of sight and hearing of the accused and his Pleader. It was read to him by an Assistant Bench Clerk to whom he admitted the correctness of the deposition. Following the Upper Burma case *San Myin* v. *Emperor* (1), the Magistrate held that a deposition taken in such circumstances was inadmissible in evidence and he discharged the accused. Subsequently the District Magistrate took up the case in revision. He pointed out that the Upper Burma ruling was not binding on Magistrates in Lower Burma and he also referred to the Madras ruling *Bogra, In re* (2), which is at variance with the Upper Burma ruling. The District Magistrate further pointed out that the Upper Burma ruling goes beyond the provisions of section 360, Criminal Procedure Code, in requiring the Judge or Magistrate himself to read out the deposition to the witness. In paragraph 256 of the Lower Burma Courts Manual it is laid down that the deposition may be read over to the witness by an officer of the Court, but the witness must be questioned by the Judge or Magistrate himself as to the correctness of the deposition. The District Magistrate accordingly set aside the order of discharge and ordered further enquiry under section 437 of the Code of Criminal Procedure. Nga Tun Ya applied to this Court in revision to set aside the order for further enquiry.

There is no published Lower Burma ruling dealing with the question in this case. But I find that in an unpublished revision case of 1917, *Kadir Pokiri* v. *Emperor* (3), Mr. Justice Maung Kin followed the Upper Burma ruling and dissented from the Madras ruling in *Bogra, In re* (2).

The learned Judicial Commissioner Sir George Shaw in the Upper Burma case cited above pointed out that "section 91 of the Evidence Act makes the record of a witness' statement the only evidence of the statement, and under section 80 of the same Act it is admissible only if it was taken in accordance with law." He, therefore, decided that a prosecution for giving false evidence could not properly be ordered if the charge were based on a deposition which had not been read over to the witness in the presence of the accused or his Pleader. The view taken by Sir George Shaw is in

(1) 15 Ind Cas. 985; U. B. R. (1910-13) 123; 13 Cr. L. J 569.
(2) 7 Ind. Cas 414; 34 M. 141; 8 M. L. T. 117; (1910) M. W N. 435; 20 M. L. J. 943; 11 Cr. L J. 482.
(3) 42 Ind. Cas. 326; 11 Bur. L. T. 202; 18 Cr. L. J, 956.

accordance with several of the earlier rulings of the Indian High Courts [*vide* *Kamatchinathan Chetty* v. *King-Emperor* (4), *Mohendra Nath Misser* v. *Emperor* (5), *Jyotish Chandra Mukerji* v. *Emperor* (6) and *Emperor* v. *Jogendra Nath Ghose* (7)]. But a different view was taken in the Madras case, *Bogra, In re* (2), cited by the District Magistrate, where Mr. Justice Miller held that a deposition should not be treated as a nullity merely because it is not regularly recorded and that if the deponent has admitted its correctness, he may properly be convicted of perjury on it. This statement of the law has recently been adopted by the Calcutta High Court also in *Elahi Baksha Kazi* v. *Emperor* (8). The following is an extract from Mr. Justice Richardson's judgment in that case:—"Under section 80 of the Indian Evidence Act, the deposition of a witness taken in accordance with law and purporting to be signed by a Judge or Magistrate proves itself. No other proof is required than the production of the deposition. I should have thought that a provision requiring a deposition to be read over to a witness was in its nature directory, and that if it were not complied with in a particular case, the deposition, while it might perhaps lose the benefit of section 80 of the Evidence Act, might still be proved in some other way. No doubt section 91 of the same Act says that in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of such matter except the document itself. But even if a deposition comes within that enactment, no question arises of proving the contents of a deposition except by the production of the deposition itself. The question is, how is the deposition to be proved. There is no provision in the Code of Civil Procedure which expressly precludes a deposition from being received in evidence unless it has been read over to the witness in the presence of the Judge. In the case of a document which requires registration but is not registered, it is inadmissible in evidence not by reason of the provisions of section 91 of the Evidence Act, but by reason of the express provisions on the subject contained in the Registration Act. As at present advised I can see no reason why, even in a prosecution for perjury, failure to comply with the provisions of rules 5 and 6 of Order XVIII should render a deposition entirely inadmissible in evidence, or why, if section 80 cannot be called in aid, the deposition should not be proved, for instance, by the Judge who took it down, or by the admission of the deponent. If it can be proved in some such way, section 91 will have no application."

These remarks were made with reference to a deposition recorded in a civil suit but they apply with equal force to depositions in criminal trials. There is no provision in the Code of Criminal Procedure any more than in the Code of Civil Procedure declaring that a deposition which has not been read over in the presence of the accused or his Pleader shall on that account be inadmissible in evidence.

I am inclined to agree with the remarks of the learned Judges of the Madras and Calcutta High Courts in the two cases of *Bogra, In re* (2) and *Elahi Baksha Kazi* v. *Emperor* (8). The provision for reading over the deposition to the witness is for the protection of both the accused and the witness, but the further provision that the reading over shall be in the presence of the accused or his Pleader appears to be for the protection of the accused only. When a deposition is read over to a witness in the absence of the accused and the witness acknowledges the deposition to be correct, the deposition may be inadmissible against the accused; but all that the law prescribes for the protection of the witness has been fulfilled and it does not seem right that a witness should escape the consequences of alleged perjury merely because something was omitted which the law prescribes not for the witness' protection but only for the protection of accused.

I have doubts also as to the effect of sections 80 and 91 of the Evidence Act with regard to informally recorded depositions. It is true that the presumption of

(4) 28 M. 308; 2 Cr. L. J. 756.
(5) 12 C. W. N. 845; 8 Cr. L. J. 116.
(6) 4 Ind. Cas. 416; 36 C. 955; 14 C. W. N. 82; 10 Cr. L. J. 581.
(7) 24 Ind. Cas. 571; 42 C. 240; 18 C. W. N. 1242; 15 Cr. L. J. 483.
(8) 45 Ind. Cas. 258; 45 C. 825; 27 C. L. J. 377; 22; C. W. N. 646; 19 Cr. L. J. 498.

genuineness, etc., will arise under section 80 only if the deposition was taken in accordance with law. But it does not seem to follow necessarily that the informal deposition is incapable of proof. There seems to be no valid reason why, as pointed out in the case of *Elahi Baksha Kazi* v. *Emperor* (8), it should not be proved, for example, by the evidence of the Judge or Magistrate who recorded it or by the admission of correctness made by the witness himself when the deposition was read over to him. And if it can be so proved then the supposed obstacle offered by section 91 will disappear.

The question involved in this case is one of great importance, and especially in view of Mr. Justice Maung Kin's ruling of 1917 in *Kadir Pakiri* v. *Emperor* (3) and the recent Calcutta decision in *Elahi Baksha Kazi* v. *Emperor* (8). I think the learned Counsel for the applicant should have a further opportunity of arguing the matter. A fresh date will be fixed about a fortnight hence and notice will be given also to the District Magistrate to whom a copy of these remarks should be sent. The case is one in which the Court should, in my opinion, have the advantage of the Government Advocate's assistance.

FINAL ORDER.—The learned Assistant Government Advocate suggests that a deposition is "taken in accordance with law" for the purposes of the Evidence Act, section 80, once it has been taken down in accordance with the provisions of section 356, Code of Criminal Procedure, and that, so far as section 80, Evidence Act, is concerned, it is immaterial that the provisions of section 360, Code of Criminal Procedure, have not been observed. I am not prepared to accept this reading of section 80. The section contemplates that the deposition, which it is proposed to use as evidence, should have all the guarantees of authenticity which the law prescribes, one of them being that the Magistrate shall have signed it only after it has been read over to the witness in presence of the accused or his Pleader in order that the witness and the accused may have an opportunity of pointing out mistakes.

But where, as in the present case, section 80, evidence cannot be called in aid, I am of the same opinion as the Calcutta Judges, namely, that the deposition can be proved by other evidence, *e. g.*, by evidence that the witness admitted it to be correct when it was read over to him, and the evidence of the Judge or Magistrate who recorded it. The learned Advocate for applicant has nothing to urge in opposition to this view.

The application to set aside the District Magistrate's order is, therefore, dismissed. In dismissing it, however, I think it necessary to express serious disapproval of the action of the Sessions Judge in disregarding the plain provisions of section 360, Code of Criminal Procedure, and paragraph 254, Lower Burma Courts Manual, and I trust that the irregular practices brought to notice in this case will be discontinued forthwith. It is no excuse to say that Sessions Judges and Magistrates can get through their work only by disregarding the procedure laid down in the section. The provisions of the law must be obeyed, even if their observance will increase the duration of trials.

Application dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1102 OF 1918.

February 7, 1919.

Present:—Mr. Justice Richardson and Justice Sir Shamsul Huda, KT.

AMRIT MAJHI AND OTHERS—ACCUSED —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 192, 202, scope of—Transfer of case—Transferring Magistrate, power of, to interfere with case after transfer—Grounds for transfer—Local enquiry directed to be made by Subordinate Magistrate—Order, validity of.

The language of section 202, Criminal Procedure Code, seems capable of an interpretation consistent with the long standing practice under which a Magistrate receiving a complaint refers it to a Subordinate Magistrate for local enquiry and report. [p. 669, col. 2.]

Under section 192 of the Criminal Procedure Code, the transferring Magistrate cannot intermeddle with the case transferred, unless and until having power to do so, he recalls it to his own file. [p. 669, col. 2.]

The provisions of section 192 and section 202, Criminal Procedure Code, are separate and distinct and the powers conferred by one section do not curtail those conferred by the other. [p. 669, col. 2; p. 670, col. 1.]

Where the principal reason which moved a District Magistrate to transfer a case from the Court before which it was pending, without any inconvenience to the parties or any

dissatisfaction on their part, to his own Court was that he desired to inform his mind as to the nature of the dispute between the accused and the complainant:

Held, that the transfer order was not proper and that the case should be restored to the file of the Court from which it had been transferred. [p. 670, col. 1.]

The practice of taking to the Criminal Courts disputes involving questions of right and title condemned. [p. 670, col. 2.]

Criminal revision against the proceedings taken by the District Magistrate, Malda, under section 372 of the Indian Penal Code.

Babus *Dasarathi Sanyal* and *Debendra Narayan Bhattacharjee*, for the Petitioners.

Babus *Manmatha Nath Mukherjee* and *Bimala Deb*, for the Opposite Party.

JUDGMENT.—Johiruddi preferred a complaint against the petitioners charging them with theft. The Magistrate receiving complaints, who was the Sub-Divisional Officer suspecting that he had to do with a civil dispute, referred the complaint to a Deputy Magistrate for enquiry and report. On the transfer of the Deputy Magistrate to another district the Sub-Divisional Officer made a second order, referring the complaint to the Sub-Deputy Magistrate for enquiry and report. Unfortunately the Sub-Deputy Magistrate fell ill and on the 9th November a third order was made referring the complaint to Babu P. L. Neogi, an Honorary Magistrate exercising second class powers, again for inquiry and report. Babu P. L. Neogi, after examining the complainant and some of his witnesses on oath, submitted his report with the depositions taken by him to the Sub-Divisional Officer on the 6th November 1918. On the 19th November, the District Magistrate for reasons stated by him withdrew the case to his own file. He read Babu P. L. Neogi's report and being of opinion that a *prima facie* case had been made out, he issued summons against the petitioners under section 379, Penal Code.

The case arises out of a dispute between landlord and tenant in the Mathurapur estate. The product known as *lac* is collected from certain trees standing on lands leased to tenants of the estate. The landlords or their farmer claim the right to enter upon the tenants' lands to collect the *lac*. The tenants, of whom two are petitioners before us, assert a right to the trees. The dispute has led to the charge of theft brought against the petitioners by Johiruddi, who is the farmer's son-in-law, and to a counter-charge of theft brought by one of the petitioners against Johiruddi and others.

It is contended on behalf of the petitioners :—(1) that the Sub Divisional Officer had no jurisdiction to refer the complaint against them to another Magistrate for inquiry and report, and that the orders, in the form in which they were made, amounted in the result to the transfer of the case to Babu P. L. Neogi for disposal, and (2) that the District Magistrate's order withdrawing the case to his own file was improper.

In support of the first of these contentions reference was made to the cases of *Hari Charan* v. *Srish Chandra* (1) and *Gangadhar* v. *Emperor* (2), but while in view of the order we propose to make it is not necessary for us to express a final opinion, it may be permissible to record a doubt whether the judgments in those cases, when carefully read, are any authority for the construction of section 202 of the Criminal Procedure Code which is suggested on the petitioners' behalf. The practice has long been to refer complaints to Subordinate Magistrates for local inquiry and report and the language of the section seems capable of an interpretation consistent with that practice, an interpretation which is in accord with the natural meaning of the words. When the section says that the Magistrate receiving a complaint may in certain circumstances "direct a previous local investigation to be made by any officer subordinate to such Magistrate," those words as they stand would naturally include a local investigation by a Subordinate Magistrate. The suggested construction depends on the definitions of "inquiry" and "investigation" in section 4, but those definitions are not exhaustive and are expressed to be subject to the context. No doubt, under section 192 the transferring Magistrate cannot intermeddle with the case transferred unless and until, having power to do so, he recalls it to his own file. The provisions, however, of section 192 and section

(1) 7 Ind. Cas. 747; 38 C. 68; 13 C. L. J. 43; 11 Cr. L. J. 525.

(2) 33 Ind. Cas. 626; 20 C. W. N. 63; 43 C. 173; 17 Cr. L. J. 145.

202 are separate and distinct and the powers conferred by the one section do not curtail those conferred by the other.

As to the second contention, a share of the Mathurapur estate is under the management of the Court of Wards. It was accordingly argued that the District Magistrate, being also the Collector and the local representative of the Court of Wards, was, under the provisions of section 556 of the Criminal Procedure Code, disqualified by reason of interest from trying the case. It is not suggested, however, that the District Magistrate had anything to do with initiating the prosecution and the explanation attached to the section says that a Magistrate "shall not be deemed to be a party or personally interested ..to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity ....." Of course, if the District Magistrate is not within the explanation and is disqualified, he cannot try the petitioners. In that case, entirely irrespective of any question of bias, they would have a legal right to be tried by some other Magistrate. On the materials before us, however, though here again it is not necessary to express a final opinion, we are not satisfied that the disqualification is established.

Apart from disqualification, it is argued that the reasons assigned by the District Magistrate for his order are inadequate; and so far as this objection is concerned it is not without considerable force. The principal reason which moved the District Magistrate to make the order was that he desired to inform his own mind as to the nature of the dispute between landlord and tenant in the Mathurapur estate. That is a praiseworthy desire, but he has or should have other ways of informing his mind in such matters without removing a case from the Court before which it is pending, apparently without any inconvenience to the parties or any dissatisfaction on their part, to his own Court.

We might be content with restoring the case to the file of the Sub-Divisional Officer, but having had the facts placed before us, we are of opinion that we ought to go further and quash the proceedings. In the view we take, regard being had to the nature of the dispute, there is little reason to suppose that the charge of theft, from whichever side it comes, will be substantiated. The dispute is eminently one for the Civil Courts where only it can be finally determined. It will be to the interest of all parties that a decision should be sought for there. The practice of taking to the Criminal Courts, for the purpose of a preliminary skirmish, disputed claims, involving questions of right and title, about which the parties may intelligibly and with perfect good faith take opposing views is, in our opinion, much to be deprecated.

The result is that the proceedings are quashed.

Proceedings quashed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 611 OF 1918.

December 23, 1918.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

SADHU—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), *ss.* 302, 326, 328—Dhatura *administered with intention to facilitate commission of robbery—Death caused by* dhatura—*Offence.*

Where *dhatura* is administered to a person with fatal results with intent to facilitate the commission of robbery, no hard and fast rule can be laid down as to the section of the Penal Code under which the person administering the *dhatura* should be convicted; the circumstances of each particular case must be taken into consideration. [p. 672, col 2.]

Appeal from the order of the Sessions Judge, Karnal, dated the 17th August 1918.

Mr. *O. Bevan Petman* (Government Advocate), for the Respondent.

JUDGMENT.—The appellants Sadhu and Atru are brothers, Chamar by caste, belonging to the village of Khatkar Khurd in the Jullundur District. They have been convicted of murdering Prem and his

wife Jamna, Chamars of Gohana in the Rohtak District, by poisoning them with *dhatura*, and sentenced to transportation for life.

On the morning of the 19th June last Prem and Jamna, with two small children named Phuski (Jamna's daughter by a former husband) and Gugania (Prem's son by a former wife), were found on the road at Jasiya, about half way between Gohana and Rohtak. Prem and Jamna were lying unconscious, and the children, though they were moving about, were also not in their senses. They were all taken to the *thana* at Rohtak, and from there to the hospital. Prem and Jamna died on the way to the hospital, but the children recovered. The evidence of the Civil Surgeon, who examined the bodies of the deceased, shows that the *post mortem* appearances indicated that the deaths were due to poison. The Chemical Examiner found *dhatura* in the deceased persons' stomachs and intestines and also in the excreta of the two children, and there can be no doubt that Prem and Jamna died from *dhatura* poisoning.

The appellants appear to have been living for some time at Gohana, where they used to sell grass, and they lived with Prem and Jamna in a hut belonging to Mai Dhan, as proved by the evidence of the latter and his wife Sama Kaur (P. W. Nos. 5 and 6) as well as by that of the children, Phuski and Gugania (P. W. Nos. 1 and 2).

A few months before the occurrence Prem had obtained Rs. 200 by giving his daughter Jai Kaur (P. W. No. 13) in marriage to some one at Balabh, although she was already married to another man (see the evidence of Mai Dhan, Sama Kaur, and Jai Kaur), and the belief that Prem was possessed of money and valuable property is said to have excited the cupidity of the appellants and to have prompted them to commit the crime on the night of the 18th June when Prem, Jamna, and the children were on their way from Gohana to Balabh.

Phuski and Gugania state that they, Prem and Jamna left Gohana in company with the appellants. They walked a little way and then got into camel carts which were going from Gohana to Rohtak. There were two carts, and three of the party travelled in one cart and three in the other. On the way Prem, Jamna, and the children ate some *laddus*. Gugania says the appellants gave them the *laddus*, but Phuski is more definite and says that Sadhu gave them. The children did not care for the *laddus* and ate only a small quantity, giving the rest to Jamna. At Jasiya the carts stopped for a time and the passengers got out. The children are unable to say what happened after that.

The cartmen Akbar Ali and Amin (P. W. Nos. 3 and 4) also depose to Prem, Jamna, the two children, and the appellants having travelled in their carts from a little way beyond Gohana to Jasiya, where the passengers alighted, but know nothing about the *laddus*. They go on to say that when it was time to resume the journey they called out to the passengers to get into the carts, but the passengers said that the woman had something the matter with her, so Akbar Ali and Amin went on with the carts leaving Prem, Jamna, and the children behind. When they had gone about 3 miles the appellants overtook them, got into one of the carts, and went on to Rohtak. They had with them a bag and a bundle which Prem and Jamna had previously been carrying, and explained that they were bringing these for their companions, who would follow in the morning.

The appellants deny that they travelled with Prem and Jamna, but they have produced no evidence and there is no reason for disbelieving the statements of the two childdren and the cartmen.

The Sub-Inspector of Police who investigated the case, after discovering that the men who had travelled with Prem and his family were residents of Khatkar Khurd, went to that village on the 26th June and found the appellants at their house there. He searched the house and found in it a number of clothes and other articles, which have been identified as the property of Prem by Phuski, Gugania and Jai Kaur, some being also identified as Prem's by Sama Kaur. Two purses found on Atra have also been identified as belonging to Prem. The appellants say that the articles found are theirs, but there is nothing to support their allegations, and we are satisfied that the property belonged to Prem.

SADHU *v.* EMPEROR.

The discovery of the deceased persons' property in the appellants' possession, coupled with the evidence as to Prem and Jamna and the two children having travelled in the appellants' company from Gohana and being given by Sadhu some *laddus* after eating which they got ill, with fatal results in the case of Prem and Jamna, establishes the appellants' guilt beyond doubt. Phuski says that she, Prem, Jamna and Gugania ate nothing but the *laddus* after leaving Gohana, and we think there can be no doubt that the *dhatura* must have been in the *laddus*. Although she says it was only Sadhu who gave them the *laddus*, we have no doubt that he was acting in concert with Atru as they were travelling together and both decamped with the property after their victims had been rendered insensible.

The question remains what offence the appellants committed.

In *Queen-Empress* v. *Tulsha* (1) a woman who had administered *dhatura* to three members of her family, who all recovered, was found guilty of an attempt to murder, but it is not clear how the Court came to that finding as it was held that although the accused knew that she might cause death she had no intention to do so, but intended only to incapacitate temporarily the persons to whom she administered the *dhatura* in order that she might fly with her lover.

In *Emperor* v. *Gutali* (2) the offence committed was held to be murder because the *dhatura* had been given in such quantity that the person to whom it was given died in 3 or 4 hours. In the present case the deaths occurred after a much longer interval and there is nothing to show how much *dhatura* was given.

The learned Government Advocate has also cited *Lala* v. *Emperor* (3), but that case is distinguishable as the learned Judges found that the appellant was an expert in *dhatura* poisoning and knew well that the poison worked in a most effective and dangerous manner upon his victims.

On the other hand in *Emperor* v. *Bhagwan Din* (4), where *dhatura* had been administered to travellers, one of whom died and the trial Court had convicted under section 304, Indian Penal Code, the High Court on appeal altered the conviction to one under section 325, though the learned Judges remarked that the case might possibly have come under section 326.

We are of opinion that no hard and fast rule can be laid down as to the section of the Indian Penal Code applicable, and that the circumstances of the particular case must be taken into consideration.

In *Pira* v. *Empress*(5) Plowden, J., remarked on page 71: "The use of *dhatura*, on the other hand, in order to facilitate the commission of robbery, does not *per se* and necessarily import the contemplation of the victim's death as a means towards, or as incidental to, the main end of robbery. Judicial experience shows that numerous robberies are committed with the aid of *dhatura* without fatal results."

In the present case we think that it has not been shown that the appellants administered the *dhatura* with such intent or knowledge as would make them guilty of murder. Their offence would fall either under section 325 or under section 328, Indian Penal Code, and we think they should be convicted of the graver of those two offences.

We accept the appeal only to the extent of altering the conviction in the case of each appellant to one for voluntarily causing grievous hurt by means of poison, under section 326, Indian Penal Code. We see no reason for reducing the sentences, which are accordingly maintained.

Appeal accepted in part.

(1) 20 A. 143; A. W. N. (1897), 225; 9 Ind. Dec. (N. S.) 453.
(2) 1 Ind. Cas. 765; 31 A. 148; 6 A. L. J. 129; 9 Cr. L. J. 383.
(3) 9 Ind. Cas. 731; 32 P. L. R. 1911; 12 Cr. L. J. 512.
(4) 30 A. 569; A. W. N. (1908), 243; 4 M. L. T. 402; 8 Cr. L. J. 383.
(5) 28 P. R. 1881 Cr.

PYO GYI *v.* EMPEROR.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 790 OF 1918.

January 30, 1919.

Present:—Mr. Justice Pratt.

PYO GYI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 408, 420—Criminal breach of trust by servant—Cheating—Person making purchases on another's behalf and remunerated by commission, whether servant.

A person who works for a firm in making purchases and is remunerated for his services by a commission on purchases made by him is, for the purpose of section 408 of the Penal Code, a servant of the firm. [p. 674, col. 1.]

The accused was employed by a firm to purchase paddy and was entrusted with a large sum of money for the purpose, and his remuneration was a fixed commission on the paddy purchased by him. Instead of purchasing the paddy the accused diverted the greater portion of the money to his own use. He was tried and convicted of cheating and dishonestly inducing the firm to deliver him the money, under section 420 of the Penal Code, and of criminal breach of trust as a servant, under section 408 in respect of the same sum of money. The accused's case was that he was a trader and not merely a buyer for the firm, and that the money was advanced to him by way of a loan for a specific purpose:

Held, that the accused acted as the agent of the firm on whose behalf he held the money and the property in it did not vest in him; that it was not a loan to him but a trust; that he had been rightly convicted under section 408 of the Penal Code, but that the conviction of cheating with respect to the same sum of money could not be maintained. [p. 673, col. 2; p. 674, col. 1.]

Mr. *Halker*, for the Appellant.

Mr. *McDonnell*, for the Respondent.

JUDGMENT.—The appellant Pyo Gyi has been convicted of cheating and dishonestly inducing Mr. McCracken, agent of Messrs. Steel Brothers & Co., to deliver him Rs. 15,000 under section 420 of the Indian Penal Code, and of criminal breach of trust as a servant in respect of the same sum under section 408 of the Penal Code and sentenced to five years' rigorous imprisonment on each count, the sentences to run concurrently. The facts are set forth *in extenso* in the judgment of the Magistrate and it is not necessary to go into them in detail. The case for the prosecution is that Pyo Gyi was employed by the firm to buy paddy for them. He was a buyer and not a trader.

On his representation to Mr. McCracken that he had purchased 14,000 baskets of paddy in pursuance of instructions from him and on his giving a list of the persons from whom he had purchased, Mr. McCracken gave him a sum of Rs. 15,000 to pay for the paddy purchased and cover the expenses of transport to Bassein. He gave a simple receipt for the money. Instead of purchasing paddy with the money, appellant proceeded to divert the greater portion of it to his own uses. In order to account for the disappearance of the money he invented a bogus burglary. It is perfectly clear that the burglary was a fiction and that Pyo Gyi appropriated the money. It is contended, however, that even if he did use the money for his own purposes, there has been no breach of trust since the money was simply advanced by way of a loan for a specific purpose, and, therefore, appellant only committed a breach of contract for which he was civilly liable. Appellant's case is that he was a trader and not merely a buyer, and that he could make a profit on the transaction. The Magistrate found that the defence was false and the accused was in the position of a buyer in a special sense. With the finding of the Magistrate on this point I am in entire accord. The position of buyers under the company is thus summarised by the Magistrate in his judgment: "They are engaged by the company's agent to purchase paddy on behalf of the company. They are, in fact, buyers in a strictly limited sense of the term. They are instructed by the agent how much paddy they are to buy, where they are to buy, and how much they are to pay for it. They are then given money to go out into the jungle to buy paddy in accordance with instructions. On their return to head-quarters they present an account, showing exactly how much they paid for the paddy in the jungle, and how much they had to spend in transporting it to Bassein. They are then paid up in accordance with this account. They are paid 'brokerage' at the rate of one rupee or one rupee eight annas for every hundred jungle baskets of paddy which they bring in, and they have no other form of legitimate remuneration. There is no question of profit or loss to them in any case." Under these circumstances it is clear that the appellant as buyer was acting as agent of the company in the transactions. He held the money on behalf of the company and property in it did not vest in him. It was not a loan to him, but a trust. This

differentiates the case from *Wong Yone Wain* v. *Emperor* (1), *Nga Po Seik* v. *Emperor* (2) *Hock Cheng & Co.* v. *Tha Ka Do* (3) and *Nga Po Ywet* v. *Emperor* (4), in all of which the accused was to deliver the paddy at the current market rate, and stood to make a profit or loss on the transactions. In the present case the appellant's only remuneration was a fixed commission on the paddy purchased by him. He was not to be paid for the paddy at the current market-rate at the time of delivery. I am of opinion that the Magistrate was warranted under the circumstances in holding that a trust was created when the money was paid to the appellant, and that it is impossible to take the view that it was nothing more than a loan. I am also of opinion that the Magistrate was correct in his view that on the evidence Pyo Gyi would come within the meaning of a servant, though I think it would perhaps have been more appropriate had he held that he was an agent, in which case his offence would have been still more serious. It has been held that a servant can be remunerated by commission, and that it is not necessary that his whole time should be employed, nor that the employment should be permanent. In *Reg.* v. *Winnall* (5) it was held that a person hired by a market gardener to do a day's work and sent by him to sell vegetables at market and bring back the proceeds is a servant of his employer in respect of such employment.

I hold that on the evidence the conviction for breach of trust was fully justified. I do not propose to consider the evidence as to the money having been obtained by misrepresentation. If it was doubtful whether the offence was cheating or criminal breach of trust, then the conviction might well have been in the alternative, but this is not the position. The breach of trust has been clearly established, and I do not consider that the appellant ought to have been convicted of cheating with respect to the same sum of money. The sum involved is large and an exemplary sentence was called for, but I am of opinion that a somewhat shorter term of imprisonment will be sufficient to act as a deterrent. I confirm the conviction for criminal breach of trust under section 408 and I sentence the appellant to three years' rigorous imprisonment. The conviction and sentence, under section 420, are set aside.

Sentence reduced.

(1) 14 Ind. Cas. 653; 5 Bur. L. T. 11; 6 L. B. R. 46; 13 Cr. L. J. 269.

(2) 17 Ind. Cas. 824; 5 Bur. L. T. 143; 6 L B R. 62; 13 Cr. L. J. 888 (F. B.).

(3) 19 Ind. Cas. 145; 6 Bur. L. T. 13; 7 L. B. R. 16; 14 Cr. L. J. 145.

(4) 24 Ind. Cas. 332; 7 Bur. L. T. 209 (F. B.); 15 Cr. L. J. 452; 7 L. B. R. 278.

(5) (1851) 5 Cox C. C. 326.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 169 OF 1918.

July 9, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

In re THE SESSIONS JUDGE OF TANJORE —REFERRING OFFICER.

Criminal Procedure Code (Act V of 1898), ss. 195, 197, 233, 531, 537—Enquiry by Committing Magistrate, applicability of s. 233 to—Commitment to Sessions Court without sanction to prosecute in case where sanction required—Sessions Court, jurisdiction of, to acquit, for want of sanction—Applicability of ss. 531, 537.

An enquiry before a Committing Magistrate is not a trial and does not come within the prohibition contained in section 233, Criminal Procedure Code. [p. 675, col. 2]

An order of commitment to the Sessions Court cannot be quashed on the ground that the Magistrate took cognizance of the complaint without the sanction required by sections 195 and 197 of the Criminal Procedure Code. Sections 531 and 537 of the Criminal Procedure Code apply to such cases, and their applicability is not affected by the fact that objection to want of sanction was taken at the earliest possible opportunity. [p. 675, col. 1.]

Zahir Singh v. *Emperor*, 28 Ind. Cas. 646; 37 A. 283; 13 A. L. J. 345; 16 Cr. L. J. 310 and *Sankaralinga Tevan* v. *Avudai Ammal*, 35 Ind. Cas. 826; 8 Cr. L. Rev. 284; 17 Cr. L. J. 394, dissented from.

Semble.—A Sessions Court has power to acquit the accused in a case committed to it on the ground of want of sanction.

Reference by the Sessions Judge of Tanjore praying that in the circumstances stated in his letter, dated the 11th April 1918, the High Court will be pleased to quash the commitment of 1. Venugopal Naidu, 2. Veeraswami Naidu, 3. Rathinam Pillai and 4.

SESSIONS JUDGE OF TANJORE, *In re.*

Veeiavu Raja, accused Nos. 1 to 4 in Sessions Case No. 15 of 1918 on his file (R. C. No. 4 of 1917 on the file of the Court of the Sheristadar Magistrate of Arantangi).

The Public Prosecutor, for the Crown.

Mr. *G. Krishnaswami Aiyar*, for Accused Nos. 2 to 4.

Mr. *K. S. Jayarama Aiyar*, for Accused No. 1.

ORDER.

SADASIVA AIYAR, J.—This is a reference by the Sessions Judge of Tanjore asking us to quash the commitment made to his Court by the Third Class Magistrate of Arantangi. The accused are four in number, the charge against the 1st and 3rd accused being that they committed offences under sections 193, 465, 466 and 471, Indian Penal Code, in connection with the document Exhibit D and the charge against accused Nos. 1, 2 and 4 being that they committed similar offences in connection with the document Exhibit N. The order of the Magistrate committing the accused falls under section 213 (1) of the Criminal Procedure Code. Before the Sessions Judge it was argued by the Public Prosecutor that under the provisions of sections 531 and 537, Criminal Procedure Code, a superior Court had no power to set aside the Magistrate's order of commitment, granting that the Arantangi Magistrate had no territorial jurisdiction over the place where the 3rd and 4th accused are alleged to have committed the offences and granting further that sanctions under sections 195 and 197, Criminal Procedure Code, were required as regards some or all of the accused. The Sessions Judge overruled the above contention founded on sections 531 and 537. I am, however, unable to agree with the Sessions Judge that sections 531 and 537, Criminal Procedure Code, are not applicable.

I further respectfully dissent from the decision in *Zahir Singh* v. *Emperor* (1), in which it was held that where the objection based on want of sanction is taken at the earliest opportunity, section 537 would not cover the case of proceedings conducted by a Magistrate in the absence of necessary sanction against the accused. In the case of *Sankara-linga Tevan* v. *Avudai Ammal* (2) the provisions of section 537 were evidently not brought to the notice of the learned Judge who decided it. The Committing Magistrate himself might have refused to take cognizance of the case in the absence of sanction. It may also be that the Sessions Judge is entitled to acquit the accused on the ground of want of sanction, as section 537 prohibits only the Court before whom the case comes on appeal or revision from treating the want of sanction as material, unless it had occasioned a failure of justice. (It could only be in very exceptional cases that mere want of sanction could itself occasion a failure of justice)

It is next urged that as regards Exhibit N, "there is no evidence to show that it was not drawn up as it stands now on the date it bears, and that sections 465 and 471, Indian Penal Code, have no application to the manufacture of such a document as there is no legal evidence before the Committing Magistrate on which a conviction could be based under these sections. This Court has got the power to set aside a commitment only on a question of law. I was at first inclined to hold that the commitment of accused Nos. 1, 2 and 4, so far as it related to the acts alleged against them in connection with Exhibit N, might, under the peculiar circumstances of this case, be so set aside But my learned brother thinks that this a matter which ought to be more appropriately dealt with by the Sessions Judge himself in the proceedings before him, and I do not wish to press my own view of the matter. (We express no opinion on the question whether sanction is or is not required as that question does not properly arise before us at this stage of the case.)

As regards misjoinder, section 233, Criminal Procedure Code, no doubt prohibits the joint trial of separate charges with respect to separate transactions. But an enquiry before a Committing Magistrate is not a trial and does not come within the prohibition contained in section 233, and we are asked by this reference to deal only with the proceedings of the Committing Magistrate, the trial itself having to take place before

(1) 28 Ind. Cas. 646; 37 A. 283; 13 A. L. J. 345; 16 Cr. L. J. 310.

(2) 35 Ind. Cas. 526; 8 Cr. L. Rev. 284; 17 Cr. L. J. 394.

the Sessions Judge hereafter. Of course, the Sessions Judge has got power in a proper case to hold separate trials as regards separate offences so as not to contravene the provisions of section 233. He has also got the power to acquit if there is no legal evidence, and the Public Prosecutor also would, no doubt, in a proper case withdraw the prosecution if there is no legal evidence to support it. But all this has to be done in the proceedings before the Sessions Judge and so far as the order of the Magistrate committing the accused is concerned, I do not think that sufficient reason has been shown for quashing that order.

I would, therefore, decline to accept the reference and would order the records to be returned to the Sessions Judge.

NAPIER, J.—I agree.

M. C. P.

Records returned.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 778 OF 1918.

November 15, 1918.

Present:—Mr. Justice Scott-Smith.

SANT RAM—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Punjab Municipal Act (III of 1911), s. 173—Depositing goods on street without permission—Site let out to third person—Offence.

The essence of an offence under section 173 of the Punjab Municipal Act is the placing of goods on a street without the permission of the Municipal Committee, but where such permission is not necessary, the Committee having farmed out its rights to a third person, no offence under the section can be committed. [p. 677, cols. 1 & 2]

Case reported by the Sessions Judge, Attock, with his No. 747 of 26th June 1918.

FACTS.—There is no dispute about the facts of this case. On 5th February 1918 the Municipality of Hazro leased out Phari Teh Bazari (the right to stock goods on a specified portion of a street) to one Bhag Mal for Rs. 70. It was stipulated that the lessee was to have the same rights as the Municipality in respect of the property leased and that he was entitled to realise the rent from any one who deposited his goods there for sale.

The petitioner deposited his goods on a portion of the site without the permission of the lessee and the Honorary Magistrate, 1st Class, at Hazro on a complaint made by the Secretary of the Committee convicted and sentenced the petitioner to a fine of Rs. 6 under section 173 (*c*) of the Municipal Act.

The accused, on conviction by Khan Bahadur Muhammad Azim Khan, exercising the powers of an Honorary Magistrate of the 1st Class in the Attock District, was sentenced by order, dated the 26th April 1918, under section 173, Act III of 1911, to a fine of Rs. 6.

GROUNDS.—Section 173 provides for a penalty in case of unauthorised projections and obstructions and the main contention put forward on behalf of the petitioner is that where the Municipality has itself leased out the property for a specified purpose, it can have no grievance.

The learned Public Prosecutor for the Crown contends that the nature of the property, *viz.*, that it is a street, is not altered by the fact of the lease and section 173 would still be applicable.

In my opinion the conviction is not justified. The Committee has a right to prevent encroachments and obstructions on its property and the law as laid down in section 173 of the Municipal Act provides for the due protection of that right. At the same time the Committee, in exercise of its rights of ownership, can decide that a particular portion of its property should be set apart for use for a specified purpose by an individual, class of persons or by the public. It can also impose conditions subject to which the right of user can be exercised.

In the present case it is clear from the deed of lease itself that the Committee has decided to set apart a portion of the street for use by the public, the use being for a specified purpose, *viz.*, that of depositing goods for sale. The right was subject to a condition that the user shall be subject to payment of rent. The amount

of rent and the manner in which it was to be realised from every individual using the property were not decided upon because the Committee decided to farm out its rights. These details were left to the lessee, from whom the Committee realised all the rent which it reasonably expected to realise if it had kept the whole thing in its own hands.

There has thus been no default *qua* the Municipality. The property has not been used for any other purpose except the one specified and that body is not pecuniarily affected because it has realised the rent from the lessee. There can be no obstruction where the property is used in the manner it is intended to be used, and the failure to pay rent only, even if the Committee had to realise it itself and there had been no lease, is clearly not an obstruction contemplated by the Act. But in this case the Committee has no reason even for that complaint.

Where the Committee's own rights are not infringed in any manner, I do not consider that it can have any justification to import the penal provisions of the Act to protect its lessee against default in payment of rent by sub lessees who actually use the property. This is exactly what has been attempted in this case.

I would for these reasons consider that the conviction cannot be maintained and I order that the record be submitted to the Chief Court with the recommendation that the conviction be quashed and fine refunded.

Mr. *Badr-ud din Kureshi*, for the Petitioner.

ORDER.—For the reasons given by the learned Sessions Judge I am of opinion that this conviction cannot stand.

Section 173 of the Punjab Municipal Act obviously cannot apply to a part of a street leased out to a person for the express purpose of his renting portions of it to shopkeepers for placing thereon their goods for sale. What Sant Ram should have done was to rent a portion of the site from Bhag Mal or to get the latter's permission to place his goods on it. If without doing this he placed his goods on the site, he may have rendered himself liable to an action for damages on the part of Bhag Mal, but he did not commit any offence within the meaning of section 173 of the Punjab Municipal Act. The essence of such an offence is the placing of goods on a street without the permission of the Municipal Committee, but where such permission is not necessary, the Committee having farmed out its rights to a third person, no offence under the section can be committed. I, therefore, set aside the conviction and sentence, and acquit Sant Ram.

Fine, if paid, to be refunded.

Revision accepted.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 156 OF 1918.

April 17, 1918.

Present:—Mr. Justice Piggott.

KURE AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 149, 304A, 325—Causing death by rash or negligent act—Grievous hurt—Sentences, separate, legality of.

Accused, members of an unlawful assembly, were convicted under section 304A of the Penal Code for causing death by a rash and negligent act in the following circumstances: Armed with *lathis* they attacked the complainants; in the course of the affray a little girl, who was near by, received a couple of blows on the head, from the effects of which she died shortly after. The accused were also convicted under sections 147 and 323 of the Penal Code, and for the two offences were awarded separate sentences to run consecutively:

Held, that the conviction under section 304A could not be maintained and that the conviction should have been under section 325 read with section 149 of the Penal Code. [p. 679, col. 1.]

As a rule it is unsound to pass cumulative sentences under section 147 and some other section of the Penal Code, where the latter of the two sections can only be applied by the aid of the provisions of section 149. [p. 679, col. 2.]

Criminal appeal from an order of the Sessions Judge, Meerut.

Mr. *Harendra Krishna Mukerji*, for the Appellants.

Mr. *Lalit Mohan Banerji* (Government Pleader), for the Opposite Party.

JUDGMENT.—This is an appeal by five persons, Kure and his sons Dava, Khimma and Kalu and a caste-fellow and neighbour of theirs named Bhikan, who have been convicted on separate charges of offences punishable under sections 147 and 323 of the Indian Penal Code and also of an offence punishable under section 304A of the same Code. It is common ground that on the night of the 28th of November last, being the night following the bathing

festival of the Kartiki Puranmashi, there was an affray in the village of Shaudan between two parties of Chamars, in the course of which serious injuries were suffered and inflicted. The first report was made by the prosecution witness Bhaggan Chamar who brought to the Police Station his niece *Musammat* Kesi, a girl about 10 years of age. Kesi was at that time suffering from serious injuries on the head and she died shortly after having been sent to the dispensary. Bhaggan himself and his brother Mukkha, father of the girl Kesi, were subsequently found to be suffering from injuries such as might have been received in the course of a *lathi* fight. On the other side the appellant Kure had received injuries on the head, on the left shoulder and on the left hand, and his right wrist was apparently broken, of his sons, Khimma had received a contused wound on the head and another injury of an unimportant nature, while Kalu and Dava were also slightly marked. The girl Kesi had received two distinct blows on the head by which the bones of the skull had been seriously fractured.

The evidence as to what took place is contradictory and unsatisfactory in many respects, as is not unfrequently the case where there has been an affray between two factions made up of men belonging to the same caste and residents of the same village. These Chamars usually live in some outlying portion of the village, and it would seem in the present case that the other residents of the village either heard nothing of this affair until it was over or did not think it worth while to concern themselves about a quarrel amongst their low caste neighbours. The only alleged eye-witness of the occurrence not a Chamar is a man of the name of Balle, a Jat by caste, who has been produced for the defence. He may have seen something of the affair, but his evidence, while supporting the case for the accused in its general outlines, seems to me most unsatisfactory and unreliable. He says that the fight was between Kure and his three sons on one side and a considerably larger number of persons, including the prosecution witnesses Bhaggan, Mukkha, Cheta and Bakhshi on the other. He gives a very vague account of what took place, suggesting in one part of his evidence that it was too dark for him to see much. He had to admit afterwards that it was bright moonlight, which, of course, it would be on the night in question. In one part of his evidence he says that he saw Kure fall to the ground and lying injured, and afterwards contradicts himself by saying that no one fell to the ground while he was present and that Kure must have done so after he had gone away. On his own showing he took exceedingly little interest in the business. The most significant part of his evidence is that he deposes to the presence of all three appellants Dava, Khimma and Kalu, whereas Kalu does not admit that he was in the village at all on the night in question. The stories told by the two parties are set forth in the judgment of the Court below and no good purpose would be served by my repeating them here. I very much doubt whether the truth as to the origin of the affray has been told by either party. I see no reason to doubt that there was a fight in which five persons or more were concerned on each side, the common object on each side being to cause hurt to members of the opposite party. Putting aside as unreliable the evidence of Balle, I certainly do not find that the remaining two witnesses called for the defence, *Musammat* Manbhari and Chhuttan, suffice to show that the appellants now before me were acting in the lawful exercise of their right of private defence. It follows that they have been rightly convicted at least of rioting and causing hurt.

The question of the hurt caused to the girl Kesi is more difficult. The prosecution witnesses do not suggest that the accused intended to kill this child. Their case is that she happened to be sitting with her father and uncle when an attack was made upon them by the accused and that one or more of the accused must have hit her on the head in the course of the affray. I must take it that the man who struck these blows had no intention of causing this girl's death, or of causing injury likely to result in her death or any knowledge that he was likely to do so. The question is whether the provisions of section 301 of the Indian Penal Code can be applied to the

established facts so as to make the appellants, or any of them, guilty of the offence of culpable homicide by reason of the injuries suffered by this child. I must take it that she was hit by blows intended for some other person and the question is as to the intention or knowledge with which those blows were struck. I think it may fairly be inferred that persons striking out violently with *lathis* in the course of a fight of this sort may be presumed to intend to cause at least grievous hurt, if grievous hurt actually results from the blows inflicted by them. Referring back to the provisions of section 321 of the Indian Penal Code, and reading that section in connection with the one which immediately follows, it is obvious that the guilt of an accused person remains just the same whether in seeking to inflict simple hurt or grievous hurt, as the case may be, upon one person, he actually causes the intended hurt to that person or to some other. I think, therefore, that the appellants must be held guilty under the provisions of section 325 read with those of section 149 of the Indian Penal Code of having caused grievous hurt to the girl Kesi. The provisions of section 304A, which have been invoked by the learned Sessions Judge, are quite inapplicable to the facts of this case. That section must be read along with sections 336, 337 and 338 of the Indian Penal Code. All these sections are confined in their operation to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient. Where a man strikes at another with a *lathi*, he is committing a criminal offence independently altogether of any element of rashness which may be involved in his conduct by reason of the proximity of a child of tender years to the person at whom the blow is aimed. I set aside the conviction of all the appellants under section 304A of the Indian Penal Code, but in lieu thereof convict them under section 325 read with section 149 of the same Code.

I have felt considerable difficulty about the question of sentences. The learned Sessions Judge has passed cumulative sentences, the effect of which is to give each of the appellants a period of two years' rigorous imprisonment. From one point of view this is not excessive in a case in which death has been caused; but I am bound to say that, in the unsatisfactory state of the evidence, I feel reluctant to affirm so severe a sentence upon all the appellants. On the evidence I must take it that the death of this girl Kesi was an accident, something altogether apart from the intention of any of the persons concerned in the affray. I note also that in order to affirm the conviction under section 325, Indian Penal Code, I have found it necessary to invoke the provisions of section 149 of the same Code; and I do not think it sound as a general rule to pass cumulative sentences under section 147 and some other section of the same Code, where the latter of the two sections can only be applied by the aid of the provisions of section 149. The result is, therefore, that, while maintaining the sentence of one year's rigorous imprisonment passed by the learned Sessions Judge in connection with the fatal injuries caused to the girl Kesi, I direct that the sentences passed under the two charges (that is to say, under sections 147, 323 and sections 325, 149, Indian Penal Code) do run concurrently. The appeals are allowed to this extent and otherwise dismissed.

Order modified.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 548 OF 1918.

March 1, 1919.

Present:—Mr. Justice Chevis and Mr. Justice Scott-Smith.

EMPEROR—APPELLANT

versus

AMOLAK RAM—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s. 193—Giving false evidence—Prosecution, duty of, to prove particular statement as false—Criminal trial—Failure to produce prosecution witness—Presumption.

In a case under section 193, Penal Code, it must be proved beyond all reasonable doubt that some particular portion of the statement alleged to have been made by the accused is false. [p. 684, col. 2.]

Where the prosecution fail to produce an important witness, the Court is justified in making the presumption that if he were produced his evidence would not be favourable to the prosecution. [p. 681, col. 2.]

EMPEROR *v.* AMOLAK RAM.

Appeal from the order of the Sessions Judge, Montgomery Division, at Lahore, dated the 6th June 1918, reversing that of the Magistrate, 1st Class, Montgomery, dated the 30th March 1918 and acquitting the respondent.

Mr. *Herbert* (Government Advocate) and Lala *Pindi Das* (Public Prosecutor), for the Appellant.

The Hon'ble Mr. *Fazl-i-Hussain* and Mr. *Mukand Lal Puri*, for the Respondent.

JUDGMENT.—This case arises out of the attempted murder of Nau Nihal Singh, half brother of Gurdit Singh, an Honorary Magistrate living at Kila Tara Singh in the Montgomery District. Sohan Singh turned approver and confessed that he had attempted to murder the boy at the instigation of Gurdit Singh. Gurdit Singh and others were tried and convicted by Mr. Parsons. In that trial Lala Amolak Ram Sub-Inspector gave evidence, in the course of which he deposed that he left his headquarters (Dipalpur) for Salowal on the morning of the 15th April 1916, and returned on the 16th, that Muhammad Din constable did not bring Sohan Singh to him at all and that he did not see Sohan Singh, and that Sohan Singh was not detained at his house. Mr. Parsons, considering these statements to be false, sanctioned a prosecution under section 193, Indian Penal Code. Amolak Ram has now been tried and convicted by Mr. Harris, Magistrate, and sentenced to two years' rigorous imprisonment. His appeal has been accepted and he has been acquitted by the learned Sessions Judge. This is an appeal by Government from the order of acquittal. The evidence in the case is voluminous, and no less than four days have been spent by us in listening to arguments. The case has been ably and exhaustively argued by learned Counsel on both sides.

The case for the prosecution is as follows: When Sohan Singh returned to his village Dillewala (about 11 miles south of Dipalpur), rumours of what he had done to Nau Nihal Singh spread about, and on the 13th April 1916 Sohan Singh made a confession to Lal Singh Lambardar, who informed Lala Amolak Ram. The latter reported the story to the Superintendent Police by letter, saying in the letter that Gurdit Singh had come back. So apparently Amolak Ram was then under the impression that Gurdit Singh was at his village Kila Tara Singh (about 2 miles north west of Dipalpur). On the morning of the 15th April Amolak Ram sent out Muhammad Din constable to bring in Sohan Singh. Muhammad Din brought Sohan Singh into Amolak Ram's house. Sohan Singh was kept for 1½ or 2 hours sitting in the *deohri*. There he was seen by Baghi Ram and Bishen Singh who spoke to him, but Amolak Ram came out and drove them away. Amolak Ram kept Sohan Singh confined in his house that night, and all the next day till the evening, when Sohan Singh confessed and signed his confession recorded by the Sub-Inspector Meanwhile Bishen Singh had sent off Hukum Chand, a cousin of Gurdit Singh, by the night train to Lahore to fetch Gurdit Singh to rescue Sohan Singh. Gurdit Singh left Lahore by the morning train of the 16th, reached Okara (a station about 16 miles from Dipalpur) at about 1 P. M., drove home and reached Dipalpur soon after Sohan Singh had confessed. He gave Amolak Ram a bribe of Rs. 1,600 in sovereigns, and got Sohan Singh released. On learning from Sohan Singh that a signed confession had been obtained from him, Gurdit Singh returned to Amolak Ram to get the confession, but was told it had been torn up. Not believing this he came again the next morning but got the same answer.

On the 18th April he sent off Sohan Singh to Pakpattan where the latter put in a petition before the Sub-Divisional Officer, complaining that the Dipalpur Police had shut him up and beaten him and had written a fictitious confession which he had been made to sign and thumb-mark. The petition accused the Sub Inspector and the Head Constable, and asked that the papers connected with the matter might be sent for.

The Thana diary has an entry showing that Amolak Ram left Dipalpur for Salowal at 7 A. M. on the 15th and another showing that he returned at noon on the 16th. If he really was absent from Dipalpur from the morning of the 15th April till noon on the 16th, then a large amount of Sohan Singh's story and a good deal of the prosecution evidence in this case must be false, and the whole case really sums up to this, whether Amolak Ram was at headquarters.

the whole of the 15th and 16th, or whether he is telling the truth when he says he was away from the morning of the 15th till noon on the 16th.

That Sohan Singh was called in from his village by Muhammad Din constable is not denied. It is also clear that he was detained there till the 16th, though the defence version is that he was detained by Nathan Lal, the Head Constable, and that he was allowed to go before Amolak Ram's return on the 16th. That he was kept in Dipalpur that night is clear from the fact that Mul Singh, a defence witness, says Sohan Singh stayed the night, though, of course, he says it was at Nathan Lal's house.

About the following facts there can be no dispute. Gurdit Singh's servants found that Sohan Singh was in the hands of the Police, and Hukm Chand was sent off to Lahore to fetch Gurdit Singh who came back by the train, reaching Okara at about 1 P. M. on the 16th. But for Gurdit Singh's return it seems impossible to suppose that either Amolak Ram or Nathan Lal would have allowed Sohan Singh to walk off, and though the only evidence as to the giving of the bribe is that of Sohan Singh—and he merely says he heard the clink of money passing hands, and was afterwards told by Gurdit Singh about the bribe having been given—this part of the prosecution story at all events has the merit of being quite in accordance with the probabilities of the case.

The following witnesses are called to prove the presence of Amolak Ram at Dipalpur on the 15th and 16th.

Bishen Singh, servant of Gurdit Singh, and Baghi Ram, a *gomashta* of Gurdit Singh, relate how they saw Sohan Singh in Amolak Ram's *deorhi* and how Amolak Ram came and sent them away.

Lal Singh Lambardar says that on the 15th April he saw Sohan Singh being brought through the Dipalpur Bazaar by Muhammad Din. He also says he saw Sohan Singh in Amolak Ram's *deorhi*, and Amolak Ram was inside, but then he says he is not sure if this was the same day or not. In cross-examination he says Amolak Ram came out, and witness asked why he had been sent for and was told he had to take fodder to the Circle Inspector, but he says he is not sure whether this was in the morning or evening. This is not very satisfactory.

Muhammad Din constable swears he took Sohan Singh first to Nathan Lal's house, and then to Amolak Ram's house and handed him over to Amolak Ram and then came away.

Nathan Lal says he questioned Sohan Singh in vain, and then sent him on to the Sub-Inspector in charge of Muhammad Din. He says he himself had fever. This witness's evidence is very unsatisfactory. And it must be remembered that his earlier statement made to the Hardwar Police in the enquiry about the Nau Nihal Singh's case was very different, *viz.*, that the Sub-Inspector was not there (*i.e.*, not at headquarters) and that he told Sohan Singh to appear before the Sub-Inspector the next day.

Then comes a batch of witnesses, *viz.*, Musa, Lambardar of Salowal, Nura of Salowal and Jamal Din, Lambardar of Kandowal, who swear that Hyder Ali constable had arrived at Salowal on the 14th to fetch them, and that Ram Surat constable also came on the 15th with summonses for Musa and Jamal Din, and that they went with the constables to Dipalpur, where the summonses were served, and the Sub-Inspector told them to compromise a certain case. Hyder Ali constable corroborates. Surat Ram has not been produced as a witness, and we see no reason for not making the usual presumption, *viz.*, that if he were produced his evidence would not be favourable to the prosecution.

Lala Nihal Chand, Honorary Magistrate, deposes that he saw Amolak Ram at about 9 A. M. on the morning of the 15th. This evidence seems quite reliable, so unless this witness's watch was fast Amolak Ram could not have left for Salowal as early as 7 A. M.

Kesar Singh, Reader to the Circle Inspector, says Amolak Ram did office work in Dipalpur on the 15th (The Circle Inspector was then on leave, and Amolak Ram was officiating for him).

So there is a considerable number of witnesses to swear to Amolak Ram's presence

in Dipalpur on the 15th April. We have to consider how far this evidence is reliable.

A question which suggests itself early in the case is this, why should Amolak Ram make false entries in the Thana diary as to his absence from headquarters, and what object had he in pretending that he was out on tour when he was all the while in Dipalpur? The prosecution theory is he wanted to get a bribe from Gurdit Singh, and so he got hold of Sohan Singh, knowing that news of this would soon reach Gurdit Singh who would be anxious to get Sohan Singh out of Police clutches, and that in order to guard against having to go out to investigate any important crime which might be reported, he made an entry pretending that he had already gone out on tour. This theory does not seem very attractive to us. Important cases demanding instant personal investigation by the Sub-Inspector are not matters of every day occurrence, and if a report of any such case had happened to come in that day surely the Sub Inspector could have invented an attack of colic, or some other excuse for not going out at once. It may further be asked, why should the Sub-Inspector have reported his return to Dipalpur before Gurdit Singh had turned up? The explanation offered is that Gurdit Singh did not turn up as soon as was expected, and so Amolak Ram feared to pretend absence any longer. But enquiries would soon tell Amolak Ram that Gurdit Singh was in Lahore, and if, as Bishen Singh and Baghi Ram's evidence shows, Amolak Ram knew that knowledge of Sohan Singh's being in Police hands had come to Gurdit Singh's servants, Amolak Ram could easily guess that Gurdit Singh would be sent for at once, and might be expected to arrive at Dipalpur on the evening of the 16th. There would surely be very little additional risk in delaying the report of his return to headquarters till the evening of the 16th or even the morning of the 17th. Seeing how near to Dipalpur Gurdit Singh's village is, it seems somewhat strange that Amolak Ram should have plotted to get a bribe from Gurdit Singh, and should have sent for Sohan Singh without first finding out whether Gurdit Singh was at home. But from Bishen Singh's evidence it would appear that even he, though a servant of Gurdit Singh, was not aware that Gurdit Singh was not at home.

Again, one would naturally expect that after making false entries in the Thana diary in order to pretend that he was not in Dipalpur the Sub-Inspector would wish to be seen by as few persons as possible. But according to the evidence he showed himself not only to Baghi Ram and Bishen Singh, but also to Lal Singh, Musa, Nura and Jamal Din, sending for them all, as if he wanted as many people as possible to be able to give evidence as to his presence in Dipalpur. It is said on behalf of the Crown that his pretence of absence was not really likely to be detected. But Kesar Singh, Reader to the Circle Inspector, might surely have noticed the fraud later on, when the Inspector returned and began to ask what had been done at Salowal; Kesar Singh would then very probably have said that so far from going to Salowal Amolak Ram had been doing office work in Dipalpur on the 15th. Bishen Singh in cross examination says that when he and Baghi Ram came to Dipalpur they met Muhammad Din, who said Sohan Singh would be found either at the house of Nathan Lal or at that of the Thanedar. Baghi Ram says that Muhammad Din's reply was that Sohan Singh might be at the house of the Chhota Thanedar, *i. e.*, Nathan Lal. Hukam Chand, P. W. No. 5, in cross-examination says Bishen Singh and Ramditta told him that Nathan Lal had arrested Sohan Singh (here we follow the vernacular record, the English record, which is that Hukam Singh had arrested Sohan Singh contains an obvious error).

When Hukam Chand brought the message to Gurdit Singh in Lahore, *Musammat* Bhagwan Devi, mother of Nau Nihal Singh, was present. As soon as Gurdit Singh was started on his journey, she sent off a telegram to prevent Sohan Singh's release. This telegram runs 'Gurdit Singh coming, don't release Sohan Singh, take his explanation before Deputy Commissioner." The significant point about this telegram is that it is addressed to "Nathan Lal Thanedar." The actual sender of the telegram, Lala Ram Nath (P. W. No. 17), is *Musammat* Bhagwan Devi's son-in-law He says he meant the telegram to reach either the Sub-Inspector

or Nathan Lal. The witness is related to Nathan Lal. Seeing that Nathan Lal is often called the Chhota Thanedar, we think that the telegram was meant for him and that it was sent to him for the simple reason that Hukam Chand had brought the message that Sohan Singh was in Nathan Lal's hands.

We now turn to what happened at Pakpattan on the 18th April. Sohan Singh, accompanied by Bishen Singh and Jawala Ram, a *gomashta* of Gurdit Singh, went to Pakpattan, and first tried to engage a Pleader, but could not agree as to fees. They then went off to a petition-writer, Lachmi Sahai (P. W. No. 9), and got a petition drawn up, which was presented to the Sub-Divisional Officer. This petition begins by relating how Gurdit Singh and his family, accompanied by Sohan Singh, went to Hardwar where the boy Nau Nihal Singh "strayed away and injured himself by an accidental fall", and was taken to Lahore for treatment. It goes on to say next that the relations between Sardar Gurdit Singh and the Police of Thana Dipalpur are strained, and then accuses the Police of the Thana of having arrested Sohan Singh, kept him in confinement, beaten him, attempted to get a statement from him that Gurdit Singh had injured the boy, and had finally written a statement to which they had obtained Sohan Lal's thumb mark and signature; so fearing lest some further wrong action should be taken, Sohan Singh winds up with a prayer that all papers connected with the matter may be sent for from the Thana, and proper steps taken to prevent the Sub-Inspector and Head Constable from any further wrong doing. What Gurdit Singh's object was in getting this petition lodged is difficult to say with any certainty. It is urged for the defence that if Gurdit Singh had bribed the Sub-Inspector and succeeded in freeing Sohan Singh, he would scarcely be likely to take any steps which would probably result in further enquiries by Amolak Ram's superior officers; on the contrary, he would be only too anxious to hush the matter up. But he may have known that there was really no chance of the matter being hushed up. There was Nau Nihal Singh's mother, and also there was Lal Singh Lambardar, evidence of whose interest in the matter is forthcoming in the letter which he sent to Mr. Tomkins, and Gurdit Singh may have known that these two would be sure not to let the matter drop. If Amolak Ram really was keeping back a written confession, pretending that he had torn it up but really holding it in reserve to be used if necessary either to protect himself or to blackmail Gurdit Singh, still further, the object of the petition may have been to force Amolak Ram's hand. If he produced the confession he would be hard put to it to explain why he had let Sohan Singh go free. If he did not produce it he would have to deny its existence, in which case he would not be able to make use of it later on. But the important point of the petition, so far as this judgment is concerned, is that it accuses both the Sub-Inspector and the Head Constable of having arrested, confined and beaten Sohan Singh and obtained his signature to a statement. Both are named by office, not by personal names. Whereas the present story of Sohan Singh is that it was Amolak Ram alone who did all the wrong, Nathan Lal doing nothing beyond telling Muhammad Din to take Sohan Singh on to the Thanedar's house.

Karm Chand, Pleader of Pakpattan, is one of the defence witnesses. He deposes: "Sohan Singh told me that he had been beaten by the Police and the Police had forced a confession out of him. I asked him which Police official had beaten him. He mentioned the name of Nathan Lal and one other Police official, a constable, whose name I don't remember. I told him that they must have beaten him under the orders of the Thanedar. He replied that the Thanedar was not there."

Now if this evidence be true, why was the Thanedar also accused in the petition which was very soon afterwards dictated to the petition-writer? May it not be that Sohan Singh and his companions intended at first to charge Nathan Lal only, but after their conversation with Lala Karm Chand thought that their story would sound more probable if they charged Amolak Ram also?

We are not prepared to admit that Lala Karm Chand's memory may have

failed him, for he gives definite and positive evidence. Either he must be lying or Sohan Singh must have told him "the Thanedar was not there."

So the case stands thus.

The present evidence is directed solely against Amolak Ram, and it is at his house that Bishen Singh and Baghi Ram are said to have seen Sohan Singh. Whereas there is good reason to hold that the message sent to Lahore was that Sohan Singh was in Nathan Lal's clutches and Lala Karm Chand swears that Sohan Singh told him "the Thanedar was not there." The petition agrees with neither version, for it charges both Amolak Ram and Nathan Lal! Then we have what we regard as the improbability of Amolak Ram inventing a dangerous and probably unnecessary *alibi*, Amolak Ram getting false entries placed in the Thana diary as to his being out on tour on the very day when he was sending for Lambardars and others to come to him in Dipalpur. This to our minds renders the whole matter so doubtful that we are not surprised that the learned Sessions Judge gave Amolak Ram the benefit of the doubt.

That Jamal Din and Musa did come to Dipalpur on the 15th April is clear enough; this is admitted. The summonses were served on them in Dipalpur by Surat Ram, and it may be asked how it was that they missed the Sub Inspector on his way out to Salowal. But Jamal Din lives at Kandowal, a village near Salowal; there are separate roads from Kandowal and from Salowal to Dipalpur, the canal running between the two. If, as the defence allege, Musa went and picked up Jamal Din at Kandowal the party would come to Dipalpur from Kandowal, and would not meet the Sub-Inspector on the way. The prosecution version is that Jamal Din was called from Kandowal to Salowal before Surat Ram came out to call the parties; but it is not clear that Hydar Ali had any instructions to call Jamal Din to appear before the Sub Inspector. Hydar Ali says he handed Nadir's telegram back to the Sub-Inspector, but it does not seem clear what need there was ever to make over the original telegram to a constable.

Then it may be asked how, if, as is alleged for the defence, Ram Surat accompanied the Sub-Inspector to Salowal, he was back in Dipalpur on the evening of the 15th. But he had to serve summonses on Musa and Jamal Din, and finding on arrival at Salowal that they had gone to Dipalpur he may well have returned there. That he did go to Salowal on the morning of the 15th and returned to Dipalpur later on in the day is admitted; the only question is whether he went to Salowal alone or accompanied the Sub-Inspector there.

We do not propose to examine the defence evidence. A good deal of it is improbable and unconvincing and Amolak Ram has signally failed to prove that he did any useful work either at Salowal, Sharin Muafi or Basirpur. But whatever may be said as to the defence evidence, we are not satisfied that the prosecution has proved beyond all reasonable doubt that Amolak Ram did not go out on tour from the morning of 15th April till noon on the 16th.

What really happened it is impossible to say, but it seems to us that the following is very possibly the real case. Amolak Ram and Nathan Lal, having plotted to blackmail Gurdit Singh, sent for Sohan Singh. Finding that Gurdit Singh was not likely to be back from Lahore till the afternoon of the 16th, Amolak Ram went on a lazy inspection tour, leaving Nathan Lal to detain Sohan Singh till his return. Bishen Singh and Baghi Ram saw Sohan Singh in Nathan Lal's custody, and sent word to Gurdit Singh, who hurried back from Lahore. Meanwhile Amolak Ram had returned from camp, and getting the required bribe from Gurdit Singh let Sohan Singh go. If this be correct, then that part of Amolak Ram's statement before Mr. Parsons which says "Sohan Singh I never saw at all" is false, but the main portion as to Amolak Ram's going out to Salowal is true. But on the evidence as it stands, we are unable to say that it is proved beyond all reasonable doubt that any particular portion of the statement is false. There has been a great deal of hard swearing in the case, mainly on the question of Amolak Ram's being at Dipalpur or away from Dipalpur from the morning of the 15th to noon on the 16th April and the conclusion at which we arrive is that with

regard to this question the defence version (*viz.*, that Amolak Ram was not in Dipalpur) is very probably correct.

We accordingly uphold the decision of the learned Sessions Judge and dismiss this appeal.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 666 OF 1918.

January 17, 1919.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

ARSHED MOLLA AND OTHERS—ACCUSED —APPELLANTS

versus

EMPEROR—RESPONDENT.

[1] *Penal Code (Act XLV of 1860), ss. 396, 411—Dacoity, proceeds of, possession of, whether evidence of guilt of dacoity—Receiving stolen goods.*

The mere fact that property stolen in a dacoity is found with a person is, in the absence of evidence connecting him with the dacoity, no ground for holding him guilty of dacoity or for imputing to him knowledge that the property was stolen by dacoity. Such a person is, however, guilty of the offence of dishonestly receiving or retaining stolen property punishable under section 411 of the Penal Code. [p. 686, col. 1.]

Appeal against the decision of the Sessions Judge, Bakargunj, dated the 11th September 1918.

Babus *Manmatha Nath Mukherji* and *Suresh Chandra Talukdar*, for the Appellants.

Mr. *Orr*, for the Crown.

JUDGMENT.—The three appellants Arshed Molla, Khorshed Molla and Safer Molla with four other accused persons were tried by the Sessions Judge of Bakargunj sitting with two assessors on charges framed under sections 396, 397 and 460 of the Indian Penal Code. In the result two of the accused were acquitted of all the charges. The remaining five, including the three appellants, were acquitted of the charge under section 397 but convicted of offences under sections 396 and 460. Khorshed and Safer were sentenced to transportation for life under section 396 and Arshed to seven years' rigorous imprisonment under that section. No separate sentences were passed under section 460.

It should be mentioned that in convicting the appellants, the learned Sessions Judge was in agreement with the opinion expressed by the assessors.

The principal witness for the prosecution is Ram Charan Shil, in whose shop a dacoity of an aggravated character was undoubtedly committed in the early morning of the 11th March 1918. Both Ram Charan and his Sarkar Asutosh Sammadar were attacked and severely wounded. The Sarkar died of his injuries six days later

For the appellants it is contended that both the Sessions Judge and the assessors having rejected as unreliable the evidence of Ram Charan so far as he purports to have identified his assailants, the remainder of the evidence which is circumstantial is not sufficient to support the conviction.

Certain cloths were found in the houses of the appellants, and both the Judge and the assessors after a careful examination of the evidence have come to the conclusion that these cloths were part of the proceeds of the dacoity at Ram Charan's shop.

Our attention has been invited to the fact that only one cloth, Exhibit XIV (*ii*), was found in the house of Safer on the top of a *machan*. But this cloth is the pair of another cloth, Exhibit XIV (*i*), which was found in Khorshed's house. The Sessions Judge says that in the case of Exhibit XIV (*i*), the printed number agrees with the entry in Ram Charan's books. It also appears that Exhibit XIV (*i*) was found concealed in a basket of paddy husks on the top of a *machan*.

In Arshed's house are said to have been found a white silk coat (Exhibit III) and a Sari. The white silk coat is said to be the property of Ram Charan's brother Ganga Charan and is identified as such by Ganga, by another brother, Rai Charan, and by the tailor who made it. The evidence regarding this coat is of a nature which satisfies us that it was the property of Ganga Charan.

Exhibit III found in Arshed's house, Exhibit XIV (*i*) found in Khorshed's house and Exhibit XIV (*ii*) found in Safer's

house were clearly stolen goods and we see no reason to dissent from the conclusion of the Court below as regards the other cloths found.

It is not suggested that Ram Charan's shop was robbed on any other occasion and regard being had to the number of the cloths and the mode in which they were concealed, there is little reason to doubt that they were proceeds of the dacoity which came dishonestly into the possession of the appellants. The learned Sessions Judge adverts in this connection to the fact that cloth is now extremely dear, and observes that it is most unlikely that even substantial cultivators like the three accused would buy more cloths than were absolutely necessary for immediate use.

On the other hand, the burden of proof is on the prosecution and the interval between the dacoity and the finding of the stolen goods having been about six weeks and the direct evidence of identification by which it was sought to connect the appellants with the dacoity having failed, there is more force in the contention that the appellants should not have been convicted of dacoity and that the knowledge that the goods were stolen by dacoity should not be imputed to them.

The appellants are clearly guilty of the offence of dishonestly receiving or retaining stolen property punishable under section 411 of the Penal Code and it is open to us to convict them of that offence under the provision of section 237 of the Criminal Procedure Code.

In the circumstances we set aside the convictions of the appellants under sections 396 and 460 of the Penal Code. Instead we convict the appellants under section 411. The sentences passed on the appellants are reduced in each case to rigorous imprisonment for two years.

Sentences reduced.

PATNA HIGH COURT.

CRIMINAL REVISION No. 151 OF 1919.

May 29, 1919.

Present:—Mr. Justice Das.

MUHAMMAD SALEH—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *ss.* 403, 435, 436—*Penal Code* (*Act XLV of* 1860), *ss.* 363, 365, 366, 368—*Kidnapping, trial and acquittal on charge of—Trial, subsequent, for offences under ss.* 366, 368, *legality of.*

Accused was tried under section 363 of the Penal Code and was acquitted. Upon an application by the complainant, the Sessions Judge directed fresh inquiry to be made to ascertain whether offences under section 366 or 368 or any other section of the Penal Code had been committed by the accused:

Held, that the order directing further inquiry should not have been made, inasmuch as kidnapping is an essential element in offences under sections 365, 366 and 368, and the accused having already been acquitted of that offence, he could not be put on trial twice for the same offence, nor could he be convicted under sections 365, 366 or 368, unless and until the prosecution established that he had committed the offence of kidnapping. [p. 688, col. 2.]

Criminal revision against the order of the Sessions Judge, Monghyr, dated the 30th April 1919, directing further enquiry under sections 366 and 368, Indian Penal Code.

FACTS of the case as well as the argument at the Bar are fully set out in the order of the Sessions Judge, dated the 30th April 1919, which was as follows:—

"The facts out of which this Rule arises are as follows:—

"Ragho Modi's wife, Rambatia, aged 14 years was missing. On 17th October 1918 she was found concealed by the accused, Muhammad Saleh, in his house, for immoral purposes. It is said that when information was lodged in the Police Thana, the officer-in charge thereof did not take proper interest. On that night it is said that when the complainant's friends were watching the house of the accused, they heard the cries of the girl inside the house and they forced their way into it to rescue the girl and were resisted by the accused.

"It has been found by the lower Court that the girl was actually found in the house of Muhammad Saleh and was rescued by the complainant's party on the day in question. The learned trying Magistrate was of opinion that there was no kidnapping.

"It was pointed out by the complainant's

Pleader to the learned Magistrate that the case against the accused falls under sections 366 and 368, Indian Penal Code, and not under section 363, Indian Penal Code, and the accused should be charged accordingly. The latter prayer was rejected by the trying Court, which charged the accused under section 363 and acquitted these accused on 14th February 1919. The complainant had previous to the termination of the case and when the Sub-Divisional Officer was still in seizin of the case moved the District Magistrate on 15th January 1919 to interfere and to commit the accused to the Court of Session or to direct the Public Prosecutor to move the Sessions Court for an order of commitment. The learned District Magistrate, after hearing the complainant's Mukhtear, was of opinion that there was no ground for interference and rejected the complainant's petition on the very same day it was filed.

"After the conclusion of the trial in the lower Court, the complainant has moved this Court to call for the record and to order commitment of the accused for trial in the Sessions Court for offences punishable under sections 366 and 368, Indian Penal Code. There are two points of law involved in this case.

(*a*) Is the filing of petition on 15th January 1919, purporting to be under section 435, Criminal Procedure Code, before the District Magistrate a bar to the petition before this Court?

(*b*) Is section 403, Criminal Procedure Code, a bar to a further prosecution under sections 366 and 368, Indian Penal Code.

"It must be borne in mind that the petition before the District Magistrate was filed on 15th January 1919 when the Sub-Divisional Magistrate was still in seizin of the case, and as such was an *ad interim* petition. The prayer therein to direct the Public Prosecutor to move the Sessions Court was more or less a prayer before the District Magistrate in his executive capacity.

"As to the prayer for commitment, the case being in the hands of the Sub-Divisional Officer, the District Magistrate could not order him either to commit the case or to frame additional charges at that stage. It may be conceded that the District Magistrate could have transferred the case to his own file and passed proper order or could have made a reference to the Hon'ble High Court for passing proper orders under section 438, Criminal Procedure Code. But there was no prayer for either. That being so, the petition of 15th January 1919 was certainly not entertainable before the District Magistrate at that stage. In that case I am of opinion that the said petition was no bar to the one before this Court. Even the learned Vakil who appeared for Muhammad Saleh very fairly admitted that this Court has jurisdiction to entertain the present petition under section 435, Criminal Procedure Code.

"As to section 403, Criminal Procedure Code, it has been argued that the Sub-Divisional Officer not being competent to take the cognizance of the case under section 366 or 368, Indian Penal Code, as these were exclusively triable by the Court of Session, acquittal under section 363, Indian Penal Code, is no bar to a trial under sections 366 and 368, Indian Penal Code. It may also be said that under sub-clause 2 of section 403, Criminal Procedure Code, if the separate offence be chargeable under section 235, clause (1), Criminal Procedure Code, the former trial is no bar. It seems to me that whereas the clause 4 to section 403, Criminal Procedure Code, deals with the questions of jurisdiction, clause 2 deals with the nature of offence. In this case the learned Sub-Divisional Magistrate had no jurisdiction to try offences under sections 366 and 368, Indian Penal Code. The facts in this case evidently disclosed offences under these two sections. The learned lower Court had no jurisdiction to assume jurisdiction by trying the accused for a minor offence on facts which constitute a graver offence exclusively triable by the Court of Session.

"Among others there are the following facts, some of which are admitted and some proved beyond doubt. The girl is the married wife of the complainant and that marriage has not been dissolved. The complainant, who is the husband of the girl, is still living. The girl is under sixteen years of age. On 17th October 1918 she was found in the accused's house with the accused at the dead of night. It appears from the evidence that she was concealed there. It is evident that she was kept there for immoral purposes. The doors and windows

of the accused's house used to be kept closed when the girl was there. The girl was rescued on the night of 17th October 1918 from there with her husband's consent. She was a kidnapped girl. She was under the same roof with the accused for four or five days before she was rescued. There are circumstances from which it would be evident that the accused knew that she was the married minor wife of the complainant. Thus there are sufficient materials for a *prima facie* case under sections 366 and 368, Indian Penal Code. I, therefore, direct that a fresh inquiry should be made with a view to ascertain if the offences under sections 366 and 368 or under any other section have been committed. In view of the fact, however, that the Sub-Divisional Magistrate who has tried both this and the counter-cases has already formed an opinion in the matter, I am of opinion that the District Magistrate will consider whether this case should not be enquired into by some other competent Magistrate. Let a copy of this order be sent to the District Magistrate of Monghyr for necessary action."

Messrs. *P. C. Manuk* and *Mahomed Hasan Jan*, for the Petitioner.

The Government Pleader, for the Crown.

JUDGMENT.—I have no doubt whatever that the order of the learned Sessions Judge of Monghyr, directing fresh enquiry with a view to ascertain if offences under sections 366 and 368 or any other section have been committed by the petitioner before me, ought not to be allowed to stand.

It appears that the petitioner was charged under section 363, Indian Penal Code. The charge was framed against him on the 16th November 1918. On the 4th December 1918 an application was filed before the Magistrate asking him to frame charges against the petitioner under section 365, 366 or 368. The learned Magistrate, being of opinion that on the evidence and in the circumstances of the case charges under those sections should not be framed, refused to pass an order in favour of the complainant. There can be no doubt that the learned Magistrate, who was in possession of all the facts, had absolute power to reject the petition filed before him on the 4th December 1918. This order by the learned Sub-Divisional Officer was passed on the 7th January 1919. On the 15th January the complainant moved the District Magistrate of Monghyr asking him to call for the record and to commit the accused to the Court of Session. This application was admittedly made under section 435 of the Code of Criminal Procedure. This application was refused by the District Magistrate. The petitioner was tried under section 362 and was acquitted by the Sub-Divisional Magistrate. Thereupon the opposite party made an application for fresh enquiry before the learned Sessions Judge of Monghyr and the learned Sessions Judge of Monghyr has directed that a fresh enquiry be made with a view to ascertain if the offences under section 366 or 368 or under any other section have been committed by the petitioner. This application is directed against this order of the learned Sessions Judge.

The first point that has been argued before me is that the learned Sessions Judge was incompetent to deal with this matter, the same having been dealt with by the District Magistrate on the 15th January. It is, in my opinion, unnecessary to deal with this point, because I have no doubt whatever that the learned Sessions Judge should not have directed the fresh enquiry in the circumstances of this case.

Now, it is admitted that kidnapping is an essential element in offences under section 365, 366 or 368. He has already been acquitted of an offence of having kidnapped *Musammat* Rambatia. It is a well recognised principle that a person should not be put on trial twice for having committed the same offence. It seems to me that he cannot be convicted under section 365, 366 or 368 unless and until the prosecution establishes that he did kidnap *Musammat* Rambatia. He has already been tried for that offence and has been acquitted, and in my opinion he should not be tried again for any offence of which kidnapping is an essential element.

I would, therefore, set aside the order passed by the learned Sessions Judge of Monghyr directing fresh enquiry into this matter. No further proceedings will be taken against either of the accused.

Order set aside.

RAM KAUR v. PARTAB SINGH.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 3 OF 1918.
July 18, 1918.
Present:—Mr. Justice Broadway.
Musammat RAM KAUR AND OTHERS—DEFENDANTS—APPELLANTS
versus
PARTAB SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage by way of conditional sale—Improvements effected by mortgagee after date fixed for redemption—Redemption—Mortgagor, whether liable to pay costs of improvements.

In the case of a mortgage by way of conditional sale, the mortgagee has a reasonable ground to entertain a *bona fide* belief that, after expiry of the period stipulated for redemption, there is no intention on the part of the mortgagor to redeem, and that he is, therefore, the owner of the property. If the mortgagee improves the property subsequent to the date fixed for redemption, it is equitable that the mortgagor, while retaining the benefit of the improvement, should pay its cost at the time of redemption. [p. 690, col. 1.]

Second appeal from the decree of the District Judge, Amritsar, dated the 26th November 1917.

Mr. *Fakir Chand*, for the Appellants.

Mr. *Badr-ud-din Kureshi*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit for redemption of the shop which was mortgaged on the 9th January 1873 for Rs. 400. The mortgagees in addition to the mortgage money claimed a sum of Rs. 600 for improvements and Rs. 528 on account of annual repairs. The trial Court found that the mortgagees had constructed a second storey at a cost of Rs. 327, and that the annual repairs had cost Rs. 68. Holding that the mortgagees were entitled to be paid these amounts, a decree for redemption was passed in favour of the plaintiffs on payment of a sum of Rs. 795. The plaintiffs thereupon preferred an appeal to the learned District Judge objecting to the payment of the two items of Rs. 327 and Rs. 68. The learned District Judge, holding that the mortgagees were not entitled to these sums, reduced the amount payable on redemption to Rs. 400.

Against this decision the mortgagees have preferred this second appeal, and on their behalf I have heard Mr. Fakir Chand while Mr. Badr-ud-din has addressed me on behalf of the respondents. The mortgage-deed contained a clause relating to a conditional sale:—If the mortgage was not redeemed within five years, the transaction was to be regarded as a sale. The mortgagees have been in possession ever since 1873 and it was contended by Mr. Fakir Chand that they acted in the *bona fide* belief that they were the owners after 1878, and on that assumption had improved the property. He claimed that his clients were entitled to be repaid the amount of their outlay as well as the amount expended by them on the annual repairs. A reference was made to *Shepard* v. *Jones* (1) as well as *Gansham* v. *Budha* (2). In *Shepard* v. *Jones* (1) it was held that if upon the hearing of a redemption suit the mortgagee proves that he has laid out money in lasting improvements, which improvements have improved the property to the extent of the money laid out, he will get the sums so laid out. In *Gansham* v. *Budha* (2) it was held that where the mortgagee of a plot of land built a house on the land without any objection on the part of the mortgagor, although the mortgagor gave no actual consent, the mortgagor, while being entitled to redeem, must pay the mortgagee a fair and reasonable sum for the house. As against this Mr. Kureshi referred me to *Shepard* v. *Jones* (1) and *Gansham* v. *Budha* (2). In the Punjab case it was held that the mortgagee was entitled to make a reasonable charge for monies expended by him on ordinary repairs but that he was not entitled to claim for alterations or improvements made by him without having obtained written permission from the mortgagor. In the Madras case, which proceeded on section 72 (*b*) of the Transfer of Property Act, it was held that that section did not permit a mortgagee in possession to effect improvements and that consequently the costs of such improvements could not be legally charged against the mortgagor who sought to redeem.

The present case can, I think, be distinguished from *Musammat Bhagwanti* v. *Mela Mal* (3) and *Arunachella Chetti* v. *Sithayi Ammal* (4), for here the mortgage was by way of a conditional sale. After 1878 the mortgagees might reasonably claim to have

(1) (1882) 21 Ch. D. 469 at p. 476; 47 L. T. 604; 31 W. R. 305.
(2) 119 P. L. R. 1916.
(3) 33 P. R. 1913.
(4) 19 M. L. J. 327; 3 Ind. Dec. (N. S.) 925.

had a *bona fide* belief that there was no intention on the part of the mortgagors to redeem and that they were, therefore, the owners of this property. The improvement to the house is clearly of a permanent nature and has, undoubtedly, increased its value. The value now is, no doubt, in excess of the actual amount of the outlay on it and it seems to me equitable that the mortgagors, while retaining the benefit of this improvement, should at least pay its cost. *Qua* the annual repairs the learned District Judge has found that the mortgagees have failed to prove that they had carried out the repairs claimed, and this being a question of fact cannot be now questioned in second appeal.

I accordingly accept this appeal, in so far as to allow the plaintiffs-mortgagors to redeem this house on payment of Rs. 400 plus the cost of the improvements only, *viz.*, Rs. 327, or a total of Rs. 727. In the circumstances, however, the parties will bear their own costs in this Court.

Appeal partly accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2135 OF 1909.

April 11, 1912.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Carnduff.

RAM LAL DUBEY—PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE FOR INDIA —DEFENDANT—RESPONDENT.

Landlord and tenant—Lease, renewal of—Notice of intention to take renewal, whether necessary—Renewal conditional on observance of covenant—Breach of covenant, effect of.

Where an unconditional covenant for renewal of a lease expressly requires the lessee to notify to the lessor his intention to take a renewal before the determination of the term, the lessee loses his right if he fails to give notice in time. But, under special circumstances, the lessee may get relief against failure to give notice in time. [p. 691, col. 2.]

Where renewal of a lease is made conditional on the observance of certain covenants by the lessee and not otherwise, such observance is a condition precedent to the right of renewal and the right of renewal is not enforceable, if at the time for renewal there is a subsisting breach of covenant. [p. 692, col. 1.]

Appeal against the decree of the District Judge, Jalpaiguri, dated the 9th July 1909, reversing that of the Subordinate Judge, Jalpaiguri, dated the 27th February 1908.

Babus *Brojo Lal Chuckerbutty* and *Bimal Chunder Das Gupta*, for the Appellant.

Babu *Ram Charan Mitra*, for the Respondent.

JUDGMENT.—The sole point in controversy in this appeal is whether the plaintiff-appellant has forfeited his right to renewal of a lease granted on the 1st April 1899 for a term of five years under the Arable Waste Land Rules. After the expiry of the lease on the 31st March 1904, the plaintiff made an application for renewal on the 9th April following. Proceedings were then taken for the survey and measurement of the land, which did not terminate till the 13th December 1905. On that date, the Settlement Officer called upon the plaintiff to execute a *kabuliyat* within the 3rd January 1906; the plaintiff complied with the requisition on the very next day. The records were thereupon submitted to the Deputy Commissioner, who, however, refused sanction on the ground that the plaintiff was not a suitable tenant. On the 16th January 1908, the plaintiff commenced this action for declaration that he was entitled to a renewal of the lease. The claim was resisted on the ground that the plaintiff had not applied for renewal before the expiry of the term and was consequently not entitled to a re-settlement under clause 8 of the preliminary lease granted to him in 1899. It was also contended on behalf of the Secretary of State that by breach of the other conditions in the preliminary lease the plaintiff had forfeited his right to re-settlement. The Court of first instance overruled all these contentions and made a decree in favour of the plaintiff. Upon appeal, the District Judge has confined his attention to one question only, namely, whether upon a true construction of the preliminary lease the plaintiff had forfeited his right to renewal of the lease by reason of his failure to make an application in that behalf before the expiry of the term. This question the District Judge has answered in favour of the defendant; in our opinion, his view cannot be supported.

Clause (8) of the lease authorises the Deputy Commissioner to enter at all times upon all lands that are used for agricultural purposes, with a view to inspection and measurement. The same clause also entitles the tenant at any time to apply for inspection and measurement. But it provides that in the latter contingency, if the tenant makes an application of this character before the expiry of the term of the lease, the costs of the measurement shall be payable by him as rent. Clause (8) further makes it obligatory upon the Deputy Commissioner to inspect and measure the land upon the expiry of the term of the lease. It then lays down that if upon measurement it is found that a moiety of the land is covered by homestead or is used for agricultural purposes or that a portion of the same is allowed to be uncultivated according to the good practice adopted in cultivation or has been properly used in any other way for the purposes of cultivation, the original lessee, subject to the rules set forth, will at all times be entitled to have the lease renewed for such additional period as corresponds to the last date of the term of the settlement, and after that for the term of every new settlement of the Taluk. Clause (10) provides that if no application is made for a renewed lease before the expiry of the term of the preliminary lease, the lessee may be allowed to hold the land as a tenant-at-will so long as the Deputy Commissioner does not make any other arrangement, but cannot be allowed to hold the same in any other manner. The learned Government Pleader has contended that the terms of clauses 8 and 10 taken together indicate that the lessee has no claim to a re-settlement of the land comprised in the preliminary lease, unless he has, before the expiry of the term thereof, made an application in that behalf. In our opinion this contention is not well founded. What determines the right of the lessee to claim re-settlement is not the fact of an application before the expiry of the term but the diligence he has displayed during the subsistence of the term. If half of the land has been reclaimed, he has a right to re-settlement. If half of the land has not been reclaimed, notwithstanding an application made prior to the expiry of the term of the preliminary lease, he has no claim to a re-settlement. The present case is, therefore, distinguishable from the class of cases in which there is an unconditional covenant for renewal expressly requiring the lessee to notify to the lessor his intention to take a renewal before the determination of the term; when that is the case, the lessee loses his right if he fails to give notice in time: *Bayly* v. *Leominster Corporation* (1), *Wight* v. *Hopetoun* (*Earl*) (2) and *Nicholson* v. *Smith* (3). But it is worthy of note that even in that class of cases, relief will be granted against failure to give notice in time, under special circumstances: *Ross* (*Earl*) v. *Worsop* (4) and *Statham* v. *Liverpool Dock Co.* (5) and *Hunter* v. *Hopetoun* (*Earl*) (6). In the case before us, there was no express provision for notice of renewal before expiration of term, and, as renewal could not be claimed merely at the option of the lessee, the rule that where the lease is silent as to the time of application for renewal, it should be made a reasonable time before expiration of the term, cannot be applied: *Lewis* v. *Stephenson* (7) and *Jaggi Lal* v. *Cooper* (8). Much reliance was placed by the respondent on clause 10; that clause, in our opinion, does not militate against the view we take; it was inserted to provide for the contingency that the lessee might continue in possession pending inspection and measurement of the land. In the absence of such a provision, the lessee might ultimately put forward a claim that he had acquired the status of an occupancy or non occupancy *raiyat* or that he was entitled to remain in occupation till an adequate notice to quit had been served upon him. The effect of clause 10 is to place him in the position of a tenant-at will, so that if the land is not ultimately settled with him, he has to quit the premises as soon as the new comer is ready to enter into occupation. The ground upon which the District Judge has dismissed the suit cannot, therefore, be supported.

(1) (1792) 1 V. es. J. 476; 2 Rev. C. C. 529; 30 E. R. 446.
(2) (1886) 4 Macq. H. L. 739.
(3) (1882) 22 Ch. D. 632; 52 L. J. Ch. 191; 47 L. T. 650; 31 W. R. 471.
(4) (1741) 1 Brown P. C. 184; 1 E. R. 568.
(5) (1830) 3 Y. & J. 565.
(6) (1865) 13 L. T. 240; 4 Macq. 979; 140 R. R. 406.
(7) (1898) 67 L. J. Q. B. 296; 78 L. T. 165.
(8) 27 A. 696; A. W. N. (1905) 154.

MUNICIPAL COUNCIL OF COCANADA *v.* CLAN LINE STEAMERS, LD.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him in order that the other points which arise in the appeal may be considered. Here we may add that it was contended on behalf of the Secretary of State that as the plaintiff, during the continuance of the preliminary lease, broke a condition of the lease, he has forfeited his right to a re-settlement. This question will be open for consideration by the District Judge and may be of great importance in view of the decisions in *Job* v. *Banister* (9), *Finch* v. *Underwood* (10) and *Greville* v. *Parker* (11), which affirm the doctrine that where the renewal is made conditional on the observance of his covenants by the lessee, but not otherwise [*Hare* v. *Burges* (12)], such observance is a condition precedent to the right of renewal, and, the right of renewal is not enforceable, if at the time for renewal, there is a subsisting breach of covenant. The costs of this appeal will abide the result.

Appeal allowed;
Case remanded.

(9) (1856) 2 K. & J. 374; 69 E. R. 827; 110 R. R. 273.
(10) (1876) 2 Ch. D. 310; 45 L. J. Ch. 522; 34 L. T. 779; 24 W. R. 657.
(11) (1910) A. C. 335; 79 L. J. P. C. 86; 10 L. T. 380; 26 T. L. R. 375 (P. C.).
(12) (1857) 5 W. R. (Eng.) 585; 109 R. R. 915.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 2 OF 1918.

November 8, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Napier.

THE MUNICIPAL COUNCIL OF COCANADA—DEFENDANT—APPELLANT

versus

THE "CLAN" LINE STEAMERS, LIMITED—PLAINTIFFS—RESPONDENTS.

Madras District Municipalities Act (Mad. IV of 1884), s. 53—Exercising trade or calling within Municipality—Carriage by sea—Shipowner unloading cargo at port—Contracts not entered into at that port—Levy of profession tax on shipping agent in that port, legality of.

A shipowner exercises his trade at all the ports at which his steamers habitually call to discharge or load cargo, which latter operation may involve entering there and then into contracts with shippers. Where, therefore, the freight-earning contracts with shippers which enable profits to be earned by sea carriage are not entered into at a port by the ship's master or the local agent of the shipowner, but elsewhere, the shipowner cannot be held to exercise his trade at the port merely because he employs a shipping agent there to attend to other matters, such as issuing shipping orders and signing bills of lading pursuant to contracts already made and receiving payment of advance freight. [p. 694, col. 2.]

The test is, where, in substance, the business of making contracts is carried on and controlled. [p. 695, col. 1.]

The Clan Line Steamers, having their registered office at Glasgow, call at Cocanada to take in cargo for Europe and also unload any cargo consigned to Cocanada. They are represented by a firm of sub-agents at Cocanada engaged by the Clan Line's Agents at Madras. The sub-agents have no authority to contract with shippers and act only under instructions from the agents; they issue shipping orders to shippers, sign bills of lading for cargo supply and collect any freight that may be payable on the cargo unloaded at Cocanada. The question in this case being whether this was such an exercise of the trade of the Clan Line or carrying on business within the Municipality of Cocanada as to render them liable to the payment of profession tax under section 53 of the Madras District Municipalities Act, 1884:

Held, that the Clan Line, being a shipping company which earned profits by the carriage of goods by sea, and in the course of its business traded with, but not necessarily within, port towns in various parts of the world, one of these being Cocanada, could not be said to exercise a trade at that port so as to make the company liable for the payment of profession tax. [p. 694, col. 2.]

Appeal from the judgment of Mr. Justice Coutts Trotter, dated the 2nd November 1917, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 219 of 1917.

FACTS appear from the judgment.

Messrs. *Venkatasubba Row* and *Radhakrishnaya*, for the Appellant.—The Clan Line Steamers do 'business' within the port of Cocanada within the meaning of section 53 of the Madras District Municipalities Act. They load and unload cargo at the port and they are represented by agents at that port who collect the cargo. The agents supply the ships with necessaries and settle the bills of the Dubash. The Company must be deemed to carry on its business in Cocanada through their agents, Messrs. Ripley and Co. They are

therefore, liable for profession tax to the Cocanada Municipality.

Mr. *D. Chamier*, instructed by Messrs. *King* and *Partridge*, for the Respondents.—The test to be applied in cases such as these is laid down in *Grainger* v. *Gough* (1). What has to be seen is, where the Company carries on its business in substance. Merchants can, in a broad sense, be said to carry on business in every country where they have customers. That is not the scope of section 53. The chief agents of the Company are in Madras who enter into shipping contracts on behalf of the Company, and it is there that they must be assessed to profession tax. The fact that Ripley and Co., do business incidental to and in pursuance of such contracts will not render them liable to profession tax in Cocanada.

JUDGMENT.

WALLIS, C. J.—The question in this appeal is whether the Clan Line of Steamers, who have their registered office in Glasgow, are liable under section 53 of the Madras District Municipalities Act, 1884, to pay profession tax in Cocanada on the ground that they are persons exercising within that Municipality one of the professions, trades or callings specified in the schedule, which includes persons "carrying on business as a company" and also "ship-owners." The Clan Line Steamers call at Cocanada to take in cargo for Europe and also unload there any cargo consigned to Cocanada, of which there is very little. They are represented in various matters by Messrs. Ripley and Co, sub-agents engaged by Messrs. Gordon Woodroffe and Co., the Clan Line's Agents at Madras. Messrs. Ripley have no authority to contract with shippers for the allotment of cargo space under letters of engagement such as are now common. Shippers apply direct to Gordon Woodroffe and Co, if they apply to Messrs. Ripley and Co., the latter forward the application to be dealt with by Gordon Woodroffe and Co., or take their instructions by telegraph if the time is short. They issue shipping orders to shippers who have secured space, sign the bills of lading for cargo shipped, and receive the freight where it is payable in advance, as it is in all cases where the goods are consigned to London for transhipment to America They also settle the bills of the Dubash who is employed by Gordon Woodroffe and Co. to supply the ships with necessities, and pay the Doctor who is similarly employed. They apparently collect any freight that may be payable on the small quantity of cargo landed.

Having regard to these facts, it may be said that in one sense the Clan Line carry on business at Cocanada through Messrs. Ripley, but what we have to see is whether it is such an exercise of their trade or carrying on business within the Municipality as to bring the case within the language of the Statute, which is indistinguishable from that of similar taxing Acts both in England and the colonies. Those cases have been reviewed by the learned Judge and have again been considered by us, but it is unnecessary to go behind the decision of the House of Lords in *Grainger* v. *Gough* (1) and the more recent decision of the Privy Council in *Lovell & Christmas* v. *Commissioner of Taxes* (2). In *Grainger* v. *Gough* (1) the fact that Louis Roederer, who carried on business at Rheims in France, employed an agent and a large number of sub agents in England to canvass for orders for his champagne, which were sent to Rheims for acceptance, was held not to make him a person exercising a trade within the United Kingdom, even when coupled with the further facts that the agents in England sometimes received the price of the goods sold for transmission to their principal, and that the principal's name appeared in the London Directory as carrying on business at 21, Mincing Lane, London. Lord Herschell, L. C., pointed out that in previous cases of this nature where liability was established, the contracts of sale had been habitually made in the United Kingdom and observed that there was a broad distinction between trading *with* a country and carrying on a trade *within* the country, and that it was impossible to say that merchants and manufacturers who export their goods to all parts of the world exercise or carry on their trade in every country in which their goods find purchasers. A wine merchant,

(1) (1896) A. C. 325; 65 L. Q. J. B. 410; 74 L. T. 435; 44 W. R. 561; 60 J. P. 692.

(2) (1908) A. C. [illegible] J. P. C. 31; 97 L. T. 651; 24 T. L. R. 32

he said, exercised his trade by making or buying a wine and selling it again with a view to profit, and if all he did was to solicit orders in England, he could not be said to exercise his trade there.

Lord Watson reviewed the earlier decisions and observed "there may, in my opinion, be transactions by or on behalf of a foreign merchant in this country so intimately connected with his business abroad, that without them it could not be successfully carried on, which are nevertheless insufficient to constitute an exercise of his trade here within the meaning of Schedule D." He referred in this connection, as did Lord Davey, to *Sully* v. *Attorney-General* (3), where it was held that the purchase of goods in England by a branch of an American firm established there of goods which it is intended to re-sell at a profit in New York, "does not, of itself, constitute an exercise of the trade in the United Kingdom, when that department of the business from which profits or gains are directly realised is carried on in another country." These two cases were followed and applied by the Judicial Committee in *Lovell & Christmas* v. *Commissioner of Taxes* (2). In that case the question was whether any of the profits of the appellant's business, which consisted of the sale of provisions on commission in London, were "derived from New Zealand" within the meaning of the New Zealand Statute, because the appellants had agents in New Zealand, who contracted with shippers there that they should consign their goods to the appellants in London for sale on commission in consideration of advances made to them against the bills of lading. The New Zealand Court held the appellants liable on the ground that these contracts from which profits resulted were made in New Zealand but the Judicial Committee reversed the decision. Their Lordships, after referring to *Grainger* v. *Gough* (1) and distinguishing *Erichsen* v. *Last* (4) and citing *Sully* v. *Attorney-General* (3) with approval, observed that the decisions did not furnish authority for going further back, for the purpose of taxation, than the business from which profits are directly derived, and the contracts which form the essence of that business. In the case before them they were of opinion that the business which yielded profit was the business of selling goods on commission in London and that the earlier arrangements entered into in New Zealand, were merely transactions, the object and effect of which was to bring goods from New Zealand within the net of the business which was to yield a profit.

Looking at the facts of the present case in the light of these decisions, I think there is no ground for holding that the Clan Line exercise a trade at Cocanada. It is a shipping company which earns profits by the carriage of goods by sea, and in the course of its business trades, in Lord Herschell's language, with, but not necessarily within, port towns in various parts of the world. It has not been contended before us that a shipowner exercises his trade at all the ports at which his steamers habitually call to discharge or load cargo, which latter operation may involve entering there and then into contracts with shippers. In the absence of other arrangements, the shipowner is represented by the ship's master in all the business incidental to loading and unloading, and it is open to question whether the fact that this business is done by a resident agent himself carrying a business there and not by the master, makes any difference. It is unnecessary to pursue this question, because it is, I think, clear upon the authorities that where, as in the present case, the freight earning contracts with shippers which enable profits to be earned by sea carriage are not entered into at the port in question by the shipmaster or the local agent of the shipowner, but elsewhere, the shipowner cannot be held to exercise his trade at the port merely because he employs a shipping agent there to attend to other matters, such as issuing shipping orders and signing bills of lading pursuant to contracts already made, and receiving payment of advance freight.

It was, however, argued that such contracts were made in Cocanada in some instance because Messrs. Ripley and Co. delivered to shippers their letters of engagement sent by Gordon Woodroffe and Co.

(3) (1860) 5 H. & N. 711; 29 L. J. Ex. 464; 6 Jur. (N. S.) 1018; 2 L. T. 439; 8 W. R. 472; 157 E. R. 1364; 120 R. R. 793.

(4) (1882) 8 Q. B. D. 414; 51 L. J. Q. B. 86; 45 L. T. 703; 30 W. R. 30'; 46 J. P. 357.

from Madras. I agree with Coutts Trotter, J., that this is not shown to have happened, and that even if it did happen in a few instances, what we have to see is where, in substance, the business of making contracts was carried on and controlled, and that this was not at Cocanada. The appeal fails and must be dismissed with costs.

NAPIER, J.—I entirely agree with the judgment just delivered by the learned Chief Justice, but as the case is one of great importance I would like to add a few words with regard to the contentions of the appellant. We were asked to examine a certain number of old cases, in which the carrying on of business had been found, to ascertain what facts were there proved and if we found some of those facts to exist in this case, to hold that carrying on business is established. I agree with the learned Judge that it is not open to us to do so in a case of this class. It may be that some of the learned Judges in *Tischler* v. *Apthorpe* (5), *Pommery* v. *Apthorpe* (6), *Erichsen* v. *Last* (4) and *Werle* v. *Colquhoun* (7) have used the language indicating their application of tests other than those applied in *Grainger* v. *Gough* (1). But the House of Lords in this last case have distinctly ignored those tests and treated those cases as decisions turning on the question, where was the contract made. In two of those cases Brett, L. J., has used this as the test, and, as pointed out by the learned Chief Justice, both Lord Herschell and Lord Watson in the House of Lords case accept this test and the Privy Council in *Lovell & Christmas* v. *Commissioner of Taxes* (2) have followed this case. Whatever, therefore, may have been the view of Jessel, M. R., or Fry, L. J., in two of those earlier cases, we must accept this proposition as established by the House of Lords and the Privy Council that in this class of cases, if the contract out of which the profit arises is not made in the place where the tax is sought to be imposed, the liability does not arise. I do not mean that if any contract is shown to have been made in the course of a business from which profits are eventually earned, that is sufficient to impose the liability, for the decisions in *Sully* v. *Attorney-General* (3) by the Exchequer Chamber and in *Lovell & Christmas* v. *Commissioner of Taxes* (2) show that this test cannot be broadly applied. I may add that in a case of production or manufacture in the country by a person sought to be assessed, the question where the contracts for sale of the proceeds are made may be immaterial. But in this class, after the above rulings I do not think it is open to us to consider any other aspect and I, therefore, agree with Coutts Trotter, J., that the plaintiffs are entitled to recover the amount paid.

M. C. P.

Appeal dismissed.

(5) (1885) 52 L. T. 314; 33 W. R. 548; 49 J. P. 372.
(6) (1886) 56 L. J. Q. B. 165; 56 L. T. 24; 35 W. R. 307.
(7) (1888) 20 Q. B. D. 753; 57 L. J. Q. B. 323; 58 L. T. 756; 36 W. R. 613; 52 J. P. 644.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 2885 OF 1917

August 9, 1918.

Present:—Mr. Justice Broadway.

JUGAL KISHORE AND ANOTHER —OBJECTORS—APPELLANTS

versus

ISHAR DAS AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (*III of* 1907), *s.* 46—*Insolvency proceedings—Sale—Objections—Procedure—Court, duty of—Appeal against order confirming sale—Auction-purchasers, whether necessary parties—Leave to appeal refused by District Judge—High Court, power of, to grant leave.*

Where property is sold in insolvency proceedings and the sale is confirmed, the auction-purchasers are not necessary parties to an appeal against the order confirming the sale. [p. 696, col. 2.]

Where, under section 46 (3) of the Provincial Insolvency Act, the District Judge refuses to grant leave to appeal, the High Court is competent to grant such leave. [p. 696, col. 2.]

Where several persons file objections to the attachment and sale of property in insolvency, it is the duty of the Court to consider these objections separately, as the failure to do so may result in a serious miscarriage of justice. [p. 697, col. 1.]

JUGAL KISHORE *v.* ISHAR DAS.

Miscellaneous first appeal from the order of the District Judge, Karnal, dated the 17th October 1917.

Mr. *Manohar Lal*, for the Appellants.

Lala *Moti Sagar*, R S., Mr. *Roshan Lal* and Dr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—The facts of the cases giving rise to this and to the connected Appeal No. 2886 of 1917 are briefly as follows:—

One Bishha Lal was adjudicated an insolvent and the Official Receiver apparently attempted to attach and bring certain properties to sale. This action resulted in a crop of objections, the objectors being:—

(1) Bishha Lal's brother, Baldeo Sahai,
(2) Bishha Lal's sons, Jugal Kishore and Sher Singh,
(3) Jugal Kishore alone,
(4) The wives of Jugal Kishore and Sher Singh, and
(5) Data Ram, purchaser of a house from Baldeo Sahai.

All these objections were disposed of by one order dated the 17th October 1917, and with the exception of one objection lodged by Data Ram all the objections were dismissed. Against this order appeals have been filed by Baldeo Sahai and Jugal Kishore and Sher Singh through Mr. Manohar Lal, who made the Official Receiver respondent at the outset for whom Mr. Moti Sagar has appeared.

At the last hearing the appellants applied to have certain persons, who had purchased the properties subsequent to the order under appeal, brought on to the record as respondents and this was done. These added respondents were represented before me to-day by Mr. Roshan Lal and Mr. Gokal Chand Narang, and an objection was taken on their behalf to the effect that the whole appeal was barred on the ground that as they were necessary parties they ought to have been made respondents from the very commencement, reference being made to Order I, rule 10, Civil Procedure Code. Upon this objection Mr. Manohar Lal stated that they were not necessary parties and asked that their names might be struck off and the application, dated the 4th July 1918, be regarded as withdrawn. This request was granted and these auction-purchasers were removed from the list of respondents. It will be as well to dispose of them at once as their Counsel claim costs. I think they are clearly entitled to costs and the appellants must, therefore, pay their costs in this Court.

Mr. Moti Sagar then on behalf of the Official Receiver raised two objections. The first was that the auction-purchasers being necessary parties and not having been impleaded, the appeal could not proceed. He referred me to Order XXI, rule 92, Civil Procedure Code, as an analogous case, in support of his contention. I am, however, unable to agree. The order appealed against was passed on the 17th October 1917. The appeal against that order was filed in this Court on the 1st November 1917. The sale of the properties was confirmed subsequent to the passing of the order appealed against and before the receipt of my order staying further proceedings. The sale of these properties appears to have been confirmed with considerable speed, and I am unable to see that the auction-purchasers can be regarded as necessary parties to the appeal.

The next objection taken by Mr. Moti Sagar was that the appeal was not competent because the appellants had asked for leave to appeal under section 46 (3) of the Insolvency Act, which leave had been refused by the District Judge. It was contended that no appeal lay from such refusal and that inasmuch as this Court had only concurrent jurisdiction in granting leave to appeal, the appeal failed. In reply to this Mr. Manohar Lal cited *Madhu Sudan Pal* v. *Parbati Sundari Dassya* (1), a decision of a Division Bench of the Calcutta High Court, in which it was specifically held that when leave under this section had been refused by the District Judge, the High Court was competent to grant it. No authority has been cited opposed to this and I see no reason for differing from the views therein expressed. I accordingly hold that I have power to grant the leave, and after hearing Counsel I confirm the

(1) 29 Ind. Cas. 406; 19 C. W. N. 760.

order passed when I admitted the appeal and granted the leave prayed for.

Turning now to the order under appeal, it will be seen that it is an extraordinarily confused one. No doubt, these proceedings are of a summary nature, but the summary manner in which the learned District Judge (Lala Diwan Chand) has dealt with these objections is, in my opinion, wholly unwarranted. The order is a brief one although it disposes of so many objections. The objections filed by Jugal Kishore on the 4th September 1917 and the 10th October 1917 were to the effect that the properties therein referred to were his exclusive properties. These objections have not been disposed of at all. No reference has been made to them in any way and apparently they have been dismissed in the general dismissal, but without any discussion, where the learned District Judge says that "the net result is that direct descendants of Bichha Lal have not proved the validity of their objections, which are dismissed with costs." It was clearly the duty of the Court below to consider these objections separately and the failure to do so may have resulted in a serious miscarriage of justice. His decision with regard to the objections filed by Jugal Kishore and Sher Singh as to the ancestral nature of the property, though somewhat inadequately dealt with, need not be considered any further, for *prima facie* the property would be liable. Mr. Manohar Lal did not seriously press this point.

With regard to Baldeo Sahai's objections, the conclusions arrived at are difficult to understand and Mr. Moti Sagar practically had to admit that it would necessitate a long dissertation on the facts of the case, to be deduced from the documentary and oral evidence on the record, to render it at all comprehensible. Baldeo Sahai's objections related to certain agricultural land, a house in the Dhobi Mohalla, a *haveli* and a *baithak*. It may be that the ultimate conclusion arrived at by the learned District Judge is the correct one, but from what he has written it is difficult to say. The remaining objections are not the subject of appeal and need not be considered. In my opinion, the order complained of is faulty in the extreme and I accordingly accept the appeal so far as Jugal Kishore's objections as to exclusive ownership are concerned and as to Baldeo Sahai's objections, the case will go back to the District Judge who will consider these objections and write a proper and intelligible order concerning them.

Mr. Moti Sagar contended that the objectors should not be allowed any further opportunity to produce evidence in support of their objections on the ground that they had closed their cases in the Court below. If, as a matter of fact, this contention is correct, the learned District Judge wil not allow them further opportunity. If it is not correct, then the learned District Judge will exercise his discretion in a judicial manner.

The costs in this Court, so far as the Official Receiver is concerned, will follow the event.

Appeal accepted.

PATNA HIGH COURT

LETTERS PATENT APPEAL No. 107 OF 1917.

June 17, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Adami.

MAHABIR PRASAD—PLAINTIFF—APPELLANT

versus

DARBHANGI THAKUR—DEFENDANT—RESPONDENT.

Contribution, doctrine of, applicability of—Setting up wrong defence, whether tort—Joint wrongdoers.

There is nothing wrong in a defendant putting the plaintiff to proof of the facts necessary to prove his claim by denying in the written statement the existence of such facts. It is for the plaintiff to prove his case and if his proof fails, the defendant will succeed even if the facts are capable of proof to the knowledge of the defendant. [p. 701, col. i.]

MAHABIR PRASAD v. DARBHANGI THAKUR.

The rule of non-contribution between joint tort-feasors exists in this country, but it applies only in cases where the parties are wrongdoers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. [p. 701, col. 2.]

Where several defendants, jointly and in collusion with each other, set up a defence which they know cannot be substantiated in fact and which fails and costs are decreed against them jointly, there is a right of contribution in favour of the defendant who discharges the joint liability for costs under the decree. [p. 702, col. 2.]

Appeal from a decision of Mr. Justice Mullick, dated the 21st July 1917, reported as 41 Ind. Cas. 522, confirming the decree of the Additional Subordinate Judge, Darbhanga.

Messrs. *Kulwant Sahay* and *Rajendra Prasad*, for the Appellant.

Mr. *Hasan Jan*, for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an appeal by the defendant under clause 10 of the Letters Patent against a judgment of Mullick, J., dated the 21st May 1917.* All the parties in the present suit together with *Musammat* Bhagbatti Kuer are the owners of Mauza Rahmatpur. The respondent, who is the plaintiff in the suit, wished to have a partition of the estate and instituted *batwara* proceedings before the Collector under the Estates Partition Act for that purpose. Some of the defendants supported him, but Bhagbati Kuer entered an objection which the Collector disallowed and ordered the *batwara* to proceed. Bhagbati Kuer and another of the co-sharers thereupon instituted a title suit in the Civil Court before the Subordinate Judge of Darbhanga impleading the respondent and the appellant and other defendants in the present suit, claiming a declaration that by reason of a previous private partition which still subsisted the Mauza was not liable to be again partitioned. Both the appellant and the respondent and some 8 other defendants in the present suit contested the claim, pleading amongst other defences that there had been no previous partition. Their defence failed and on the 27th April 1914 Bhagbati Kuer's suit was decreed with costs against all the contesting defendants jointly and severally. The decree was executed and the costs were recovered against the respondent alone. He thereafter instituted the present suit to recover from his co-defendants their proportionate share of the costs recovered from him under the decree of the 27th April 1914. The appellant alone resisted the claim, the other defendants allowing judgment to go against them by default.

Apart from the question which I shall presently consider, I think it is clear that the case is one where there was a common liability on the parties and where the equitable doctrine of contribution applies in favour of the person compelled by legal process to discharge the common liability. The defence of the appellant to the present action was that the respondent, although he knew there had been a previous private partition, persuaded the appellant to join with him and others in filing a joint written statement in Bhagbati Kuer's suit raising, amongst other defences, that there had been no previous partition, although they both knew the contrary to be the fact and that the respondent promised to indemnify him against any costs that might be incurred in that suit. No defence was raised that contribution could not be claimed by reason of the parties being joint tort-feasors. Before the Munsif, however, the issues raised were:

(1) Were the plaintiff and defendants joint wrongdoers in so far as the defence in the title suit was concerned? If so, is the suit maintainable?

(2) Did the plaintiff contract with defendants to meet expenses of the title suit in consideration of the defendants' helping him with witnesses? If so, is plaintiff estopped from suing for contribution?

(3) To what relief is plaintiff entitled?

On the second of the above issues the Munsif found that no such contract as that relied on by the appellant had been entered into. On the first issue he took the view that the defence raised in the previous action was not a *bona fide* defence because the respondent as well as the appellant knew that the Mauza had previously been partitioned into separate *pattis*. His judgment on this issue was as follows:—

"The leading case on this point is the ruling reported as *Suput Singh* v. *Imrit Tewari* (1) Taken as a proposition of law

*See 41 Ind. Cas. 522—*Ed.*

(1) 5 C. 720; 6 C. L. R. 62; 2 Ind. Dec. (N. S.) 1066.

the plaintiff's Pleader admits it to be binding on this Court. His contention, however, is that his defence in the title suit was not false and that it was a *bona fide* defence which proved to be wrong. I do not agree with him on this point. The title suit was instituted by Bhagbati Kuer as plaintiff put in a petition for partition before the Collector. Defendant No. 7 did not join the plaintiff in this petition. In the civil suit the main question of fact was as to the existence of *pattis* (as Exhibit 1 shows). Now the plaintiff knew and ought to have known that his act in filing the petition for partition was wrong. And he certainly knew or ought to have known the existence of the *pattis*. His action, therefore, in denying the existence of *pattis* and in resisting the suit on that ground mainly was also wrong. His deed of purchase makes mention of *pattis* (*vide* Exhibit 6) and he admits in this suit that he was aware that *pattis* did exist in the village. It is clear, therefore, that his initial act which gave rise to the suit and his defence which resulted in the accumulation of costs were all wrongful to the knowledge of the plaintiff and of defendant No. 7 (the present appellant), who of course admits knowledge of all these facts. The case is, therefore, governed by the principle laid down in the ruling quoted above and plaintiff and defendant No. 7 being both joint wrongdoers, this suit for contribution will not lie and I hold accordir gly."

From this judgment the respondent appealed to the Additional Subordinate Judge, who dismissed the appeal being of opinion that the appellant and respondent were joint wrongdoers by reason of having set up a defence which they knew to be untrue. The evidence before the Court was mainly documentary, showing that a private partition had taken place a long time ago and that several co-sharers had separate *pattis*. A copy of the judgment of the 27th April 1914 was also exhibited. The only oral evidence given at the trial was that of the respondent himself and of Kuldip Saha, the appellant's Patwari. The Subordinate Judge found that the judgment of the 27th April 1914 showed that the respondent and the appellant had denied in that suit that there had been a private partition, although they must have known that the contrary was the fact. From the evidence of the respondent in the present suit it appears that he frankly admitted that there had been a private partition many years ago before he acquired an interest in the property but said that it was Kutcha. The meaning of this clearly is that he thought the previous partition was either of an informal character or that it otherwise failed to comply with the provisions of section 7 of the Estates Partition Act, in which case it would not be such a partition as would debar the Collector from proceeding with the *batwara* proceedings which the respondent had instituted. The truth is that the question of the existence of a previous partition is a mixed question of law and fact, and there is nothing reprehensible in such circumstances in denying the existence of a previous partition even if it is known that the estate has been divided into separate *pattis*. As the question has been raised as to the exact nature of the findings of the Subordinate Judge, it is desirable that I should set out at length that part of his judgment which deals with this question. He says:—

"Now the judgment (Exhibit 1) shows that both the appellant and the respondent Mahabir denied the existence of a previous private partition altogether, but the fact that the denial was false to their knowledge is indicated by the statement made by the appellant himself in this case. He has the good sense to tell us in this case that there actually existed a private partition from before he acquired a proprietary interest in Mauza Rahmatpur long ago, but he adds that the partition was Kutcha. But whether the partition was Kutcha or not, the fact remains that there was a partition and that each proprietor or set of proprietors was in exclusive possession of separate *pattis* to the knowledge of the appellant, and so there can be no room for doubt that the total denial of the existence of a private partition was false to the knowledge of the appellant and the respondent. Matters might have stood on a different footing if the appellant had admitted the existence of the private partition and merely pleaded that it was effected without the intervention of a Court or was somehow incomplete or informal.

Then it will be observed that the appellant

admittedly moved the Collector for partition and though the respondent did not join with him in doing so, he too approached the Collector for partition shortly after and both of them resisted when Bhagbati Kuer pleaded before the Collector and before the District Judge that there was a private partition and that the Mauza was not on that account liable to be partitioned. It seems to me, therefore, that this attempt to get the Mauza partitioned and to do away with the private partition was made by the appellant in concert with the respondent. It is true there is no direct evidence of appellant's colluding with respondent to set up a false defence.

"The circumstances disclosed strongly argue in favour of such a collusion.

"In such circumstances I am inclined to agree with the learned Munsif and to hold with him that the appellant and the respondent were joint wrongdoers and that the appellant cannot maintain a suit for contribution against him.

"In the result the appeal fails and is dismissed. I make no order for costs".

Before dealing with the effect of these findings, it is desirable that I should state how the matter was dealt with by the learned Judge of this Court when the case came before him on appeal and from whose judgment the present appeal is brought. He was of opinion that even if the decision of the lower Court amounted to a finding that the plaintiff and the respondent conspired to put forward and maintain a false defence in the previous suit, this would not amount to an actionable wrong for which damages might have been recovered by the plaintiff in that suit, as he would be amply indemnified against such collusive acts by the award of costs. He was of opinion that the rule prohibiting contribution between joint tort-feasors was recognised in India, but that in the present case there was no actionable wrong to which the plaintiff and the defendants were parties and that even if the findings of the lower Appellate Court were such as he, for the purposes of his judgment, assumed them to be, still there was no reason why contribution in this case should not be allowed. At the same time he thought that if his view of the law were wrong, it might be necessary to remand the case to the lower Court for further findings.

In the view I take of the findings of the lower Court it is unnecessary to determine how far the learned Judge of this Court was justified in the view he took of the legal aspect of the case. I have quoted above the judgment of the Subordinate Judge at length, because it is contended that the finding is that the respondent and the appellant not only set up a false case in their written statement by way of defence to Bhagbati Kuer's suit, but conspired together to do so and then gave false evidence in support of it as part of the conspiracy. If that were indeed the finding, it might be that the Court would not assist either party in such a conspiracy to recover from the other a contribution towards the costs incurred as the result of setting up what they knew to be a false defence and supporting it by perjury in the witness-box. But I cannot read into this judgment any intention to arrive at such a conclusion. The learned Judge finds that there is no direct evidence of the appellant colluding with the respondent to set up a false defence but agrees with the Munsif that they were joint wrongdoers. The earlier part of his judgment, in which he finds that the total denial of the existence of a private partition was false to the knowledge of the appellant and the respondent, must refer not to oral evidence given at the trial in the title suit of which there is no evidence, but to the defence pleaded in the written statement. The appellant in fact gave no evidence in that suit. This view is further borne out by the concluding passage of the first paragraph, where he refers to the matters pleaded. But in order to satisfy ourselves and obviate the necessity of a remand, we have looked at the evidence given in this case and there is not a word either in the oral evidence of the only two witnesses called or in the judgment in the title suit (Exhibit 1) which could possibly justify a finding that there was a conspiracy such as that suggested or that the respondent gave perjured evidence. It appears from Exhibit 1 that the issue framed on this question was "whether Mauza Rahmatpur, Tauzi No. 4058, has been completely and formally privately partitioned as alleged by the plaintiff." In dealing with that issue

the District Judge in that judgment says: "The defence relies upon section 7 of the Act and argues that the admissions in the plaint that the lands included in Khewat 1/20 are joint disproves the fact of a complete and formal partition." He then deals at length with a number of documents and comes to the conclusion that they establish a private partition many years ago. The only witness whose evidence is referred to is one Jena Raut, who denied ever having heard of the *pattis* although his vendor's Khewat mentions them. The learned Judge says this shows the unreliable nature of the defence evidence. This witness is apparently singled out as one who went to great lengths but the respondent's evidence is not mentioned nor is there anything from which it can be inferred that he gave false evidence. The respondent in his evidence in the present suit admitted he knew of the existence of separate *pattis* but contended that they only indicated what he calls a Kutcha partition, and there is nothing to show that he gave evidence inconsistent with this in the title suit. It would be useless, therefore, to remand this case which was instituted four years ago for findings on a point which on the evidence could only be decided in the respondent's favour. It must be taken that the finding of the Subordinate Judge that the appellant and respondent were joint wrongdoers is based on the fact that by their written statement they denied the existence of an earlier formal private partition. As already pointed out, this is a mixed question of law and fact and was a perfectly legitimate plea. In any case there is nothing wrong in a defendant putting the plaintiff to proof of the facts necessary to prove his claim by denying in the written statement the existence of such facts. It is for the plaintiff to prove his case and if his proof fails, the defendant will succeed even if the facts are capable of proof to the knowledge of the defendant. To hold that it is a tort for the defendant by his pleadings to deny a fact which he knows to be true even if he has no evidence to the contrary, is a proposition which cannot be supported on any known principle of law. It follows, therefore, that on the facts found by the lower Court the parties were not wrongdoers in the sense which would debar contribution between them. The case of *Surput Singh* v. *Imrit Tewari* (1) relied on by the Munsif is certainly no authority for the proposition that there is no right of contribution between joint defendants in respect to the costs awarded against them and paid by one of them in an action in which they knew that the facts pleaded in the defence could not be established. The costs in that case were awarded against the plaintiff and the defendant in an action for tort, the tort consisting in cutting down trees the property of the plaintiff in the original suit. The only question for consideration was whether notwithstanding that the original suit was grounded in tort, the defendants were wrongdoers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act or whether the acts complained of were not in fact committed under a *bona fide* claim of right. The case was remanded for findings upon this point, but so far from establishing the appellant's contention it recognises that there may in certain cases be contribution even between tort-feasors. This also was the view of Lord Herschell, L. C., and Lord Watson in *Palmer* v. *Wick Steam Shipping Co., Ltd.* (2), in which the former expressed the view that although it was now too late to question the decision in *Merryweather* v. *Nixan* (3), it did not appear to be founded on any principle of justice or equity which would justify its extension to the jurisprudence of other countries. That the rule of non-contribution between joint tort-feasors exists in India cannot, I think, be questioned, but the authorities appear to show that it ought only to apply in cases where the parties are wrongdoers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act [*Sreeputty Roy* v. *Laharam Roy* (4)]. In the case now under consideration the act relied on by the appellant is the setting up of a defence to a suit which the defendants in that suit knew could not be substantiated in fact and that they combined together for that purpose. This was, in my opinion, a perfectly legitimate act for the reasons already given, and it is an abuse of language

(2) (1894) [illegible]; 6 R. 246; 71 L. T. 163.
(3) (17[illegible]) [illegible] 180, 19 R. R. 820; 101 E. R. 1337; 1 Sm. L. C. [illegible].
(4) [illegible] B. L. R. Sup. Vol. 687.

to describe a combination for the purpose of carrying out a lawful act as collusion or conspiracy. Nor are we concerned in any way with the motives which influenced that action. They may have been malicious or they may have been morally unimpeachable, but in neither case would the Court be justified in treating as a tort that which was not legally wrongful. Viewed from this standpoint I agree with the conclusions arrived at by the learned Judge of this Court, although I think he expressed the legal principle upon which he acted in language of too wide import which, if taken as of general application and apart from the facts of this case, may be misleading. He says that a conspiracy to put forward and maintain a false defence is not a wrong for which the law allows a remedy by an action for damages. If this is limited to a defence put forward by the pleadings I agree with the proposition intended to be laid down, but the word conspiracy does not appear to me to be an apt term for expressing such a case. Indeed the language used might lead to the conclusion that it was not a wrongful act to conspire together to commit perjury in support of a defence known to be unsupportable, which would in itself be a crime.

Certain cases were relied on by the appellant in support of the contention that where two defendants have jointly, and in collusion with each other set up a false defence which has failed and costs have been decreed against them jointly, there is no right of contribution by the one who has discharged the joint liability for costs under the decree. The first case is that of *Vayangara Vadaka Vittil Manja* v. *Kadugochen* (5). It does not appear from the report whether the costs were incurred in an action for tort or not. The Munsif found that the costs awarded were in the nature of a fine as compensation for damages and dismissed the suit. The High Court found that the plaintiff was in fact the real defendant in the former suit and that the defendant was merely a Kanomdar and further that they colluded together in order to defeat the plaintiff in the previous suit. They considered that they were bound by the principles laid down in the case of *Suput Singh* v. *Imrit Tewari* (1) (*ubi sup.*) and that the plaintiff was not entitled to contribution from the defendant. The judgment appears to have been based upon the fact that the plaintiff was the real defendant and that the defendant was not directly interested in the previous suit, but it recognised the general rule as to contribution between joint defendants for costs paid by one of them.

The case of *Gobind Chunder Nundy* v. *Srigobind Chowdhry* (6) appears to have gone somewhat further. It was found that the plaintiff and defendant had combined together in a former suit to defeat the plaintiffs in that suit and with that object they put in false defences. The learned Judges relied upon the case of *Vayangara Vadaka Vittil Manja* v. *Kadugochen* (5) (*ubi sup.*) for the proposition that where the plaintiff colluded with the defendant in a former suit to endeavour to defeat the plaintiffs there and was made liable for costs, no suit for contribution in respect to such costs would lie, and remanded the case to the lower Court for further findings. If it was the intention of the learned Judges in that case to lay down a rule that contribution cannot be recovered between co-defendants for costs paid by one of them on the ground that the defence in the previous suit denied a state of facts known by the defendants to be true, I must respectfully decline to follow that ruling, nor do I think that the proposition there broadly stated necessarily follows from the case reported as *Muringa Mangalath Gopalan Nayar* v. *Kinyaka Kovilagath Valia Tamburathi* (7), which was relied upon in support of it. The expression false defence, which has been used from time to time in judgments in which the question of contribution has been considered, appears to me to have led to some confusion of thought and to have induced the Courts in some cases to treat as a wrongful act that which in itself was perfectly legitimate.

The English case of *Dearsly* v. *Middleweek* (8) was also relied upon for the

(5) 7 M. 89; 2 Ind. Dec. (N. S.) 647.

(6) 24 C. 330; 1 C. W. N. 179; 12 Ind. Dec. (N. S.) 887.

(7) 7 M. 87; 2 Ind. Dec. (N. S.) 646.

(8) (1880) 18 Ch. D. 236.

proposition that where co-defendants are decreed to pay the costs of an action, one of them who has paid the whole of the costs cannot obtain contribution from the other. The case which is very shortly reported, the judgment consisting of abont six lines, appears to have been based upon a dictum of the Court of Appeal in the case of *Real and Personal Advance Company* v. *McCharthy* (9), which had been decided on the previous day and referred to by one of the learned Counsel engaged to the effect that no apportionment of or contribution for costs could be obtained by one co-defendant against another in an independent proceeding. That case is reported at page 362 of the same volume and came before the Court of Appeal on the plaintiff's objection to taxation. One of two defendants in an action in ejectment obtained leave to withdrew his defence on the terms of his paying to the plaintiffs their costs of the action, "so far as they were occasioned by the said defence of the said defendant." Upon taxation of the plaintiffs' costs against that defendant the Taxing Master held that the only costs which such defendant was liable to pay under the order were the increased costs occasioned by such defendant having defended the action and that he was not liable to pay an apportioned part of the plaintiffs' general costs. The Court of Appeal supported the Taxing Master. One of the questions was whether part of the general costs of the action ought not to be apportioned against those defendants under the terms of the order. The dictum relied upon in *Dearsly* v. *Middleweek* (8) was in these words: "If the appellants were right in their action, they ought to have their whole costs from the defendants or some of them. But this is Common Law action and at Common Law there is no such thing as apportionment of costs. There is an apportionment of costs in equity but it is of quite a different kind. It is an apportionment of costs between different claims." The question of contribution between co-defendants where one of them has paid the liability of both was not dealt with, and the case of *Dearsly* v. *Middleweek* (8) appears to have been based upon a misapprehension of what was said in the earlier case. I cannot, therefore, regard this decision as an authority, conflicting as it does with the principle of contribution now well recognised.

The other cases relied upon by the appellant need not be referred to in detail. They were cases where the parties were clearly joint tort-feasors, or where the plaintiff seeking contribution had been the real defendant in the previous suit or where the costs in respect to which contribution was claimed had not in fact been paid by the plaintiff.

On the other hand the case of *Brajendro Kumar Roy* v. *Rash Behari Roy* (10) clearly recognises the principle upon which the right to contribution in such cases is based. In that case a decree had been obtained against the plaintiff and the defendants for damages for breach of a covenant not to open a ferry at a particular place. The decree was executed against the plaintiff alone, who thereupon brought a suit for contribution against his co-defendants in the former suit. Both the lower Courts dismissed the suit on the ground that the plaintiff and the defendants had been joint wrongdoers and that no suit for contribution would lie as between them. The High Court held that the rule relied upon by the Courts below had no application to the circumstances of the case and that the plaintiff was entitled to maintain his action. The Munsif had found that the plaintiff and the defendants made a conspiracy and opened the ferry Ghat in violation of an agreement made by them in favour of the plaintiff in the suit for damages and that they knew that they were doing an illegal or wrong act, and for that reason held the suit not tenable. The District Judge took the same opinion, holding that as the ferry had been opened in violation of an agreement previously come to, it seemed to him that this constituted the defendants wrongdoers in the sense that they knew or ought to have known that they were doing a wrong or unlawful act. The High Court came to the conclusion that both the Courts below erred in treating the plaintiff and defendants as wrongdoers. "When the Munsif speaks of a conspiracy", said Norris, J., in his judgment, "the utmost that he can mean

(9) (1880) 18 Ch. D. 362; 45 L. T. 116; 30 W. R. 481.

(10) 13 C. 300; 6 Ind. Dec. (N. S.) 700.

is that the plaintiff and defendants met together and deliberately agreed to break their covenant and establish a ferry Ghat. This is not sufficient to constitute a conspiracy. To constitute a conspiracy there must be an agreement between two or more persons to do something either *malum prohibitum* or *malum in se* or to do something which they are entitled to do only by illegal means", and he came to the conclusion that the plaintiff and the defendants were guilty only of a breach of contract which would render them liable for damages under their contract but which was not in itself an actionable wrong. The Court allowed the appeal but remanded the case to the lower Court to be tried on the merits.

The case of *Shakul Kaneed Alim Sahib* v. *Syed Ebrahim Sahib* (11) is another case where the Subordinate Judge had dismissed a suit for contribution partly on the ground that the parties had put in a false defence in a previous suit which had failed. The suit in which the costs were incurred was one for partition and the whole of the costs had been paid by one of the defendants who sought contribution from his co-defendants. The High Court, consisting of Sir Arnold White, C. J., and Benson, J., allowed the plaintiff's claim for contribution, as there was no tort which could bring it within the ruling of *Mereyweather* v. *Nixan* (3).

It seems clear, therefore, that the doctrine of contribution is well recognised in this country and that the only cases in which it will not be enforced are those in which a liability arises out of a joint wrong or where the equities of the case demand that the plaintiff should not recover, as where the party sued was merely a formal defendant in the previous suit and not personally interested in the result of it. Again, there may be cases where it is just and proper that the liability should be apportioned in unequal shares. In the present case it seems to me that no distinction can be drawn between the respective liability of the plaintiff and defendant and that this appeal should be dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.

(11) 26 M. 373.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 391 OF 1916.

August 6, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

LACHHMAN DAS—DEFENDANT—APPELLANT

versus

KHARAK SINGH AND OTHERS—PLAINTIFFS—DIWAN CHAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 22—Specific performance—Delay in bringing suit, effect of—Discretion of Court.

Where a person allows a period of more than three years to elapse from the failure of the defendant to complete a contract of sale before bringing a suit for specific performance of the contract, the inordinate delay, apart from any other act of the plaintiff which would amount to a waiver of his right to sue for specific performance, is sufficient to disentitle him to any relief, and the case is not one in which the discretion given by section 22 of the Specific Relief Act should be exercised in favour of the plaintiff. [p. 706, col. 1.]

Second appeal from the decree of the District Judge, Gujranwala, dated the 10th January 1916.

Messrs. *Mul Chand* and *Ram Bhaj Datta*, for the Appellant.

The Hon'ble Pandit *Sheo Narain* and Mr. *Sewa Ram Singh*, for the Respondents.

JUDGMENT.—In the case out of which the present appeal arises plaintiffs Kharak Singh and others, respondents, sued Khushal Chand and others vendors and Lachhman Das vendee for specific performance of the contract to sell a certain land to them for a sum of Rs. 4,100. The lower Appellate Court having reversed the order of the first Court and having decreed the claim, Lachhman Das has filed a second appeal in this Court and there is a cross-appeal by the plaintiffs for reduction of the price to be paid by them.

The facts are clearly given in the judgment of the lower Court and briefly are as follows:—Upon an application made to the Deputy Commissioner sanction was given by him on the 11th August 1911, in accordance with section 8 of the Punjab Alienation of Land Act, for sale of the land in dispute to the plaintiffs for a sum of Rs. 4,100. Subsequently a second application was made to the Deputy Commissioner to sanction the sale in favour of Lachhman Das, who was offering Rs. 5,000

i.e., Rs. 900 more than the plaintiffs. On the 15th September 1911 the Deputy Commissioner, in spite of the protest of the plaintiffs' agent who was present, gave sanction for the sale in favour of Lachhman Das in lieu of Rs. 5,000. He did not, however, pass any order cancelling the previous sanction to the sale in favour of the plaintiffs. On the 30th October 1911 the sale was duly effected in favour of Lachhman Das and out of the consideration a sum of Rs. 331 was admittedly paid to Kharak Singh in liquidation of a simple money debt owed to him by the vendors. It is admitted that the plaintiffs financed a suit for pre emption of the land by one Dit with the intention of getting the land from him if he succeeded in his claim. Dit's claim, however, was dismissed. It is also admitted that plaintiffs financed the suit of Munshi son of Hira, vendor, for a declaration that the sale should not affect his reversionary rights. This suit has also been dismissed and a second appeal from the order is pending in this Court—Civil Appeal No. 1612 of 1914. The first Court, while finding other issues in favour of the plaintiffs, dismissed their suit on the ground that the sanction given by the Deputy Commissioner to the sale in favour of Lachhman Das cancelled the sanction previously given by that officer to the sale in favour of the plaintiffs. The lower Appellate Court on the other hand held that the original sanction was still in force and had not been cancelled, and further that plaintiffs were not estopped from bringing the present suit and that there was no reason why specific performance should not be decreed in their favour and it, therefore, decreed the plaintiffs' claim.

The first point urged by Mr. Mul Chand on behalf of Lachhman Das appellant was that the original sanction dated the 11th August 1911 had been impliedly cancelled by the grant of sanction for the sale in favour of his client on the 15th September 1911. We agree with Mr. Mul Chand that if the Deputy Commissioner had cancelled the sanction it would not have been open to us to question the correctness of his order, but we are quite clear that he did not cancel the sanction and that that sanction remained in force even after the 15th September 1911, when the proposed sale in favour of Lachhman Das was sanctioned.

The next point urged was that the plaintiffs were estopped by their conduct in receiving payment of their debt of Rs. 331 from Lachhman Das on the 27th February 1912. Now, it is in evidence that Kharak Singh at the time of receiving the money told Lachhman Das that he intended to bring civil and criminal suits against him. We do not see how he could very well refuse to accept payment of his debt. The money had been left by the vendors with the vendee for payment to him and if he had refused to receive the money from him, the latter could very easily have returned it to the vendor who could then have offered the money and Kharak Singh could not have refused to accept the payment. It is, however, urged that the long delay on the part of the plaintiffs in bringing the present suit, which was instituted nearly three years after the sale to Lachhman Das, shows that they acquiesced and waived their right to bring a suit for specific performance. It is also urged that in any case such delay disentitles the plaintiffs from claiming specific performance of their contract. *Nawab Begam* v. *Creet* (1) is referred to by Mr. Mul Chand, in which it was held that great delay on the part of the plaintiff in applying to the Court for specific performance of a contract of which he claims the benefit is of itself a sufficient reason for the Court in the exercise of its discretion to refuse relief. In *Peer Mahomed* v. *Mahomed Ebrahim* (2) a dictum of the Privy Council upon the doctrine of laches in Courts of Equity cited with approval in the case of *Erlanger* v. *New Sombrero Phosphate Company* (3) is referred to, in which Lord Penzance observes "that delay has two aspects, it may lead to a change in the thing sold or it may imply acquiescence so as to bar a plaintiff's right—and it is essential 'to keep these two aspects of it separate and distinct when the consequences of delay come to be considered in connection with the circumstances of an individual case.'" The point then in the present case is whether the delay on the part of the plaintiff in bring-

(1) 27 A. 678; A. W. N. (1905) 147; 2 A. L. J. 405.
(2) 29 B. 234 at p. 245; 6 Bom. L. R. 1013.
(3) (1878) 3 A. C. 1218 at pp. 1230, 1231; 39 L. T. 269; 26 W. R. 65.

ing the present suit justifies an inference of acquiescence or consent to the sale already effected in favour of Lachhman Das.

Mr. Sheo Narain on behalf of the respondents says that they have satisfactorily explained the delay in suing. Their explanation is that they did not know that they could legally enforce an oral contract to sell and that it was only when advised by a Pleader that they could enforce it that they brought the present suit. In our opinion this explanation is not a satisfactory one. The plaintiffs may indeed have thought that they could not enforce the agreement to sell to them, in view of the fact that the Deputy Commissioner had subsequently sanctioned the proposed sale in favour of Lachhman Das, but whatever they actually did think they must be presumed to have known the law. At any rate they could easily have found it out by taking legal advice. The facts that they accepted payment of their debt four months after the sale to Lachhman Das, that they previously financed two other suits against Lachhman Das with the object of getting the land from him or of causing him trouble, and that it was only after this and nearly three years after the original sale that they brought the present suit, warrant in our opinion the inference that they waived their claim to sue for specific performance. If they did not and merely delayed to bring the present suit from some other motives, then we are of opinion that such an inordinate delay is sufficient to disentitle them to the relief claimed. After all the jurisdiction to decree specific performance is under section 22 of the Specific Relief Act discretionary, and we do not think that this is a case in which the discretion of the Court should be exercised in favour of the plaintiffs.

We, therefore, accept the appeal of Lachhman Das and setting aside the order of the lower Appellate Court dismiss the plaintiffs' suit but under all the circumstances of the case we leave the parties to bear their own costs in all the Courts.

The plaintiffs' cross-appeal is also dismissed, the costs being on the parties.

Appeal accepted.

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE No. 59 OF 1919.

May 30, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Adami.

Maharaja GURUMAHADEVA ASRAM PRASAD SAHAI—PETITIONER

versus

RAM SEKHAR PRASAD SINGH AND OTHERS—OPPOSITE PARTY.

Receiver, appointment of—Sale of property—Auction-purchaser, payments made by—Sale set aside—Auction-purchaser, whether can recover amount spent by him from Receiver.

In a mortgage suit the High Court, at the instance of the mortgagee plaintiff, appointed a Receiver to take charge and possession of the mortgaged properties and to hold them for the benefit of the parties. The mortgaged properties were subsequently sold but the Receiver was not discharged. The auction-purchaser, considering himself the full proprietor and owner, continued to pay the revenue; the Receiver at the same time also paid the revenue on behalf of the judgment-debtor. Four years afterwards, the sale was set aside and the auction-purchaser applied to the Collector for refund of the amounts paid by him as revenue, and was met with the reply that the amounts were not available for refund; he then applied to the High Court for an order on the Receiver to re-imburse him for the amounts which were paid for the benefit of the estate, and on behalf of the Receiver it was contended that he was not subject to the orders of the High Court but that he was an officer subject to the orders of the trial Court:

Held, (1) that the Receiver, having been appointed by the High Court to which he had submitted his accounts, must be regarded as an officer subject to the orders of that Court; [p. 707, col. 1.]

(2) that so far as the auction-purchaser was concerned, he was justified in considering that he was the person liable to pay the Government revenue that became due during his auction-purchase, on the principle that he became the proprietor from the date of the sale and the duty of paying the revenue devolved upon him from that moment; [p. 707, col. 2.]

(3) that under the circumstances the proper order was to give the auction-purchaser leave to sue the Receiver in respect of his claim. [p. 708, col. 1.]

Messrs. *P. C. Manuk*, *Sailendra Nath Palit* and *Harnarain Prasad*, for the Petitioner.

Mr. *Atul Krishna Rai*, for the Opposite Party.

JUDGMENT.

MULLICK, J.—This is an application by the Maharaja of Huthwa for an order from this Court directing the Receiver in charge of the Manjha estate to pay to the Maharaja a sum of money, which is estimated to be about Rs. 27,000 and which is alleged to

have been paid by the Maharaja into the Government Treasury in payment of land revenue between the 11th June 1912 and the 31st May 1916.

It appears that a suit was brought upon a mortgage-bond by the proprietor of the Paikpara Raj estate against the proprietors of the Manjha estate sometime previous to 1912, and that in that suit in consequence of certain covenants in the mortgage-deed a Receiver was appointed at the instance of the mortgagee plaintiff to take charge and possession of the mortgaged properties and to hold them for the benefit of the parties. The Receiver appears to have been appointed by the High Court of Calcutta in the course of an appeal against an order of the Subordinate Judge, before whom the mortgage suit was pending, refusing to appoint a Receiver.

It has now been contended before us that the Receiver was not a Receiver subject to the orders of the High Court but that he was an officer subject to the orders of the trial Court.

It seems that the original Receiver, Babu Chander Sekhar Prasad Singh, was appointed by the High Court and that his accounts were submitted to that Court. He has since died and the present Receiver, Babu Ram Sekhar Prasad Singh, his brother, has been appointed by this Court to carry on the duties of the office.

In the case of *Rani Debendra Balla Dassi* v. *Babu Chandra Sekhar Prasad Singh* (1) the question whether the Receiver was to be viewed as an officer subject to the orders of the Subordinate Judge was raised before a Division Bench of this Court but was not decided.

So far as the present proceedings are concerned, it seems quite clear that the Receiver must be regarded as an officer subject to our orders, and it is on that footing that the applicant before us asks for an order directing the Receiver to pay to the applicant the money which he paid into the Government Treasury on account of land revenue.

To return to the history of the mortgage suit, it seems that on the 11th June 1912, the mortgagee brought the mortgaged properties to sale and that the properties were purchased by the Maharaja of Huthwa for a sum of Rs. 5,00,000 or thereabouts. Considering himself the full proprietor and owner of the property, the auction-purchaser continued to pay the land revenue due upon it till the 31st May 1916, when the auction-sale was set aside.

The Receiver, who ought to have been discharged as soon as the sale, was, however, not discharged by the Court and he is still in office by reason of the fact that the execution of the mortgage decree is still being carried out.

It appears that, while the auction-purchaser was paying the Government revenue which he thought was due from him as sole proprietor, the Receiver was at the same time also paying it on behalf of the judgment-debtor, with the result that there have been double payments which the Collector has applied in liquidation of his claims against other co-sharers in the estate; so that when the auction-purchaser applied to the Collector for the refund of the amounts paid by him he was met by a reply that the amounts were not available for refund.

He accordingly makes the present application to this Court for an order in the first instance upon the Receiver to reimburse him for the amounts which, according to his contention, were paid for the benefit of the estate.

Their Lordships of the Privy Council in the case of *Bhawani Kaur* v. *Mathura Prasad Singh* (2) held that the mortgagee purchaser becomes the proprietor from the date of the sale and that the duty of paying the Government revenue devolves upon him from that moment. The learned Vakil for the Receiver contends that that principle only applies to a case where the sale is subsequently confirmed, but in the judgment of their Lordships there is no limitation of this kind placed upon the rights and liabilities of a mortgagee auction-purchaser, and I take it that so far as the present auction purchaser is concerned, he was justified in the view that he was the person liable to pay the Government revenue that became due after his auction purchase.

(1) 35 Ind. Cas. 589; 1 P. L. J. 449.

(2) 16 Ind. Cas. 210; 40 C. 89; 16 C. W. N. 985; 23 M. L. J. 311; 12 M. L. T. 352; (1912) 1 M. W. N. 944, 14 Bom. L. R. 1046; 16 C. L. J. 606; 39 I. A. 228 (P.C.).

Mr. Manuk on behalf of the auction-purchaser also draws our attention to the case of *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (3), where their Lordships observed that a person who has been adjudged to have a title to a property and under such colour of title pays in Government revenue for the benefit of the estate, even though his collections from the estate are less than the amount of the Government revenue paid by him, he is entitled, in the event of his title being afterwards set aside by a higher tribunal, to a refund of the difference between the amount paid him and the amount collected by him on account of rent from the estate.

Here it is contended that all the payments made by the auction-purchaser were for the benefit of the estate and that, therefore, the applicant should be re-imbursed in full by the Receiver. The learned Vakil for the Receiver suggests that we should hold this matter up for the appearance of the decree-holder, who has not been served with notice of this petition. I agree that the decree-holder is vitally interested in the matter, because any surplus money remaining in his hands has, by the direction of the Court which appointed the Receiver, to be paid by the Receiver to the decree-holder, but it is not necessary to delay the decision of this matter any longer, in particular as a question of limitation is involved, because we think that the proper order that we should make is, not that the Receiver should make the payment which is claimed, but that liberty should be given to the auction-purchaser petitioner to sue the Receiver according to law. It is no doubt true that a Court can adopt the procedure which is most convenient for determining the claims which are made before it and can, if necessary, investigate the merits of the auction-purchaser's demand, but having regard to the various questions of the limitation and the rights and liabilities of the auction-purchaser as against the Receiver that may arise in the course of the investigation, we think that the most convenient course will be to leave the auction-purchaser to have the matter litigated by a separate suit. Leave is accordingly given to the auction-purchaser to sue the Receiver in respect of his claim.

The application is, therefore, allowed with costs. Hearing fee, three gold *mohurs*, will be paid out of the funds of the estate.

ADAMI, J.—I agree.

Application allowed.

(3) 21 C. 142 (P. C.): 20 I. A. 160; 17 Ind. Jur. 576; 6 Sar. P. C. J. 366; 10 Ind. Dec. (N. S.) 727.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1291 OF 1917.

August 2, 1918.

Present:—Mr. Justice Broadway.

BASANTA MAL—PLAINTIFF—APPELLANT

versus

MUNICIPAL COMMITTEE, HOSHIARPUR—DEFENDANT—RESPONDENT.

Punjab Municipal Act (III of 1911), ss. 195, 225—Injunction to restrain Municipal Committee from certain action, suit for, maintainability of—Appeal to Commissioner, failure to prefer, effect of.

The mere fact that a person prefers not to appeal against the orders of a Municipal Committee to the Commissioner under section 225 of the Punjab Municipal Act, does not deprive him of the right to bring a suit for an injunction restraining the Committee from taking certain action. [p. 709, col. 1.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 5th February 1917.

Sheikh *Umar Bakhsh*, for the Appellant.

The Hon'ble Bakhshi *Sohan Lal*, for the Respondent.

JUDGMENT.—The facts of this case are as follows:—

On the 11th June 1907 Basanta Mal filed an application with the Municipal Committee, Hoshiarpur, asking for permission to raise his *thara* and cut down a tree. On 12th March 1908 sanction was accorded, but a rider was added that he was not to build over the *thara*. Basanta Mal had not asked to be allowed to do so. On the 6th February 1911 Basanta Mal made an application to be allowed to construct a *chappar* over this *thara*. This reached the Municipal office on the 8th February 1911, but no orders were passed on it up to the 2nd May 1911.

On that date it was discovered that the *chappar* had been erected. Thereupon the Committee issued a notice to Basanta Mal

calling on him to remove the *chappar* and the *kaula* or supports or pillars on which it rested.

Basanta Mal protested and tried to get the Committee to review its orders but in vain, and finally a criminal complaint was lodged against him. He then brought this suit for an injunction. The trial Court granted him a decree, but the learned District Judge has dismissed his suit on the ground that the erection of the "*kaula*" was not justified, and also that as he had failed to appeal to the Commissionor he ought not, even if he were entitled to it, be given a decree. Basanta Mal has accordingly preferred this second appeal through Sheikh Umar Bakhsh and I have heard Bakhshi Sohan Lal for the Committee.

No doubt in *Municipal Committee, Ambala* v. *Mahander Singh* (1) it was held that it was necessary to exhaust the remedies provided by the Act, but in the present case I am unable to see that that decision is in point. There there was a demand from the Committee for a refund of Octroi, here there is a claim that the Committee should refrain from taking certain action.

I am also unable to understand the difference that the learned District Judge makes between the "*chappar*" and the "*kaula.*" The "*kaula.*" are the supports to the "*chappar*" and an integral part of it.

In my opinion the plaintiff is entitled to the decree asked for, and I accordingly accept this appeal with costs and setting aside the order of the lower Appellate Court restore the decree of the learned Munsif. The injunction will not, however, take away any statutory rights the Committee may now or at any future time possess or be given.

Appeal accepted.

(1) 9 Ind. Cas. 1000; 38 P. R. 1911; 118 P. L. R. 1911; 97 P. W. R. 1911.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 979 OF 1917.

October 2, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

C. VENKATACHARIAR—PLAINTIFF—APPELLANT

versus

C. RANGASWAMI AYYANGAR AND ANOTHER—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Landlord and tenant—Kayam saswatham *lease*—*Denial of landlord's title, effect of*—*Forfeiture*—*Derivative title, disclaimer of, effect of*—*Disclaimer, whether works forfeiture*—*Lease executed before enactment of Transfer of Property Act*—*Pre-requisites to forfeiture*—*Ejectment, suit in*—*Transfer of Property Act (IV of 1882), s.* 111 (g).

A *kayam saswatham*, or permanent tenancy, can be forfeited by denial of the landlord's title. [p. 711, col. 2.]

Rama Iyangar v. *Anga Gurusami Chetti*, 46 Ind. Cas. 62; 35 M. L. J. 129; 8 L. W. 109 and *Kally Dass Ahiri* v. *Monmohini Dassee*, 24 C. 440; 1 C. W. N. 321; 12 Ind. Dec. (N. S.) 961, followed.

A denial of a derivative title will work a forfeiture as much as the denial of the original landlord's title. [p. 711, col. 2.]

Rama Iyangar v. *Anga Gurusami Chetti*, 46 Ind. Cas. 62; 35 M. L. J. 129; 8 L. W. 109, followed.

Doorga Kirpa Roy v. *Sree Janoo Lathak*, 18 W. R. 465, dissented from.

If a tenant, honestly doubtful and not intending to identify himself with a third party who sets up a title in himself against the real landlord, merely puts his alleged derivative landlord to the proof of the latter's title before recognizing him as such, such conduct may not work a forfeiture of the tenancy and may not constitute such a disclaimer of the title of the landlord as would work a forfeiture. [p. 711, col. 2.]

In cases of leases executed before the Transfer of Property Act came into force or of agricultural leases, a separate act by the landlord indicating his intention to act upon a forfeiture that has been incurred is not a necessary pre-requisite for the maintainability of a suit in ejectment. [p. 712, col. 1.]

Second appeal against the decree, dated the 27th September 1916, of the Court of the Temporary Subordinate Judge, Salem, in Appeal Suit No. 216 of 1915, preferred against the decree, dated the 17th August 1914, of the Court of the District Munsif, Dharmapuram, in Original Suit No. 140 of 1913.

Messrs *V. C. Seshachariar*, *A. Krishnaswami Aiyar* and *K. V. Sesha Aiyangar*, for the Appellant.

Messrs. *K. Srinivasa Aiyangar* and *B. Somaya*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant. He purchased the plaint village

of Bojinaickampatti (or Posinaickenpatti) from Narasimhalu Naidu who acted on behalf of himself and his brother. They made the said sale as Mittadars in 1901 under Exhibit III. Plaintiff had formerly brought a suit for rent against the defendants, who had obtained a Kayam Saswatham lease in 1839 from the original Mittadars. That suit for rent was Original Suit No. 988 of 1904. In that suit, the defendants (the Kayam Saswatham lessees) denied that the plaintiff was the owner of the Mitta and denied also the title of the plaintiff's vendors, Narasimhalu Naidu and his brother, to sell the property to the plaintiff. They set up the title of Venkatarama Naidu (the father of the plaintiff's vendors) who had parted with his rights in favour of his sons in 1897. The first Court decreed that suit of 1904 brought for rent, overruling the lessees' objections and establishing the title of the plaintiff as landlord. The lessees appealed, denying again in the Appellate Court the plaintiff's title as landlord and continued such denial notwithstanding that Venkatarama Naidu (the father of the plaintiff's vendors, who had been made a party to the suit) mentioned in an application made to the Appellate Court that he did not want any longer to contest the plaintiff's title in that particular suit, and his name was thereupon removed from the record on his expressing the intention of putting an end to the plaintiff's title afterwards by instituting a future suit for cancellation of the deed executed by him in favour of his sons. The lessees failed in the appeal also and yet they preferred a second appeal again denying the plaintiff's title as landlord. On these facts, and also on the allegation that before filing of the present suit in ejectment (on the ground of forfeiture by denial of the landlord's title by the defendants) the plaintiff sent a notice to the defendants on the 25th January 1908 requiring them to deliver up possession of the village, the plaintiff instituted the present suit for possession.

The defendants set up that the plaintiff's two brothers not having joined him in the suit, the suit was bad for non-joinder, that the plaintiff's purchase was bad for champerty and maintenance, that the defendants had a permanent lease right and that no notice of intention to take advantage of the alleged forfeiture was given in 1903 as alleged by the plaintiff.

The District Munsif held on a construction of the Kayam lease-deed (Exhibit I of 1839) that it did confer a permanent heritable right on defendants' predecessor-in-title. He, however, decided that the defendants incurred forfeiture of that right of permanent tenancy by their denial of the plaintiff's title as their landlord not only in the written statement in the former suit in the first Court but also by their denials in the District Court and the High Court. He states in the 10th paragraph of his judgment that "there was a clear and *mala fide* denial of plaintiff's title in the District Court and also in the High Court and that there was a forfeiture." He further found that the plaintiff had given the notice, Exhibit K, insisting on the forfeiture. The learned District Munsif was further of opinion that no notice to quit was necessary under the circumstances, because (I take it) the Transfer of Property Act was not applicable to the rights and conditions of the lease, Exhibit I, created in 1839. As regards non-joinder of plaintiff's brothers, one of them, as plaintiff's witness, denied that plaintiff's brothers had any right. This contention of defendants, though thus patently frivolous, was persisted in the appeal memorandum.

On appeal, the learned Subordinate Judge agreed with the District Munsif in holding that the Kayam lease deed, Exhibit I, conferred a permanent heritable right. On the other question, *viz.*, the question of forfeiture, however, he held that, as the defendants did not attorn to the plaintiff after the purchase of the Mitta village by the latter in 1901, the denial by the defendants of the plaintiff's title as landlord did not work a forfeiture. As regards the question whether their denial was *bona fide* or not, he does not give any definite finding except that the denial at the time of the written statement in the first Court in the former suit may not have been *mala fide*. The Subordinate Judge admits that the defendants made an unsuccessful attempt before the plaintiff's purchase to

buy the property themselves from Narasimhalu Naidu and his brother and he also admits that the defendants "attempted to attack the plaintiff's right" as Mittadar of this village in a suit instituted by them against the plaintiff and others. He observes "that these two facts can never be said to be recognition of plaintiff's title." So far as the first fact is concerned, it may not be a recognition of the plaintiff's title though it was clearly a recognition of plaintiff's vendor's title. As regards the second fact (see Exhibit D which is an application by defendants for attachment of plaintiff's right as Mittadar), I am wholly unable to understand the Subordinate Judge's observation that it is not a recognition of plaintiff's title. As regards the notice Exhibit K, the Subordinate Judge does not give any finding as to whether it was sent by the plaintiff or not. He, however, found in paragraph 15 of his judgment that such a notice was not necessary if a forfeiture had been incurred.

In this second appeal, the questions which have been argued before us are (1) whether the lease deed, Exhibit I, conferred a permanent, heritable right or only a right during the lifetime of the grantee, (2) whether there have been several denials of the plaintiff's title during the course of the former suit of 1904, (3) whether any or all of those denials entailed a forfeiture of the tenancy, (4) whether any notice showing an intention to take advantage of the forfeiture was necessary, even after such denials, as a pre-requisite for the maintainability of this suit, and (5) whether the notice, Exhibit K, was really given. So far as the first point is concerned, I do not think it is necessary to give any final decision, though it should not be thought that I agree with the lower Courts in their construction of Exhibit I. If the matter were *res judicata*, I might probably have agreed with them. But having regard to the cases in *Rajaram* v. *Narasinga* (1) *Venkataramana* v. *Venkatapatti Nayani Garu* (2) and *Foulkes* v. *Muthusami Goundan* (3), I am not sure whether the question is not concluded by authority in favour of the restricted right of the grant as merely a grant for the lessee's lifetime. However, as I said, it is unnecessary to express any final opinion on that point for the decision of this case.

Assuming that Exhibit I created a permanent heritable tenancy, it is clear that even such a tenancy can be forfeited by a denial of the landlord's title. See *Rama Iyangar* v. *Anga Gurusami Chetti* (4) and *Kally Dass Ahiri* v. *Monmohini Dassee* (5). It was argued for the respondents that a denial of a derivative title can in no circumstances work a forfeiture and the case in *Deorgi Kripa Roy* v. *Sree Janoo Lathak* (6) was relied upon. That case was quoted in *Rama Iyangar* v. *Anga Gurusami Chetti* (4) but was dissented from, and I respectfully adopt the reasoning in the judgment in *Rama Iyangar* v. *Anga Gurusami Chetti* (4) on this point.

So far as the question of denials in the former suit is concerned, there can be no hesitation on the perusal of the records of the former suit (Exhibits A, B, C, II, IV, XIV) in holding that the lessees denied the plaintiff's title on different occasions, and in each of the Courts through which that litigation passed and so far as the Courts of Appeal are concerned, such denial could not have been *bona fide*. If a tenant, honestly doubtful and not intending to identify himself with a third party who sets up a title in himself against the real landlord, merely puts his alleged derivative landlord to the proof of the latter's title before the tenant could recognise him as such, such conduct may not work a forfeiture of the tenancy and may not constitute such a disclaimer of the title of the landlord as would work a forfeiture. But it is impossible to hold, having regard to the defendants' conduct both in the former suit and in this suit, that the defendants did not intend to disclaim the plaintiff's title and their tenancy under the plaintiff but merely in good faith wanted to have their doubts cleared whether the plaintiff was their legal landlord or whether anybody else was their legal landlord. The question

(1) 15 M. 199; 5 Ind. Dec. (N. S.) 490.
(2) 29 Ind Cas. 188; 28 M L. J. 510; 17 M. L. T. 269; (1915) M. W. N. 313.
(3) 21 M. 503; 8 M. L. J. 207; 7 Ind. Dec. (N. S.) 712.
(4) 46 Ind. Cas. [illegible]; 35 M. L. J. 129; 8 L. W. 19.
(5) 24 C. 420; 1 C. W. N. 321; 12 Ind. Dec. (N. S.) 961.
(6) 1 W. R. 465.

whether there was a denial in appeal and in second appeal in the former litigation was not decided by the lower Appellate Court in this case, but upon the admitted facts there can only be one conclusion, and that is that the denial by the defendants was deliberate and malicious and that they did not care whether Venkatarama Naidu still owned the landlord's title or not, their only object being to defeat the plaintiff by all means even after Venkatarama Naidu practically gave up his contest with the plaintiff.

Then the next question is, whether a separate act by the plaintiff indicating his intention to act upon the forfeiture is a necessary pre-requisite for the maintainability of the suit. It is clear that the Transfer of Property Act does not apply to this lease, because the lease was created in 1839 long before the Transfer of Property Act was enacted. I am further of opinion that it is an agricultural lease and on that ground also the Transfer of Property Act does not apply. The same view has been held in *Padmanabaya* v. *Ranga* (7) and in *Rama Iyangar* v. *Anga Gurusami Chetti* (4) in respect of leases prior in date to the Transfer of Property Act. We are, therefore, thrown back upon the law as it existed before the Transfer of Property Act came into force. That law has been fully considered in the case in *Rama Iyangar* v. *Anga Gurusami Chetti* (4), and I agree with the conclusion arrived at therein that where there was a forfeiture by disclaimer of landlord's title, no separate preliminary act on the part of the landlord is necessary to enable him to maintain a suit in ejectment. The case in *Venkatramana Bhatta* v. *Gunda Raya* (8) quoted for the respondents has been explained in *Padmanabaya* v. *Ranga* (7), and that explanation seems to have been accepted in *Rama Iyangar* v. *Anga Gurusami Chetti* (4) also. Assuming, however, that notice is necessary, the Munsif found that the plaintiff did send the notice, Exhibit K. The plaintiff has gone into the box and proved that he sent the notice and had it properly served through his Amin. The 1st defendant's denial is worthless. I see no reason to disbelieve the plaintiff, Exhibit K containing the usual endorsement by the person who served the notice that a copy was left with the person who received it. As the Appellate Court has not dissented from the finding of the Munsif on this question and has not given a finding of its own, I think we are entitled to find it ourselves.

In the result I would reverse the decision of the lower Appellate Court and restore that of the District Munsif except that the figure for damages, Rs. 1,000, mentioned in the Munsif's decree be altered into Rs. 750 at Rs. 250 a year in accordance with the finding of the lower Appellate Court on that question. The respondents will pay the plaintiff's costs throughout.

SPENCER, J.—I agree.

M. C. P.

Appeal allowed.

(7) 6 Ind. Cas. 447; 34 M. 161; (1910) M. W. N. 462; 8 M. L. T. 110; 20 M. L. J. 930.

(8) 31 M. 403; 4 M. L. T. 221.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 500 OF 1915.

November 8, 1918.

Present :—Sir Henry Rattigan, KT., Chief Judge, and Mr. Justice Scott-Smith.

HAR KISHEN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

LAHORE BANK, LIMITED, IN LIQUIDATION—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Appeal filed beyond time—Amendment of decree, application for, whether sufficient ground for extension of time—Civil Procedure Code (Act V of 1908), O. XLI, r. 25—Appeal—Issue not tried by lower Court—Remand.

A defendant is not bound to appeal from a decree at a time when the plaintiff has, within the period of ninety days allowed for an appeal, already applied for amendment of the decree. In any event, an extension of time for appealing should in such a case be granted under section 5 of the Limitation Act. [p. 714, col. 1.]

Where a case is badly conducted in the lower Court and an important point has not been put in issue, the Appellate Court would be justified in remanding the issue for trial. [p. 714, col. 2.]

First appeal from the decree of the Subordinate Judge, 1st Class, Amritsar, dated the 24th June 1914, as amended on 19th November 1914.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *Sundar Das*, for the Respondent.

HAR KISHAN SINGH *v.* LAHORE BANK, LD.

ORDER.—The plaintiff in this case is the Lahore Bank, Limited, of Amritsar, and it sues to recover a sum of Rs. 17,638 as principal and interest due on a promissory note executed on the 3rd May 1911 by defendants Nos. 1 and 2, as "agents and managers" of a joint Hindu family which includes themselves and defendants Nos. 3, 4, 5, and 6, the sons of defendant No. 1, who were, at the time of the institution of the suit, minors under the guardianship of their mother *Musammat* Dhan Devi. The plaintiff Bank in its plaint further alleged that on the day when the promissory note was executed, defendants Nos. 1 and 2 mortgaged a three-storied house at Amritsar by way of an equitable mortgage to the Bank and handed over the title-deeds of the house. The relief claimed was a decree of Rs. 17,638 on account of principal and interest on the security of the mortgaged house referred to in the plaint together with costs against defendants and in the event of the house being insufficient in value to satisfy the claim, it was prayed that the decree might be realised from defendants' other property as well as against their persons. It was further prayed that interest from the institution of the suit to the satisfaction of the decree might be awarded at the agreed rate. Defendants Nos. 1 and 2 admitted the execution of the promissory note and the deposit of the title-deeds by way of security, but pleaded that they had received no consideration in respect of the promissory note and that the deposit of title deeds did not create an equitable or legal mortgage of property in favour of the Bank. The minor defendants pleaded that the defendants were not members of a joint Hindu family, that defendants Nos. 1 and 2 had not executed the promissory note in the capacity of agents or managers of the family, that there was no necessity for the loan, and that the money was not borrowed or spent for the benefit of the family. The Subordinate Judge framed the following issues :—

(1) Is the plaint signed and filed by a proper person on behalf of the plaintiff Bank?

(2) Are defendants Nos. 1 and 2 and defendants Nos. 3 and 6 not members of a joint Hindu family?

(3) Did defendants Nos. 1 and 2 execute the promissory note without receiving full consideration ?

(4) Is plaintiff entitled to recover the money due on the promissory note from the house, the title deeds as to which and its plan were deposited with the plaintiff ?

(5) Is plaintiff entitled to realise compound interest ?

As pointed out by the Subordinate Judge in his judgment, defendants were given numerous opportunities of producing evidence in support of their allegations but these opportunities were not taken advantage of and in the result three witnesses, two for the defendants and one for the plaintiff, were very briefly examined. Their evidence, such as it is, will be found at pages 28 and 29 of the printed book. On the 24th June 1914 the Subordinate Judge delivered judgment in favour of the plaintiff Bank whose claim was decreed in full with costs. The original decree did not, however, specify that the decretal amount could be recovered from the house which had been mortgaged to the plaintiff and consequently an application for amendment of decree was made on the 30th July 1914. This application was granted and the decree duly amended on the 19th November 1914. On the 19th February 1915 Bawa Harkishen Singh, defendant No. 3, who had attained his majority after the decision of the case in the lower Court, filed an appeal to this Court and his memorandum included all the defendants as co-appellants, though it appears that he possessed no power-of-attorney from defendants Nos. 1 and 2 and does not appear to have been made a next friend of his minor brothers by any order of Court.

At the hearing before us Mr. Sundar Das on behalf of the respondent took a preliminary objection that the appeal was barred by limitation, inasmuch as it was not filed till February 1915, whereas the date of the original decree was 24th June 1914. The learned Counsel conceded that the appeal would be in time so far as it purported to be merely an appeal from the amended decree of November 1914, but urged that (except as regards the amended portion of the decree) the original decree of June 1914 could not be attacked by an appeal filed more than 90 days after its date. We overruled this objection as

it appeared to us untenable to contend that the defendants were bound to appeal from the decree of June 1914 at a time when the plaintiff had, within the period of 90 days allowed for an appeal, already applied for amendment. In any event we were prepared to grant an extension of time under the provisions of section 5 of the Limitation Act

On behalf of the appellant Harkishen Singh and the latter's minor brothers Mr. Tek Chand informed us that the sole ground on which he proposed to attack the decree of the lower Court was that the burden of proof that the money borrowed by defendants Nos. 1 and 2 was taken for a necessary or family purpose lay upon the plaintiff Bank and that this burden had not been discharged, the result being that no decree could be passed either against defendants Nos. 3 to 6 personally or against any part of the house in which they were co-sharers. In support of the latter contention the learned Pleader referred us to *Piare Lal* v. *Ram Chand* (1) and the recent ruling of their Lordships of the Privy Council reported as *Sahu Ram Chandra* v. *Bhup Singh* (2).

It appears that the plaintiff Bank in its plaint alleged that the money had been borrowed by defendants Nos. 1 and 2 "as agents or managers of a joint Hindu family," but it was not specifically stated or claimed that the money had been taken for such necessary or family purposes as would bind the other members of the joint Hindu family. On the other hand, the minor defendants through their guardian distinctly pleaded that they were not bound by the debt inasmuch as it had been contracted by defendants Nos. 1 and 2, if at all, for their own personal purposes and not for any family necessity. This point should undoubtedly have been put in issue, but unfortunately it appears to have been entirely overlooked. Mr. Tek Chand concedes for the purposes of this appeal that the family is a joint Hindu family, and his sole point is that plaintiff must fail because it has not proved that the debt was not one binding upon defendants Nos. 3 to 6. The case was badly conducted in the lower Court and we think it would be unjust to the plaintiff to decide the point against it without allowing an opportunity of proving, if it can, that the debt was contracted for a necessary purpose or that the money was used for the benefit of the family. Under Order XLI, rule 25, we accordingly remand the following issue to the Subordinate Judge for trial and direct him to take the additional evidence required and thereafter to return the evidence to this Court together with his finding thereon and the reasons therefor:

"Was the promissory note Exhibit P-4 executed by defendants Nos. 1 and 2 as agents or managers of the joint Hindu family and was the sum of Rs. 15,000 borrowed by them from the plaintiff Bank for necessary or family purposes or was it used for the benefit of the family?"

The *onus* of proof will be on the plaintiff, but both parties should be called upon to produce all the evidence available upon the point. A return should be made to this order within three months and objections must be filed within 15 days of the receipt of notice from this Court to the effect that the return has been made.

Case remanded.

(1) 11 Ind. Cas. 443; 112 P. W. R. 1911; 21 P. R. 1912.

(2) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 696; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1558 OF 1917.

September 27, 1918.

Present: —Justice Sir William Ayling, KT., and Mr. Justice Krishnan.

KOTTARATHIL PUTHIYAPURAYIL POKKER—DEFENDANT No. 1—APPELLANT

versus

BALATHIL PARKUM CHANDRANKANDI KUNHAMAD AND OTHERS—PLAINTIFFS AND DEFENDANT No. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63, App. D, Form 13—Transfer of Property Act (IV of 1882), s. 53—Suit by attaching creditor to set aside fraudulent alienation by judgment-debtor—Suit brought in individual capacity, whether liable to dismissal—Representative suit, whether necessary—Amendment of plaint.

A suit by an attaching decree-holder to set aside an alienation by the judgment-debtor as infringing

section 53 of the Transfer of Property Act is not liable to be dismissed merely on the ground that it is not a representative suit on behalf of the general body of creditors. [p. 716, col. 1; p. 718, col 1.]

Palaniandi Chetty v. *Appavu Chettiar*, 34 Ind. Cas. 778; 30 M. L. J. 565; 19 M. L. T. 390, *Ishvar Timappa Hegde* v. *Devar Venkappa Shanbog*, 27 B. 146; 5 Bom. L. R. 19, *Subramania Ayyar* v. *Muthia Chettiar*, 43 Ind. Cas. 651; 41 M. 612; 6 L. W. 750; 33 M. L. J. 705 (F. B.), *Burjorji Dorabji Patel* v. *Dhunbai*, 16 B.1; 8 Ind. Dec. (N. S.) 479 and *Chatterput Singh* v. *Maharaj Bahadur*, 32 C. 198; 2 A. L. J. 190; 9 C. W. N. 225 (P. C.), explained and distinguished.

Hakim Lal v. *Mooshahar Sahu*, 34 C. 999; 11 C. W. N. 889; 6 C. L. J. 410, not approved.

Mouatt, In re; *Kingston Cotton Mill Co.* v. *Mouatt*, (1899) 1 Ch. 831; 68 L. J. Ch. 390; 80 L. T. 406; 47 W. R. 506, *Cornish* v. *Clark*, (1872) 14 Eq. 184; 42 L. J. Ch. 14; 26 L.T. 494; 20 W. R. 897, *Ideal Bedding Co.* v. *Holland*, (1907) 2 Ch. 157; 76 L. J. Ch. 411; 96 L. T. 774; 14 Manson 113; 23 T. L R. 467, *Reese River Silver Mining Co.* v. *Atwell*, (1869) 7 Eq. 347; 20 L. T. 163; 17 W. R 601 and *Maddever, In re*; *Three Towns Banking Co.* v. *Maddever*, (1884) 27 Ch. D. 523; 53 L. J. Ch. 998; 52 L. T. 35; 33 W. R. 286, distinguished.

Obiter.—Even an ordinary creditor suing to set aside an alienation under section 53 of the Transfer of Property Act is under no obligation to sue in a representative character. [p. 716, col. 1; p. 719, cols. 1 & 2.]

Per *Ayling, J.*—There are no restrictions as to the nature of the suit to be brought by the attaching creditor under Order XXI, rule 63, Civil Procedure Code. That the plaint only asks in terms for a declaration that the property is liable to sale in execution of the decree is immaterial. [p. 716, col. 1.]

Per *Krishnan, J.*—There is no rule either in the English or in the Indian law justifying the dismissal of a suit under section 53 of the Transfer of Property Act because it is not brought in a representative capacity. To avoid the difficulty of a multiplicity of suits, the Trial Court may, of its own motion, and should, if moved by the transferee-defendant, direct that a suit by a single creditor under the section should be amended so as to make it a suit on behalf of all the creditors. The Court should also take care, when passing a decree setting aside a transfer even in a single creditor's suit, to adopt Form No. 13 in App. D, Civil Procedure Code. [p. 718, col. 1]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tellicherry, in Appeal Suit No. 715 of 1916, preferred against the decree of the Court of the District Munsif, Khuthuparamba, in Original Suit No. 713 of 1914.

Mr. *K. Ramanatha Shenai*, for the Appellant.

Messrs. *C. Madhavan Nair* and *R. Pocker*, for the Respondents.

This second appeal coming on for hearing on the 19th and 20th of September 1918, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

AYLING, J.—In this case the lower Appellate Court seems to me to have erred in supposing that unless the contested sale deed, Exhibit V, is merely a sham transaction, the present suit is not maintainable. The ruling quoted [*Palaniandi Chetty* v. *Appavu Chettiar* (1)], if examined, does not support such a view; nor does the later Full Bench ruling [*Subramania Ayyar* v. *Muthia Chettiar* (2)] which considered the same question, and to which I was a party.

What was decided in these cases was this; that, where the validity of an alienation is impugned on the ground that it offends against section 53, Transfer of Property Act, that alienation must be upheld until it is set aside in proceedings properly instituted for the purpose. The exact nature of the proceedings which should be instituted was not determined. In *Palaniandi Chetty* v. *Appavu Chettiar* (1) Coutts Trotter, J., expressed the opinion that a creditor suing to set aside an alienation on this ground must do so on behalf of all creditors, unless (as in the case before us) he was a judgment-creditor who had taken attachment in execution of his decree. This view was dissented from by the other learned Judge Seshagiri Aiyar, J., and the Full Bench expressly left the point undecided. No other light is thrown on the nature of the proceedings by either judgment.

What we have, therefore, to consider is whether the present suit should be treated as one properly instituted for the purpose of setting aside the assignment deed, Exhibit V.

It was brought by plaintiff under Order XXI, rule 63, Civil Procedure Code. First defendant had preferred a claim to the property attached by plaintiff, based on Exhibit V, which had been allowed under Order XXI, rule 60. Plaintiff, therefore, brought this suit, as he was bound to do by Order XXI, rule 63, to establish the right which he claimed of bringing the property to sale, as that of his judgment-debtors.

Whether it was the judgment debtor's property or not depends solely on whether

(1) 34 Ind. Cas. 778; 30 M. L. J. 565; 19 M. L. T. 390.

(2) 43 Ind. Cas. 651; 41 M. 612; 6 L. W. 750; 33 M. L. J. 705 (F. B.).

Exhibit V be upheld or set aside. The suit directly raises, and actually turns upon, the validity of the assignment by Exhibit V, and, in my opinion, it must be regarded as one properly instituted to set aside that transaction. That the plaint only asks in terms for a declaration that the property is liable to sale in execution of the decree is immaterial. The form the suit has taken is determined by the peculiar position held by plaintiff. The law declares that an attaching decree-holder against whom the claim of a third party is allowed *must* sue within a year of the date of the order to establish his right; failing which the latter is extinguished. It puts him in a specially unfavourable position as regards limitation as compared with an ordinary creditor; but, on the other hand, in prescribing the exact nature of his remedy it frees him from any other restrictions as to the nature of the suit to be brought which the latter may labour under. It seems to me impossible to hold that, as appellant's Counsel contends, he is bound to bring two suits, one in his individual capacity under Order XXI, rule 63, to save himself from limitation, and another as a representative of the whole body of creditors impugning the validity of the alienation.

Quite apart from the provisions of Order XXI, rule 63, the exceptional position of a judgment-creditor is generally recognized even in English Law: *vide* 15 Halsbury 89. In *Palaniandi Chetty* v. *Appavu Chettiar* (1) Coutts Trotter, J. points out the distinction; and although it was ignored by the learned Judges in *Hakim Lal* v. *Mooshahar Sahu* (3), this may have been because the point was not raised and the decision of the case proceeded on altogether different grounds. Our attention has been drawn to no case in which a suit by an attaching judgment-creditor was dismissed simply because it was not brought in a representative capacity.

Whether an ordinary creditor who seeks to set aside an alienation as infringing section 53, Transfer of Property Act, must sue in a representative capacity we are not called upon to say. I must not be understood to hold that he is under any such obligation.

(3) 34 C. 999; 11 C. W. N. 889; 6 C. L. J. 410.

The present suit is, in my opinion, certainly not liable to dismissal on account of any defect of form; and on the concurrent findings of fact arrived at by both the lower Courts, plaintiff is entitled to a decree. I can see no ground for questioning these findings or for holding that defendants should have been allowed further opportunity of adducing evidence.

I would, therefore, dismiss the second appeal with costs.

KRISHNAN, J.—I agree with my learned brother that this second appeal fails. But as the point raised by the appellant's Advocate Mr. Shenai, as to the necessity of bringing a representative suit under section 53 of the Transfer of Property Act, is an important one and has been argued at some length before us, I shall add a few words.

Both the lower Courts found on the evidence in the case that Exhibit V, the sale deed in favour of the appellant, was intended to defeat the vendor's creditors of which plaintiff was one and that the appellant was not a transferee in good faith. The Subordinate Judge went further and found that the sale was a sham or colorable transaction which was void and did not require to be avoided. This last finding has been attacked before us and it is difficult to support it on the facts of the case. But, in my view, it is an unnecessary finding and may be ignored, as the sale deed was properly treated as unenforceable against the plaintiff on the other two findings.

It was, however, argued by Mr. Shenai that a creditor was not entitled to avoid a transfer under section 53 of Transfer of Property Act unless he had brought a representative suit on behalf of all the creditors and got a decree setting aside the deed. He contended that as this was not such a suit, we must ignore the findings as to the fraudulent character of Exhibit V and treat it as in force and dismiss the plaintiff's suit. The result of his contention, if adopted, will be that we should be driven to uphold a sale-deed which has been proved to be fraudulent and voidable at plaintiff's option, and enforce it against him simply because he has not brought what is called a representative suit. Such a result seems

somewhat startling, but Mr. Shenai contended that his proposition was supported by decided cases both in this country and in England; we must, therefore, examine the authorities relied on. It is conceded that there is no statutory rule on the point.

Mr. Shenai relied in the first instance on the English rule regarding cases under the Statute of Elizabeth, 13 Elizabeth, Chapter 5; the provisions of that Statute are practically the same as that of section 53 of the Transfer of Property Act on this point. The English rule, as stated in Halsbury's Laws of England, Volume XV, page 89, is as follows :—"In an action to set aside an alienation under the Statute a creditor should sue on behalf of himself and all other the creditors of the grantor, except where he has recovered judgment for his debt, in which case he can obtain an order declaring the alienation as void against him and containing consequential directions for the satisfaction of his debt alone, without mention of any other creditors or their debts."

As pointed out by Coutts Trotter, J., in *Palaniandi Chetty* v. *Appavu Chettiar* (1), the Equity Courts used to insist that after getting a judgment in his favour the creditor should sue out a writ of *Fifa* or *elegit* before seeking their help to set aside a deed of transfer in equitable execution of his decree. If we adopt the rule in the restricted manner with the execution as above stated, the present suit will be a validly constituted one as it is by a judgment creditor who has attached immoveable property, which corresponds in a general way to suing out the writ of *elegit*. Apart from that, it has not been shown that the rule itself was ever used for the purpose of dismissing a suit by a single creditor. No authority has been cited where such a procedure was followed in England. The cases cited in support of the rule, *viz.*, *Bott* v. *Smith* (4), *Mouatt, In re*; *Kingston Cotton Mill Co.* v. *Mouatt* (5), *Cornish* v. *Clark* (6), *Ideal Bedding Co.* v. *Holland* (7) and *Reese River Silver Mining Co.* v. *Atwell* (8), when examined, show either that the suit was brought by the plaintiff himself on behalf of all the creditors or, as happened in the last case cited, the suit was allowed to be amended for the purpose in the trial Court. On the contrary in the case of *Maddever, In re*; *Three Towns Banking Co.* v. *Maddever* (9), though the suit was by a single creditor, no objection was apparently taken as to its form but the decree gave, as a matter of form, a declaration that the conveyance in question was void against the plaintiff and all other, if any, creditors of the debtor. It seems to me, therefore, that even in cases of ordinary creditors where the rule applied and not the exception, suits were not dismissed for not being brought on behalf of all the creditors, but were allowed to be amended in the trial Court or where the transfer was to be set aside, a decree was passed setting it aside on behalf of all the creditors.

As the provisions in the Statute of Elizabeth and section 53 of the Transfer of Property Act are practically the same, we may well adopt the English rule as a whole, but without giving any further scope to it either by allowing objections to the form of the suit being taken in appeal for the first time or by dismissing the suit because it is not in a representative character. As pointed out by Coutts Trotter, J., in the case in *Palaniandi Chetty* v. *Appavu Chettiar* (1) already cited, the rule has already been, to some extent, adopted in India.

There are indications in the Indian law to show that a creditor may bring a suit under section 53 of the Transfer of Property Act in his individual character without joining the other creditors or suing on their behalf. The wording of section 53 itself gives to each individual creditor who has been defeated or delayed a right to treat as voidable at his option a transfer that falls within it. He has not got to exercise his option in

(4) (1856) 52 E. R. 957; 21 Beav. 511; 111 R. R. 187.
(5) (1899) 1 Ch. 831; 68 L. J. Ch. 390; 80 L. T. 406; 47 W. R. 506.
(6) (1872) 14 Eq. 184; 42 L. J. Ch. 14; 26 L. T. 494; 20 W. R. 897.
(7) (1907) 2 Ch. 157; 76 L. J. Ch. 441; 96 L. T. 774; 14 Manson 113; 23 T. L. R. 467.
(8) (1869) 7 Eq. 347; 20 L. T. 163; 17 W. R. 601.
(9) (1884) 27 Ch. D. 523; 53 L. J. Ch. 998; 52 L. T. 35; 33 W. R. 286.

conjunction with his co-creditors. He thus gets a cause of action for himself and there is nothing in the Code of Civil Procedure to prevent him from seeking relief by himself.

Again, it would seem from the wording of the form of the decree under the Civil Procedure Code in a suit to set aside a transfer in fraud of creditors, see Form No. 13, First Schedule of Appendix D, a suit to which all the creditors are not parties either personally or otherwise is contemplated; for the form of the decree in *Re Maddever's case* (9) above cited is adopted. The use of the words "if any" shows that all the creditors are not before the Court.

I am, therefore, of opinion that there is no rule either in the English or in the Indian law justifying the dismissal of a suit brought under section 53, Transfer of Property Act, because it is not brought in a representative capacity. To avoid the difficulty of multiplicity of suits pointed out by Coutts Trotter, J., in *Palaniandi Chetty* v. *Appavu Chettiar* (1), I think the trial Court may, of its own motion, and should, if moved by the transferee-defendant, direct that a suit by a single creditor under section 53, Transfer of Property Act, should be amended so as to make it a suit on behalf of all the creditors, as was directed to be done in *Ishvar Timappa Hegde* v. *Devar Venkappa Shanbog* (10). The Court should also take care, when passing a decree setting aside a transfer evenin a single creditor's suit, to adopt the Form No. 13 in Appendix D above referred to. But if a suit had been proceeded with, without any objection being taken to its form on the ground of its not being on behalf of all the creditors and a decree had been passed setting aside a transfer as fraudulent, it seems to me that there is no justification for allowing such an objection to be raised for the first time in appeal or for ignoring the findings arrived at by the lower Court and dismissing the suit as not being of a representative character. Such a course will make the Court really an instrument for the support of a proved fraud.

(10) 27 B. 146; 5 Bom. L. R. 19.

I shall now refer to the Indian cases relied on by Mr. Shenai. To start with, he relid on the Madras cases reported as *Palaniandi Chetty* v. *Appavu Chettiar* (1) and in *Subramania Ayyar* v. *Muthia Chettiar* (2). The latter case is a Full Bench decision. The point decided in both these cases was that a defendant to an action cannot plead in defence his right to avoid a transfer under section 53 of the Transfer of Property Act; and that if he wishes to exercise his option under that section, he can do so only as a plaintiff and not as a defendant. If this question were *res integra*, I should find some difficulty in adopting this view. But it is not necessary to discuss it as the question before us now is quite different. The creditor here is not seeking to set up his right as a plea in defence but he has come to Court as a plaintiff and the question raised is, whether he should do so in a representative suit only. On that question I consider that neither case is an authority. In the judgment in the Full Bench case, this question has been expressly excluded from consideration. No doubt, there is an observation in it that the sale should be set aside "in proceedings properly instituted for the purpose." There is, however, no indication in the judgment what these proceedings are and as my learned brother who made the observation considers that the present suit is such a proceeding, it cannot be relied on as an authority against the respondent.

If *Palaniandi Chetty's case* (1) is examined, it will be found that Seshagiri Aiyar, J., definitely ruled that no representative suit was necessary. The view of Coutts Trotter, J., on the point is not quite clear; but it seems to be that a representative suit is necessary except in the case of attaching decree holders. The difficulty in understanding his view arises from the fact that he apparently overlooked that the case before him was that of a decree holder who had not only attached property but had obtained an order in his favour in the claim petition. From his judgment it would appear that he would have supported the decree in the case if he had not treated it as one of a mere decree holder. However that may be, if the learned Judge is to be taken as holding that a

creditor's suit should be dismissed in second appeal if it is not brought in a representative capacity, with all respect, I am unable to follow him. I am inclined to agree with the view of Seshagiri Aiyar, J., on this point, though I am doubtful about his view as to the applicability of section 11, Explanation VI of the Civil Procedure Code; for in a case which ends in favour of the transferees it may be difficult to hold that the creditors who were no parties to the suit are also barred from disputing the validity of the transfer.

The other cases relied on by Mr. Shenai are *Burjorji Dorabji Patel* v. *Dhunbai* (11), *Ishvar Timappa Hegde* v. *Devar Venkappa Shanbog* (10), *Hakim Lal* v. *Mooshahar Sahu* (3) and *Chatterput Singh* v. *Maharaj Bahadur* (12). The last one is a Privy Council ruling and the observation relied on is on page 217, "such an issue could be raised and such a decree could be made only in a suit properly constituted for that purpose and this suit was not so constituted either as to parties or otherwise." There is nothing to show that their Lordships meant by a properly constituted suit a representative suit; they do not say so. The facts of the case show that proper allegations had not been made and proper parties, *viz*, the transferors, had not been joined to enable the Court to set aside Chutterput's private purchase as fraudulent. The observation referred to is apparently connected with these circumstances. I am, therefore, not able to treat it as an authority on the point before us.

The observations in the next Calcutta case on page 1106* is no doubt in point in appellant's favour; but as the decision in the case was that the conveyance was a valid one and not liable to be set aside under section 53 of the Transfer of Property Act, they are in the nature of *obiter dicta*. It was also pointed out to us that the learned Judges had not noticed the exception recognized in the English Law to the general rule in favour of the attaching decree-holder, though the case before them was one of such a decree-holder. With every respect I am unable to follow their view that a suit under section 53 of the Transfer of Property Act is liable to be dismissed if not brought in a representative capacity. They have also not expressed a definite opinion whether the objection should be allowed to be raised for the first time in appeal, though they were apparently inclined to hold that it should not. As I have already stated, I am also of the same opinion that it should not be allowed.

I have already referred to the case in *Ishvar Timappa Hegde* v. *Devar Venkappa Shanbog* (10) and I am in agreement with the learned Judges there that suitable amendments may be directed by the trial Court to make a suit brought by a single creditor under section 53 of the Transfer of Property Act a representative suit. The actual decision in that case was that a creditor who has not obtained a decree in his favour is nevertheless entitled to sue under that section. In the case in *Barjorji Dorabji Patel* v. *Dhunbai* (11) the suit was not dismissed on the ground of its not being a representative suit, though no doubt the learned Judge was of opinion that the suit was liable to be dismissed on that ground. This opinion, however, was really only an *obiter dictum*, for it was found by him that plaintiffs were claiming under the transferor himself and could not, therefore, impeach his transfer. It was not a case of creditors at all and was not under section 53 of the Transfer of Property Act as the Act, did not then apply to Bombay. As already pointed out, the English authorities the learned Judge follows do not show that the suit should be dismissed if not brought in a representative character. I do not, therefore, consider that this case which, it will be noted, is the decision of a single Judge is an authority against the view I am taking and which I should follow.

I have thus, for the reasons above stated, come to the conclusion that even looking upon plaintiff as no more than an ordinary creditor of the vendor, the appellant's contention that we should now dismiss his suit should be overruled. In my view the Subordinate Judge was wrong in allowing the point to be raised for the first time in appeal,

(11) 16 B. 1; 8 Ind. Dec. (N. S.) 479.
(12) 32 C. 198; 2 A. L. J. 190; 9 C. W. N. 225 (P. C.).

*Page of 34 C.—*Ed.*

In this case, however, the decree of the lower Court can be supported on a much narrower ground as well; for the plaintiff here is not merely a creditor but an attaching decree-holder who was the defeated party in a claim petition filed by the transferee-defendant under Order XXI, rule 60, Civil Procedure Code. I have already pointed out that adopting the English rule he will have, as attaching decree-holder, a personal right to sue by himself to avoid the transfer. Again as the defeated party in a claim petition he has a statutory right of suit given to him under rule 63 and that suit must necessarily be one brought by himself alone and is not a representative suit. Under that rule he can sue to establish the right which he claims to the property in dispute, and that right is that it can be attached and sold for his decree. The present suit is exactly that suit and it cannot, therefore, be defeated by any rule of practice which has no statutory basis. As it is necessary to find whether Exhibit V is valid against him to give him the relief claimed, the Court, I think, was bound to decide that question and he could not be referred to another suit for the purpose. In fact the suggestion of the appellant's Counsel that after bringing this suit plaintiff should have at once launched another suit of a representative character to set aside Exhibit V and get a stay of this suit pending that suit, if he wanted to save it from dismissal, does not seem to me to be at all reasonable nor the course proposed necessary; it is perhaps even impracticable; I do not see why plaintiff should be driven to bring two suits for the same purpose. To hold that plaintiff cannot get the deed set aside except in a representative suit will be a practical denial of his statutory right of suit, a suit which he has to bring, as pointed out by my learned brother, within one year at the risk of losing his right to attach his property if he does not do so.

The only case cited to us which was a case of an attaching decree-holder defeated in a claim petition suing, is the one in *Hakim Lal* v. *Mooshahar Sahu* (3) already referred to. But in that case the learned Judges did not consider his special and peculiar right to sue in his own name under rule 63. I have already stated that I am unable to follow their view as to the character of the suit to be brought under section 53. It is, therefore, no authority against the respondent.

I agree with my learned brother that the appellant's contention that the present suit should be dismissed because it was not a representative suit on behalf of all the creditors fails and that the lower Courts were right on their findings in holding that Exhibit V was not valid against the plaintiff and in giving relief on that footing.

I agree the second appeal should be dismissed with costs.

Appeal dismissed.

M. C. P.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 569 OF 1918.

October 18, 1918.

Present :—Mr. Justice LeRossignol.

DEVI DIAL AND OTHERS—APPELLANTS

versus

SUNDAR DAS AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 36, 37—Alienation by insolvent, annulment of—Alienee, whether can prove just antecedent debts.

Where an alienation effected by an insolvent is annulled under sections 36 and 37 of the Provincial Insolvency Act by the Insolvency Court, the alienee may prove as an unsecured creditor just antecedent debts which existed before the fraudulent transfer but were included in the consideration therefor. [p. 721, col. 1.]

Miscellaneous first appeal from the order of the District Judge, Shahpur at Sargodha, dated the 5th November 1917.

Mr. *Ram Chand*, for the Appellants.

The Hon'ble Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—Certain alienations effected by insolvents were annulled under sections 36 and 37 of the Provincial Insolvency Act by the Insolvency Court and that Court's order was confirmed on appeal by this Court and the question now for decision is, whether the alienees, the transfers in whose favour have been annulled may prove as unsecured creditors, their claims represented by the

consideration for the annulled transfers. The District Judge has ruled that it is open to the transferees to prove genuine debts and there are cross appeals against that finding.

The creditors of the insolvent firm contend that the original debts due by the insolvents to the transferees were merged in the transfers, and that as the transfers were in fraud of the general body of creditors, they are null; further that in virtue of section 23 of the Contract Act, the consideration for them cannot form the basis of any claim.

The transferees' grounds of appeal are not intelligible, but Mr. Sheo Narain explained that the appeal refers to two items, one of Rs. 1,700 and the other of Rs. 703 (Transfers A1, C1 and C2), which the District Judge held must be treated as fictitious, having been so ruled by his predecessor. Mr. Sheo Narain, however, dropped his appeal, when it was pointed out to him that these items did not purport to be genuine antecedent debts, but to have been paid at the time when the annulled alienations were executed. Authority on the point involved in the creditors' appeal appears to be somewhat meagre, but it was laid down in *Myers, In re, Myers, Ex parte* (1) that a creditor cannot prove in bankruptcy for money paid by him to the insolvent in the course of carrying out a transaction devised in fraud of the general body of creditors. This decision is based probably upon the principle that no Court will grant relief, which reposes on a fraudulent transaction, but I can find no authority for the doctrine that just antecedent debts which existed before the fraudulent transfer but were included in the consideration therefor cannot be proved, and there appears to be no sound legal prohibition against their proof in bankruptcy.

For these reasons the District Court appears to have laid down for itself a correct rule, *viz*, to accept proof of all genuine debts due by the insolvent to the transferees prior to the execution of the now annulled transfers and to reject proof of monies paid at the time in part consideration of those transfers. The appeal is dismissed with costs.

Appeal dismissed.

(1) (1908) 1 K. B. 941; 77 L. J. K. B. 386; 15 Manson 85.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 172 OF 1918.

December 3, 1918.

Present :- Sir Henry Drake-Brockman, J. C.

MULCHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BISNU—DEFENDANT—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 41—Occupancy holding, sale of—Mortgage, simultaneous, by vendee in favour of vendor for part of consideration—Notice to landlord in respect of mortgage, absence of, effect of—Landlord, remedy of—Vendee, position of—Lien, whether exists—Transfer of Property Act (IV of 1882), s. 55 (4) (b).

B., an absolute occupancy tenant, after giving the landlord the notice prescribed by section 41 (2) of the C. P. Tenancy Act, sold on 2nd November 1903 his holding to *A.* and two others for Rs. 1,500, out of which Rs. 850 were paid in cash and for the balance of Rs. 650 the purchasers executed the same day a mortgage-deed without possession in favour of the vendor with a condition of foreclosure in case the amount remained unpaid after three years. On the 21st July 1917 *B.* obtained possession of the holding in execution of a final foreclosure decree obtained on the foot of the mortgage The landlords brought the present suit to eject him on the ground that the notice prescribed by section 41 (2), C. P. Tenancy Act, was not given before the mortgage was effected. For the defence it was pleaded, *inter alia*, that the sale and mortgage practically constituted one transaction, so that no separate notice was necessary:

Held, (1) that the sale and the mortgage were separate transactions and that no notice having been given to the landlords in respect of the mortgage, the defendant was liable to be ejected: [p. 722, col. 2.]

(2) that the statutory charge, which the defendant had under clause (*b*) of section 55 (4) of the Transfer of Property Act, was excluded by the express mortgage which the defendant not only took but foreclosed: [p. 723, col 1.]

(3) that the landlords were not restricted by section 41 (5) of the C. P. Tenancy Act to a remedy of pre-emption only. [p 723, col. 1.]

Appeal against the decree of the District Judge, Chhindwara, in Civil Appeal No. 169 of 1917, decided on the 22nd December 1917, arising out of Civil Suit No. 41 of 1917, in the Court of the Sub-Judge, Seoni, decided on the 26th September 1917.

Mr. *M. Gupta*, for the Appellants.

Messrs. *W. R. Puranik* and *K. K Gandhe*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought by the *malguzars* of Mauza Singai to recover possession of an absolute occupancy holding of which the defendant was the original tenant.

MULCHAND v. BISNU.

The trial Judge decreed the claim but his decree was reversed by the lower Appellate Court.

The history of the holding is as follows:—

The defendant Bisnu, who is the respondent in this Court, after giving the landlord the notice prescribed by section 41 (2) of the C. P. Tenancy Act, 1898, sold the holding, the rent of which was Rs. 20 2-0, to one Hiralal and two others for Rs. 1,500 on the 2nd November 1903. The sale-deed was duly registered and sets out that the land itself was conveyed and possession delivered to the buyers. The document, of which Exhibit D-1 is a certified copy, contains a clause to the following effect regarding the payment of consideration:—

"We have already received Rs. 50 in cash as earnest money. The purchasers have executed the mortgage deed in our favour and we have this day received Rs. 800 in cash. We have received the total amount of Rs. 1,500."

The mortgage-deed executed the same day by the purchasers provides for payment of Rs. 650 as principal along with interest in three instalments, three of Rs. 200 each and one of Rs. 50 and also for foreclosure should any balance remain unpaid. The document is explicitly described as a mortgage without possession. On the 21st July 1917 the defendant-respondent obtained possession of the holding in execution of a final decree for foreclosure obtained on foot of this mortgage. The landlords then sued to eject him on the ground that the notice prescribed by section 41 (2), C. P. Tenancy Act, was not given before the mortgage was effected.

For the defence it was pleaded, *inter alia*, that the sale and mortgage of the 2nd November 1903 practically constituted one transaction, so that no separate notice of the mortgage was necessary. This plea was overruled by the trial Judge on the ground that the notice actually given related solely to a sale by the original tenant. In the lower Appellate Court, the view taken was that the sale and mortgage together constituted a single transaction, the effect of which was that the defendant did not divest himself of all rights in his holding.

In this Court the contention on behalf of the landlords is that there was in express terms a complete sale so that the mortgage was effected by the purchasers in the capacity of tenants and is, therefore, voidable by the landlord in the absence of the notice prescribed by section 41 (2), C. P. Tenancy Act. For the respondent the view taken by the lower Appellate Court is said to be correct.

In my opinion there is no room for holding that the sale and mortgage should be regarded as constituting a single transaction. The language of both documents is perfectly plain and admits of but one meaning in each case. No question of interpretation can really be said to arise: see *Gujarmal Ramlal* v. *Sitaram Arjun* (1). The theory that the defendant in fact retained so much of the absolute occupancy right as corresponds to a security afforded by the mortgage is incompatible with the express language of the sale which constitutes the purchasers owners, recites delivery of possession and acknowledges receipt of the consideration in full. The effect of the sale, therefore, was to make the purchasers tenants in the place of the defendant. The effect of the mortgage was to leave the purchasers in the position of tenants while making over to the defendant a certain interest for the purpose of securing payment of a portion of the consideration. As pointed out in *Lakhmichand* v. *Ganpati* (2), in the case of a mortgage the ownership of the estate remains with the mortgagor and the expression 'equity of redemption' is misleading in so far as it implies that the interest of the mortgagor is something less than the interest of an owner.

In the present case the only notice given was one of intention to sell by the original tenant. The law requires a notice of intention to mortgage from the new tenants and this was never given.

A point raised for the defendant-respondent for the first time in the lower Appellate Court is again pressed here, namely, that he has a statutory charge under clause (*b*) of section 55 (4), Transfer of Property Act, and cannot, therefore, be ejected until the balance of the purchase-money is paid. In

(1) 3 N. L. R. 19 at p. 24.
(2) 14 C. P. L. R. 177 at p. 179.

this connection *Subrahmania Ayyar* v. *Poovan* (3) is relied upon. That case, however, is not in point, the parties being the vendor and the vendee. Moreover, the existence of the statutory charge appears to be excluded by the express mortgage which the defendant not only took but enforced to the extent of foreclosure: see *Webb* v. *Macpherson* (4). In *Abdulla Beary* v. *Mammali Beary* (5) it was held that the statutory charge is negatived even if a contract to the contrary arises by implication only. Again, it is not explained how the statutory charge can be held to revive after the vendor foreclosed his mortgage and so secured all that he was entitled to under the two contracts taken together.

It is also contended on behalf of the defendant-respondent that the landlord is restricted by section 41 (5) of the C. P. Tenancy Act to a remedy of pre-emption. To accept this view would be to depart from an interpretation of that provision which has long obtained in these provinces: see *Than Singh* v. *Chandu Lal* (6). It is certainly unfortunate for the respondent that he is in a worse position than if contenting himself with the statutory charge created by section 55, Transfer of Property Act, he had brought the holding to sale in enforcement of that charge. But he has in my view contravened an explicit provision of the law and must abide by the consequences. He will not be altogether without remedy, for his vendees may yet be reinstated in the holding under section 41 (b) of the C. P. Tenancy Act.

The decree of the lower Appellate Court is set aside and that of the trial Judge is restored. The defendant will pay the plaintiffs' costs in all three Courts.

Decree set aside.

(3) 27 M. 28.
(4) 31 C. 57 (P. C.); 30 I. A. 238; 8 C. W. N. 41; 5 Bom. L. R. 838; 13 M. L. J. 389; 8 Sar. P. C. J. 554.
(5) 5 Ind. Cas. 87; 33 M. 446; 7 M. L. T. 376.
(6) 6 Ind. Cas. 819; 6 N. L. R. 69.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 212 OF 1918.

March 23, 1918.

Present :—Mr. Justice Shadi Lal.

RALLA RAM—APPELLANT

versus

THE AMRITSAR MUTUAL RELIEF FUND, LIMITED—RESPONDENT.

Companies Act (VII of 1913, s. 202—Liquidation proceedings—Court, whether can rectify mistake.

A Judge conducting liquidation proceedings is not precluded from re-calling a wrong order and rectifying a mistake.

Miscellaneous appeal from the order of the District Judge, in charge of Liquidation Work, Lahore, dated the 4th January 1918, directing the examination of appellant under section 162 of the Indian Companies Act, 1882.

Lala *Moti Sagar*, R. S., for the Appellant.

Babu *S. K. Mukerji*, for the Respondent.

JUDGMENT.—The District Judge has passed an order under section 162 of the Indian Companies Act, 1882, summoning the appellant to appear in Court and give information concerning certain transactions entered into by him as the voluntary liquidator of the Company. Mr. Moti Sagar seeks to impeach that order on the ground that one of the matters to be enquired into by the District Judge has already been disposed of by a previous order passed by Bhai Umrao Singh, and that the District Judge is not competent to re-open the same question. I am not prepared to accede to this contention. Apart from the reasons given by the learned Judge, which, in my opinion, are sound, I consider that a Judge conducting the liquidation is not precluded from recalling a wrong order and rectifying a mistake, *vide* Civil Appeal No. 2421 of 1916. The judgment in *Mussoorie Bank, Limited* v. *Himalaya Bank, Limited* (1) lays down the rule that section 169 of the Indian Companies Act was not intended to refer to a case in which a Judge upon the discovery of fresh matter considers it expedient to pass a fresh order or to review an order passed by him. It is to be observed that this view of the matter is in accordance with the procedure followed by the English Courts

(1) 18 A. 54; A. W. N. (1893) 205; 8 Ind. Dec. (N. S.) 35.

in similar circumstances, *vide In re National Assurance and Investment Association, Ex parte Munday* (2).

For these reasons I do not think there is any sufficient reason for my interference with the order of the lower Court. I accordingly dismiss the appeal with costs.

Appeal dismissed.

(2) (1862) 31 Beav. 206; 54 E. R. 1117; 135 R. R. 406.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 121 OF 1916.

September 18, 1917.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

RAMADH BIBI AMMAL—DEFENDANT—APPELLANT

versus

KANDASAMI PILLAI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch I, Arts. 75, 132—Mortgage-bond, construction of Stipulation for payment of interest by instalments and of principal on a specified date and for payment of whole amount due with compound interest on default when creditor requires—Creditor, failure of, to exercise option—Prayer for compound interest in plaint—Cause of action, accrual of—Minor represented by guardian, decree against, whether binding on minor.

A mortgage-bond provided for payment of interest accruing due once in every six months and for payment of the principal amount on a specified date, *viz*, 14th May 1900. The document proceeded: "In default, we shall pay, whenever you require, the interest accruing due for the days overdue at the aforesaid rate and the principal amount. In case of default in the payment of interest according to the due dates, you may recover, whenever you require and without reference to the due date fixed for payment of the said principal amount, the aggregate principal and interest amount found due on adding to the principal the interest due every six months together with the interest due at the aforesaid rate on such aggregate amount." The mortgagee did not exercise his option of suing for the entire amount on the first default, but brought his suit within 12 years of the date fixed for payment of the principal asking for compound interest according to the stipulation in the bond:

Held, (1) that the mortgagee was not bound to exercise his option of calling in the whole amount on the first default; [p. 726, col. 1; p. 727, col. 1.]

(2) that as the mortgagee did not exercise his option as aforesaid, the suit was within time under Article 132 of Schedule I to the Limitation Act; [p. 726, col. 1; p. 727, col. 2.]

Narna v. *Ammani Amma*, 35 Ind. Cas. 418; 39 M. 981; 4 L. W. 77; 20 M. L. T. 176; (1916) 2 M. W. N. 125; 31 M. L. J 865, followed.

Sitab Chand Nahar v. *Hyder Malla*, 24 C. 281; 1 C. W. N. 229; 12 Ind. Dec. (N. S.) 854, not followed

Girindra Mohun Roy v. *Bacha Das*, 1 Ind Cas 49; 36 C. 394; 9 C. L. J. 226; 13 C. W. N. 1004, distinguished.

(3) that the demand for compound interest at the time of instituting the suit did not constitute such an overt act as to have a retrospective effect on the accrual of the cause of action, the clause for the recovery of the principal being independent from the stipulation for compound interest. [p. 726, col. 1 p. 727, col. 2.]

The words 'whenever you require' are not equivalent to 'forthwith' or 'immediately.' [p. 726, col. 1; p. 727, col. 2.]

Perumal Ayyan v. *Alagirisami Bhagavathar*, 20 M. 245; 7 M. L. J. 222; 7 Ind. Dec. (N S.) 174, not followed.

Karunakaran Nair v. *Krishna Menon*, 12 Ind Cas. 57; 36 M. 66; 10 M. L. T. 258, *Vythilinga Nadan* v. *Narayanasami Ayyar*, 16 M. L. J. 364 and *Netta Karuppa Goundan* v. *Kumarasami Goundan* 22 M. 20; 8 M. L. J. 167; 8 Ind Dec. (N. S.) 15, followed.

A minor is bound by a decree in a suit in which he is represented by a guardian *ad litem*, except where the latter acts fraudulently, or where his interests are adverse to that of the minor. [p. 726, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Tinnevelly, in Appeal Suit No. 455 of 1914, preferred against the decree of the District Munsif, Kovilpatti, in Original Suit No. 290 of 1912.

FACTS appear from the judgment.

Mr. *C. S. Venkatachariar*, for the Appellant.—The suit is barred. The defendant having made default in the payment of interest on a specified date, the cause of action accrued on the default for the entire amount then due. *Perumal Ayyan* v. *Alagirisami Bhagavathar* (1) and *Sitab Chand Nahar* v. *Hyder Malla* (2).

The fact that plaintiff has claimed compound interest shows that he has availed himself of the penal provision in the bond and he should be deemed to have exercised his option.

No waiver can be inferred from plaintiff's abstinence from filing the suit earlier or immediately on the occurrence of the default. *Girindra Mohun Roy* v. *Bacha Das* (3).

The exercise of the option by the plaintiff has nothing to do with the cause of

(1) 20 M. 245; 7 M. L. J. 222; 7 Ind. Dec. (N. S.) 174.

(2) 24 C. 281; 1 C. W. N. 229; 12 Ind. Dec. (N. S.) 854.

(3) 1 Ind. Cas. 49; 36 C. 394; 9 C. L. J. 226; 13 C. W. N. 1004.

action, which dates from the time when the money became due.

The suit bond was executed for a decree amount in the previous suit in which the defendant who was then a minor was not represented by a proper guardian. The decree is not binding on her.

Mr. *S. T. Srinivasagopalachariar*, for the Respondent.—The mortgagee, under the terms of the document, is not bound to sue immediately on the default. He may exercise his option to sue or not at his pleasure. If he does not exercise his option, the cause of action accrues only when the principal amount is payable.

The words 'whenever you require' in the mortgage bond do not mean immediately. See the recent decisions of the Madras High Court in *Karunakaran Nair* v. *Krishna Menon* (4) and *Vythilinga Nadan* v. *Narayana Sami Ayyan* (5) and No. 27 of 1916.

The prayer for compound interest in the suit cannot be traced back to the default by defendant and construed as an exercise of the option by plaintiff to fall back upon the penal terms in the bond. The stipulation is quite independent of the exercise of the plaintiff's option to sue.

The decree in the previous suit in which the defendant was represented by a guardian *ad litem* is binding on the defendant. It is not a matter for consideration in this suit whether that guardian was a proper guardian.

JUDGMENT.

SPENCER, J.—Suit upon a hypothecation deed. In second appeal three arguments were advanced, which are (1) that the suit is barred by limitation, (2) that defendant was not liable as the hypothecation bond was executed to discharge certain decree debts for which she was not legally liable, and (3) that the clause providing for compound interest was penal and should be relieved against.

The suit hypothecation bond provides for payment of the principal on 12th May 1900, and it is conceded that, if the Court vacation be excluded, the plaint was presented within 12 years of that date. But it is argued that, as the bond contains a clause that in default of payment of interest every 6 months the principal and interest will become immediately recoverable, the cause of action accrued upon the first default for all that then remained owing of the whole debt. The authorities relied on in support of this proposition are *Perumal Ayyan* v. *Alagirisami Bhagavathar* (1), *Sitab Chand Nahar* v. *Hyder Malla* (2), which followed *Hemp* v. *Garland* (6) and *Reeves* v. *Butcher* (7), and the *obiter dictum* of Seshagiri Aiyar, J., in *Narna* v. *Ammani Amma* (8) to the effect that if the mortgagee claimed interest at the enhanced rate it might well be argued that that became due when the first default was committed.

The important clauses in the suit document are in these terms:—"We shall pay in cash the interest accruing due from this date at the rate of Rs. 1-4-0 per cent. per mensem, once in every 6 months, and the principal amount on the 30th Chittarai of Andu 1075 (12th May 1900) and shall get back this document and the other documents given herewith. In default, we shall pay, whenever you require, the interest accruing due for the days overdue at the aforesaid rate, and the principal amount. In case of default in the payment of the interest according to the due date, you may recover, whenever you require and without reference to the due date fixed for the payment of the said principal amount, the aggregate principal and interest amount found due on adding to the principal the interest due every six months together with the interest due at the aforesaid rate on such aggregate amount." I read these clauses as creating a right in the mortgagee to recover at his option, in case of default in payment of interest regularly every six months, the principal and interest before the date fixed for payment of the principal. But nothing has come out at the trial to show that the mortgagee exercised his option in that way and made a requisition for payment of the principal at any time prior to the transfer of his interests to the plaintiff by the assignment of 8th January 1909, by which

(4) 12 Ind. Cas. 57; 36 M. 66; 10 M. L. T. 258.

(5) 16 M. L. J. 364.

(6) [illegible]; 12 L. J. Q. B. 134; 7 Jur. 262; 3 [illegible]; 1 D. & L. 828; 114 E. R. 994.

(7) [illegible]; 60 L. J. Q. B. 619; 65 L. T. 324, 325.

(8) [illegible]; 39 M. 981; 1 L. W. 77; 20 M. L. T. 17[illegible]; 2 M. W. N. 129; 34 M. L. J. 865.

date the principal had long become due under the other terms of the hypothecation deed. I think we should follow the recent decision of this Court in *Narna* v. *Ammani Amma* (8) so far as it decides that a mortgagee is not bound to take advantage of a default; and that the learned Judges of the Calcutta High Court who decided *Sitab Chand Nahar* v. *Hyder Malla* (2) were wrong in applying the principle of Article 75 of the Limitation Act, which deals with defaults on promissory notes and instalment bonds, to suits upon mortgages, which are governed by Article 132, when the mortgage bond contains a clause leaving it to the option of the creditor to enforce the provision for immediate payment of the whole.

The case of *Girindra Mohun Roy* v. *Bacha Das* (3) was one of an unregistered instalment bond which did not create a charge upon immoveable property. The finding that in the circumstances of that case which were governed by Article 75, mere abstinence of the plaintiff from bringing a suit to recover the whole amount did not amount to a waiver, will not affect the principles upon which *Narna* v. *Ammani Amma* (8) was decided and this suit has to be decided.

I am further of opinion that the words "whenever you may require," which occur in the suit hypothecation bond, should not be construed as equivalent to "immediately" or "forthwith"—which was the meaning given to the words "on demand" in *Perumal Ayyan* v. *Alagirisami Bhagavathar* (1) —and that in this respect we should follow the decision of this Court in *Gopanna Mannadiar* v. *Muttu Velmani Gopanna Mannadiar* (9).

In the absence of any overt act on the part of the plaintiff's assignor to indicate that he did at any time require payment of the principal amount before it became due in the regular course on 12th May 1900, I think that the suit is not time barred. I do not consider the demand for compound interest at the time of instituting the suit constitutes such an overt act as to have a retrospective effect on the accruing of the cause of action. Moreover, I read the clause for recovery of the principal as independent from the stipulation in the document for compound interest. The other two contentions may be briefly disposed of.

(9) No. 27 of 1916.

In the suits, Original Suits Nos. 11 of 1896 and 308 of 1897, in which decrees were obtained against the minor she was represented by her mother as guardian *ad litem*. It is not alleged that the guardian *ad litem* acted in fraud of the minor's interest or that her interest was adverse to the minor (in which case she might have been removed under Order XXXII, rule 9). The defendant is, therefore, bound by those decrees.

Lastly, in defendant's written statement she pleaded that, if she was liable at all under the suit hypothecation deed, the amount recoverable from her was only Rs. 732-3-10, and not Rs. 1,088-13 2 as claimed in the plaint.

As the Appellate Court's decree provided only for payment of the lesser amount of these two, it is not open to the appellant to contend now that even this amount should be reduced. The second appeal must be dismissed with costs.

KRISHNAN, J.—The chief question raised in this case is one of limitation. The material terms of the hypothecation deed sued on bearing on this question are set out by my learned brother in his judgment. It is conceded that Article 132 of the Limitation Act applies and that if time is taken to run from the due date fixed in the deed the suit is in time. Under that Article time begins "when the money sued for becomes due;" the question, therefore, for decision is when did the money become due in the present case, was it at the date fixed in the deed or, as the appellant contends, at the date of the first default? This depends primarily on the construction to be placed on the default clause in the deed, referring to non-payment of the six-monthly interest on the due date. The words used are "you may recover whenever you require." That clearly gives an option to the mortgagee to anticipate the due date and call in his whole money if he so chooses; but he is not bound to do so. It is not alleged that the mortgagee made any demand for his money before the due date. He apparently did nothing either to take advantage of his option or, on the other hand, to waive his right to do so. It seems to me that when a due date is fixed and an option is given to the creditor to

change it, it will be unreasonable to presume that he did change it when he did nothing at all to produce that effect. Plaintiff has sued on the footing that the due date has not been changed and to presume otherwise will be entirely to his prejudice now, as his suit will have to be dismissed. If there is evidence that he did exercise his option the position is clear; but in the absence of such evidence, I am not prepared to make any presumption to his prejudice.

The appellant has argued that the queswhen the money became due is independent of the question whether the mortgagee exercised his option or not, and he has relied on the case of *Sitab Chand Nahar* v. *Hyder Malla* (2). That would depend upon whether the exercise of the plaintiff's option was or was not a condition for the defendant's obligation to pay before the due date to arise. Defendant was not bound to pay unless the plaintiff required her to do so, on the terms of the document here. In the Calcutta case cited the learned Judges held that on the document before them the creditor's right to recover the whole money accrued to him at once on the default of the debtor and that he had only a right to waive his right to recover that money if he so chose; of course on that view when the creditor was not shown to have waived his right his cause of action began on the date of default. The terms of that document are not fully set out in the report; but if there was nothing in it to interfere with the creditor's option to call in his whole money on default, I am not prepared to follow the ruling as it is against the view of this Court in *Narna* v. *Ammani Amma* (8) which, with all respect to the Judges of the Calcutta Court, is, I think, correct. The principle that a man need not take advantage of a default clause in his own favour is, it seems to me, overlooked in the Calcutta case.

Furthermore, in the present case money is to be paid by the defendant only on the mortgagee requiring her to do so. The words "when you require" have been held to imply a condition in *Nettakaruppa Goundan* v. *Kumarasami Goundan* (10) and in the recent case of *Goppanna Mannadiar* v. *Muttu Velmani Goppanna Mannadiar* (9). The interpretation put on the words "on demand" in a hypothecation deed in the earlier Madras case cited for the appellants, *Perumal Ayyan* v. *Alagirisami Bhagavathar* (1) *viz.*, that it is equivalent to "forthwith", has not been adopted in the later cases. See also *Karunakaran Nair* v. *Krishna Menon* (4) and *Vythilinga Nadan* v. *Narayana Sami Ayyan* (5). I am, therefore, unable to treat that case as an authority and must follow the more recent decisions of this Court. "You may recover whenever you require" is conceded to be tantamount to "We shall pay whenever you require."

For the above reasons I hold that the plaintiff's cause of action arose only on the due date fixed and I agree that the suit is not barred by limitation.

The appellant raised a further argument that the plaintiff having sued for compound interest which became payable only on default, he should be taken to have exercised his option based on the default and, therefore, his cause of action for the whole money should also be taken to have arisen on the date of default. It is difficult to follow this argument as, on the terms of the deed, the enhanced interest becomes payable on default quite independently of any exercise of his option by the mortgagee; and, therefore, his claim for such interest cannot be treated as any indication of his having exercised his option to call in his full amount within the due date. Reliance was placed on the observation of Seshagiri Aiyar, J., in *Narna* v. *Ammani Amma* (8). But that is to the effect that "if the claim is for enhanced interest it may well be argued that that became due when the first default was committed." The observation has no reference to the principal sum. I read it as referring to that portion of the enhanced interest which accrued for the period anterior to the due date fixed for the payment of the principal, and possibly such interest may be argued to be barred. Such a question, however, is not raised in this case and therefore, need not be considered.

Appellant next contended that, on a proper construction of the hypothecation deed, interest on interest accrued due before the due date of 12th May 1909, was alone payable and not compound interest generally incurred by the plaintiff. The language of the deed is ambiguous and is

(10) 22 M. 20; 8 M. L. J. 167; 8 Ind. Dec. (N.S.) 15.

capable of this construction, though the construction that it gave compound interest generally is also possible. It is not necessary to decide the question on the language of the deed, as defendant admitted in her written statement that on a proper calculation of the money due under the deed Rs. 732-3-10 were due and that as the appellate decree is given on that footing, she cannot be heard in second appeal on any question intended to reduce the amount still further either on the ground of construction or on the ground that the provision as to compound interest is a penal one. The provision for compound interest from the date of default is not necessarily a penal one.

It was finally urged that the suit mortgage, which was executed by the defendant's guardian to save her property from being sold in execution of the decree obtained against her with her mother as guardian *ad litem*, should be held to be not binding on her, because her mother was not a proper guardian for her in that suit. The question whether a guardian *ad litem* is a proper guardian or not is for the Court trying that suit to decide. Defendant cannot be allowed to raise the objection now, particularly as no allegation of fraud or legal capacity of the guardian is made

I agree. The second appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2936 OF 1918.

June 7, 1919.

Present:—Mr. Justice Fetman.

JAWAND SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUHAMMAD DIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 55—Injunction—Noise, whether sufficient cause for issue of injunction—Nuisance—Acts of several persons constituting nuisance—Liability of all concerned—Calling of azan, whether nuisance—Inherent right.

Mere noise alone, on a proper case of nuisance being made out, is a sufficient ground for an injunction. [p. 729, col. 2.]

When a man, who is entitled to a limited right exercises it in excess so as to produce a nuisance and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it altogether within its proper limits. [p. 730, col. 1.]

The acts of two or more persons may, taken together, constitute such a nuisance that the Court will restrain all from doing acts constituting the nuisance, although the annoyance occasioned by the acts of any one of them, if taken alone, would not amount to a nuisance. [p. 730, col. 1.]

Plaintiffs sued for the issue of a perpetual injunction restraining defendants from preventing plaintiffs from calling out the *azan* and praying in their mosque. It appeared that the defendants created noises and disturbances at the time of the calling out of the *azan* and at the time of the subsequent prayers, and the Court found that it was done maliciously with the sole purpose of annoying and obstructing the plaintiffs in their religious observances and ceremonies:

Held, (1) that the defendants did not have an unlimited right to blow conches or beat drums, nor could each of them plead that the little noise created by him personally did not amount to a nuisance; [p. 730, col. 1.]

(2) that the plaintiffs had an inherent right to call out the *azan* from the mosque; [p. 729, col. 2.]

(3) that the plaintiffs were entitled to obtain an injunction [p. 730, col. 2.]

Christie v. *Davey*, (1893) 1 Ch. 316; 62 L. J. Ch. 439; 3 R. 210, followed.

Second appeal from the decree of the District Judge, Amritsar, dated the 31st May 1918, affirming that of the Subordinate Judge, First Class, Amritsar, dated the 28th February 1918, decreeing the claim.

Lala *Balwant Rai*, for Bakhshi *Tek Chand*, for the Appellants.

Dr. *Khalifa Shuja-ud din*, for Mr. *Abdul Rashid*, for the Respondents.

JUDGMENT.—Several questions of interest and possibly of importance to the Muhammadan community arise in this second appeal and although the facts found are such that it is reasonable to suppose that owing to religious antagonism between Hindus and Muhammadans, similar occurrences have taken place in the past, there are apparently no published Indian decisions directly in point.

The facts necessary to be stated are that in a village occupied by about 600 Hindus and a little over 100 Muhammadans there are two mosques, one, unconnected with the present case, is situate just outside the *abadi*, and the other, with which the case is concerned, is an ancient building

erected about 200 years ago inside the village. It appears that the ancient mosque fell out of repair and in recent years has been repaired and was used as a school and for other semi-religious purposes, but more recently it was used for prayers. The Hindus objected to the calling out of the *azan*, a serious riot took place between the Hindus and Muhammadans and criminal proceedings were instituted but, on the intervention of the District Magistrate, the dispute was ended, for the time being, by a compromise, to which two of the present plaintiffs were parties, whereby it was agreed that the Muhammadans should pray in the ancient mosque but that there should be no calling out of the *azan*. This agreement, whether for good reasons or not, has not been observed by the Muhammadans, with the result that the defendants-appellants and other Hindus blew conches, beat drums and generally created noises and disturbances at the time of the calling out of the *azan* and at the time of the subsequent prayers. Three of the Muhammadans instituted a suit for an injunction against the defendants restraining them from interfering with the calling out of the *azan* and praying in the ancient mosque. The Hindus denied that the building was a mosque and that the plaintiffs had any right to pray there, and it was also denied that they had interfered with the exercise of religious ceremonies by the plaintiffs. The first Court granted the injunction and the lower Appellate Court held that the building continued to retain its character as a mosque, that the defendants had taken part in preventing the use of the building as a mosque and more particularly as regards the calling out of the *azan*, that the conches had not been blown in connection with any religious ceremony of the Hindus, that the acts complained of had been committed solely for the purpose of stopping the call of the *azan*, and that the defendants were not entitled to create a disturbance while the *azan* was being called out, by acts of the nature complained of and, therefore, dismissed the appeal.

On behalf of the appellants it is contended that the compromise made by the Muhammadans bars the present suit, but it is unnecessary to discuss the effect of that compromise, because Muhammad Bakhsh, one of the plaintiffs, was no party to the compromise and it is not shown, or argued, that such an arrangement has any binding legal effect. The next contention is that the plaintiffs have no inherent right to have the *azan* called out and that the exercise of that right for two years only is not sufficient to create the right. It was suggested that 20 years might be considered sufficient to create the right by way of an easement, and it was pointed out that the Hindu defendants had brought no suit to restrain the calling out of the *azan*. I do dot think this argument can be taken seriously. It must be conceded that there is an inherent right to call out the *azan* from a mosque. It has nothing to do with the subject of easements. It has not been claimed, or urged, that the calling is itself a nuisance and it is obvious that the objection of the Hindus is not to the noise of the call but to its subject matter. Apart from a mosque, any person has the right to call out from his property provided that the noise he makes does not become a nuisance by reason of its continuity and that the subject-matter of the call does not constitute an offence.

It is clear that the conches were not blown at a temple or *gurdwara* in pursuance of any religious ceremony, and that the noises were maliciously made at the times of calling out of the *azan* for the sole purpose of frustrating the object of the call as found by the lower Appellate Court, and the real point for consideration is, whether the acts mentioned constitute a nuisance and, if so, whether the plaintiffs are entitled to the injunction prayed for.

Counsel have cited no authority on the subject. As pointed out in Kerr on Injunctions, 5th Edition, page 203, the proposition that mere noise alone will, on a proper case of nuisance being made out, be a sufficient ground for an injunction, is well established. The inconvenience caused is not one of a trifling nature of which no reasonable man should complain, nor is the nuisance one of a temporary or occasional character. Though it may be said that the blowing of conches, or beating of drums on isolated occasions of the calling out of the *azan* would not amount to such

a nuisance as would necessitate the interference of a Court by injunction, yet, by their continuance and constant repetition, a sufficiently substantial case for such interference would be made out. There is every likelihood of their continuance Again, as pointed out in Kerr on Injunctions, page 156, when a man who is entitled to a limited right exercises it in excess so as to produce a nuisance and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it altogether within its proper limits. The Hindu defendants have not an unlimited right to blow conches and beat drums as claimed by them in this Court. Nor can each of them plead that the little noise made by him personally at only one time of the day, or even at intervals of days, but at the time of the calling out of the *azan*, does not amount to a nuisance. The defendants had a common intention, and *Lambton* v. *Mellish* (1) is an authority for holding that the acts of two or more persons may, taken together, constitute such a nuisance that the Court will restrain all from doing acts constituting the nuisance, although the annoyance occasioned by the acts of any one of them, if taken alone, would not amount to a nuisance. That case related to the nuisance caused by a number of barrel organs.

It has been established, by a current of the highest English authorities, "that what makes life less comfortable and causes sensible discomfort and annoyance is a proper subject for injunction," whilst certain decisions show that an injunction may be issued even where the defendant had acted reasonably. Such a case is *Broder* v. *Saillard* (2), where it is explained that it is no answer to say that the defendant is only making a reasonable use of his own property and the law is stated as follows:—"I take it the law is this, that a man is entitled to the comfortable enjoyment of his dwelling house. If his neighbour makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it." The present case is a much stronger one for the issue of an injunction, because the nuisance caused by the Hindu defendants is not a reasonable exercise of their rights. Their actions break what Lord Bramwell has called "the rule of give and take; live and let live."

The judgment in *Christie* v. *Davey* (3) is, I think, very pertinent to the present case. In that case a teacher of music, living in a house, gave lessons in music extending over seventeen hours in a week; there was, also in the same house, practising on the piano and violin and singing and musical entertainments sometimes extended to eleven at night. These facts were held not to constitute a legal nuisance of which the occupier of the adjoining house was entitled to complain, but an injunction was granted to restrain the occupier of the adjoining house, who had asserted, as the defendants assert here, that he had a perfect right to make the noises complained of, from causing any sounds or noises in his house to vex or annoy the occupier of the first house, the Court being satisfied that he had been making noises on musical instruments and otherwise maliciously for the purpose of annoying the occupier of the first house. A similar state of things exists in the present case. The acts of the Muhammadans objected to by the Hindus do not constitute a legal nuisance of which they can rightly complain, whilst the acts of the Hindus are maliciously done for the sole purpose of annoying and obstructing the Muhammadans in their religious observances and ceremonies.

The powers of the Courts in India under the Specific Relief Act are no less than the powers of the Courts in England, whilst in some respects such powers are wider. I hold, therefore, that the plaintiffs respondents are entitled to an injunction to restrain the defendants-appellants from committing the nuisance complained of. I am, however, not satisfied with the form of the injunction granted by the lower Courts, which is that the defendants do not henceforth prevent the plaintiffs from using the building in suit as a mosque and from praying

(1) (1894) 3 Ch. 163; 63 L. J. Ch. 929; 8 R. 807; 71 L. T. 385; 43 W. R. 5; 58 J. P. 835.

(2) (1876) 2 Ch. D. 692; 45 L. J. Ch. 414: 24 W. R. 1011.

(3) (1893) 1 Ch. 316; 62 L. J. Ch. 439; 3 R. 210.

therein and from calling out of the *azan* therein, and I will amend the same.

For the above reasons I dismiss the appeal on the merits with costs, but technically accept the same and amend the decree of the lower Appellate Court by granting the plaintiffs an injunction restraining the defendants from blowing conches, beating drums and otherwise making noises which interfere with, or interrupt, the use of the mosque by the plaintiffs as a place of worship according to Muhammdan usage or custom, including the calling out of the *azan*, but this injunction shall not restrain the defendants from such acts when done in connection with their own religious ceremonies, social events or other necessary temporary causes and when the time is not maliciously and intentionally selected to clash with the religious observances and worship of the plaintiffs at the said mosque, though in fact such acts may, on occasions, interrupt or interfere with such observances and worship.

Appeal dismissed;
Decree amended.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 307-B OF 1915.

August 15, 1916.

Present:—Mr. Mittra, Offg. A. J. C.

SHAMRAO AMRUT DESHPANDE—PLAINTIFF—APPELLANT

versus

Sheikh IMAM—DEFENDANT—RESPONDENT.

Hyderabad Assigned Districts Land Revenue Code of 1896, *Chap. XVIII—Pre-emption—Sale-deed, price mentioned in, whether pre-emption price. Presumption.*

Under the Berar Land Revenue Code the price stated in the sale-deed is *prima facie* the price for pre-emption, unless it is shown that it has not been fixed in good faith. [p. 732, col. 2.]

Appeal against the decree of the Additional District Judge, Akola, in Civil Appeal No. 111 of 1914, dated the 12th May 1915, arising out of Civil Suit No. 42 of 1912, decided by the Senior Subordinate Judge, Akola, on the 27th October 1913.

Mr. *G. V. Kukade*, for the Appellant.

Mr. *G. L. Subhedar*, for the Respondent.

JUDGMENT.—One Raoji and his brothers owned a half share in three survey numbers. The other half share belonged to one Bhagwan and his brother Baliram. On the 19th of March 1909 the plaintiff-appellant purchased the half share of Raoji and his brothers for Rs. 2,000. On the 27th of June 1911 the defendant-respondent purchased from Bhagwan the remaining half share for a consideration which is recited to be Rs. 1,500, the exact nature of which will have to be determined later. On the 6th of July 1911, the plaintiff purchased the $\frac{1}{4}$th share of Baliram for Rs. 550. It has been now decided in another suit that Bhagwan had no right to sell anything more than his own $\frac{1}{4}$th share, so the plaintiff now owns $\frac{3}{4}$ths, and seeks to pre-empt the remaining $\frac{1}{4}$th.

The property sold was subject to a mortgage, dated the 23rd May 1907, for Rs. 1,000 in favour of one Ganpat Ekoji Ghule. This was executed by both Raoji and Bhagwan. This mortgage has not been paid off by the defendant. The first Court held that the plaintiff is entitled to pre-empt on payment of Rs. 250 on the ground that the defendant paid his vendor Bhagwan only Rs. 500. The lower Appellate Court has held that the plaintiff is bound to pay Rs. 750, half the amount of the consideration recited in the sale-deed. The plaintiff has filed this appeal.

The sale-deed in favour of the defendant recites that there is a mortgage on this property in respect of which Bhagwan, the vendor, is liable to the extent of Rs. 500 for principal and the total amount of Rs. 1,000, including interest, that a *hawala* was taken by the purchaser for this debt, and the remaining amount of Rs 500 was paid in cash. A certified copy of the mortgage referred to has been filed as Exhibit P-7. It is a mortgage by conditional sale, and, therefore, does not contain any personal covenant. The term *hawala* seems to have been loosely used [illegible] is not alleged or suggested that [illegible] was a party to this arrangement.

The ques[illegible] have to decide is what is [illegible] for the sale. Now Bhagwa[illegible] sell the equity of redemption [illegible] the mortgage in favour of Raoji. Now this he received Rs. 500 as

consideration. The defendant, no doubt, agreed to clear off an incumbrance on the property. The amount due on the mortgage could only be ascertained in Berar, as the rule of *damdupat* prevents the recovery of more than double the principal amount. The covenant on the part of the defendant to pay off this amount was superfluous. It was an obligation attached to the property which the defendant bought from Bhagwan. As I have already said, Ganpat Ekoji's mortgage was one by conditional sale, and no personal claim could have been made against the mortgagor, or against his assignee, even if the term '*hawala*' had been used in its strict sense. I hold that the price for the sale of the equity of redemption was only Rs. 500. It is urged on behalf of the respondent that his vendor could enforce the payment of Rs. 1,000 to Ghule, if he is himself compelled to pay the amount But I have already shown that the vendor could not be compelled to pay the amount personally. If he voluntarily paid the amount after ceasing to be the owner of property on which the amount is charged, he could scarcely recover under section 69 of the Contract Act. Could he sue the defendant for damages for breach of a covenant? The answer depends upon whether the vendor would suffer any loss. I am of opinion that he could not. It seems to me clear that the covenant simply meant that the property was not sold free of incumbrances, and that the purchaser's title was subject to this mortgage. I hold that the price fixed for the sale of the equity of redemption is Rs. 500 and as the plaintiff is pre-empting only the equity of redemption, the consideration should be deemed to be Rs. 500. If the defendant had been in a position to transfer the property free of incumbrances, he would have been entitled to the full amount, and this he could do if he had already redeemed the mortgage and thus acquired the rights of the mortgagee. It is the plaintiff who will have to pay off the mortgage if he pre empts. Both the Courts below have assumed that the plaintiff is only liable to pay half the consideration for the sale, whether it is Rs. 1,500 or Rs. 500. But the point has not been discussed in the judgment of either Court. In *Modhub Chunder* v. *Tomee Bewah* (1) Kemp and Markby, JJ., held that a person claiming to exercise his right of pre-emption must take the bargain as it was made, and any apportionment of the purchase-money is altogether illegal. But a different view has been taken by the Allahabad High Court in *Muhammad Latif* v. *Gobind Singh* (2). I am not concerned here with the Muhammadan Law, or the Customary Law regarding pre-emption. I have to interpret the provisions of Chapter XVIII of the Hyderabad Assigned Districts Land Revenue Code, 1896. Under this Code, a right of pre emption accrues when the interest or any part of the interest of a co-occupant in any survey number is transferred. The co-occupant proposing to sell must give notice to all other co-occupants of the price at which he is willing to sell. Upon such notice within two months from the date of its service, the pre-emptor must deposit the "price aforesaid" with the Tahsildar. The right of pre-emption also may be enforced by a suit, if notice is not given and the proposed sale is completed. It is only upon proof that the price stated in the notice or the price mentioned in the sale-deed was not fixed in good faith that the Court is to fix such price as appears to be the fair market-value of the interest proposed to be sold, or sold. It would, therefore, seem the price fixed is *prima facie* the price for pre-emption, unless it has not been fixed in good faith.

In the present case Bhagwan was actually in possession of the eight-annas share, which he and his brother Baliram had inherited from their uncle. He had managed to keep his brother out of possession for nearly six years and had, therefore, a possessory title over his separated brother's share. The purchaser obviously knew of the existence of this brother as a co heir. If he has really paid Rs. 500 for Bhagwan's interest, as found by the Courts below, then it is difficult to hold that the price was not fixed in good faith. It cannot be assumed that the defendant with knowledge that title to four annas share was open to doubt has paid an equal amount for it, as he has paid for the portion over which

(1) 7 W. R. 210.

(2) 5 A. 382; A. W. N. (1883) 66; 3 Ind. Dec. (N. S.) 334.

his vendor had a good title. No proportionate abatement can, therefore, be made in this case. The Berar Code allows the Court to determine the market value only when the price has not been fixed in good faith. There is no reason to suppose that the defendant paid an inflated price with the object of defeating the plaintiff's right of pre emption. I hold, therefore, the plaintiff is bound to pay Rs 500 as the price of pre-emption. A fresh decree will be drawn up in modification of the lower Court's decree by allowing the plaintiff to pre-empt on payment of Rs. 500 within three months from this date with proportionate costs throughout.

Decree modified.

PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.

APPEAL FROM APPELLATE DECREE No. 23 OF 1917.

April 9, 1918.

Present:—Mr. Justice Chapman and Mr. Justice Roe.

ANANTARAM BOHIDAR - DEFENDANT —APPELLANT

versus

GANESHRAM BOHIDAR AND ORDERS— PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 115—Profits, account of, suit for, against lambardar by proprietors—Limitation, commencement of.

A suit by the proprietors of a village against a *lambardar* for an account of the profits of the village management must be brought within the period prescribed by Article 115 of Schedule I to the Limitation Act, and, inasmuch as the *lambardar* is the agent of the proprietors bound by an implied contract to render an account at the end of each agricultural year, the period of limitation commences to run on the date upon which the account should have been rendered under the implied contract. [p. 734, col. 1.]

Appeal from a decision of the Subordinate Judge, Sambalpur, dated the 7th December 1916, modifying that of the Munsif, Sambalpur, dated the 30th June 1916.

Mr. *B. C. Bose*, for the Appellant.

Mr. *Biswanath Sinha*, for the Respondent.

JUDGMENT.

CHAPMAN, J.—This appeal arises out of a suit for an account against a Lambardar. The plaintiffs claim to hold a ten-anna share in the village between them. It was alleged that the defendant had a one anna share in the village but that he was the manager of the village and was the customary agent managing the village on behalf of all the co sharers and rendering accounts to them of the profits of the village management. The plaint alleged that certain sums had been realized on account of village profits during the previous six years. The plaintiffs asked for an account and alleged that their causes of action had accrued on the 1st June in each year since the year 1910. The defendant contested the suit on various grounds with which we are not now concerned. We are asked to interfere in second appeal on one ground only, and that is the ground of limitation. Both the Courts below have held that the period of limitation is six years under Article 120 of the Second Schedule to the Limitation Act. In taking this view the lower Courts followed the decision of the Judicial Commissioner of the Central Provinces in *Mohammad Farrukh* v. *Kadir Ali Khan* (1). No doubt that decision is authority for the view which has been taken by the Courts below. After giving the matter very careful consideration, and with all respect to the learned Judicial Commissioner, we are of opinion that case was wrongly decided. It is true that a Lambardar is appointed by the Government, but that appointment is merely for the purpose of representing the proprietary body in its relation to the Government. The duties imposed upon a Lambardar under the Central Provinces Land Revenue Act are concerned only with the relations of the proprietary body to the Government. In so far as, for the purpose of convenience, the proprietary body permit the Lambardar to collect rents and to manage the village on their behalf, he is their agent and he has been held to be their agent in a series of rulings of the Central Provinces Courts referred to in the Munsif's judgment and in *Sheoba* v. *Simaria* (2). He is also described as a customary agent in the plaint. We have no doubt that in fact he is, as the agent of the proprietary body,

(1) 10 C. P. L. R. 38.
(2) 2 C. P. L. R. 171.

bound by an implied contract to render an account at the end of each agricultural year, that is to say, on the 1st of June every year. It is clear, therefore, that Article 89, or rather Article 115 applies, and it has been held that where an agent is under contract to render a yearly account, his liability to account commences on the date upon which the account should have been rendered under the implied contract, and the period of limitation of three years commences from that date. In these circumstances we are of opinion that the period of limitation was three years commencing with the 1st of June 1913, and that the Lambardar was liable to render an account for the agricultural year ending on the 1st June 1913, and for the subsequent years up to the 1st June 1915, prior to the institution of this suit. We direct that the decree of the lower Court be modified accordingly and that the costs should be in proportion to the success throughout.

ROE, J.—I agree.

Decree modified.

MADRAS HIGH COURT.

CIVIL APPEAL No. 220 OF 1917.

August 20, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF CHINGLEPUT DISTRICT—DEFENDANT No. 1—APPELLANT

versus

M. E. SRIRANGACHARIAR AND OTHERS—PLAINTIFFS NOS. 1 TO 3, 5 AND 6 AND DEFENDANTS NOS. 2 TO 10—RESPONDENTS.

Water rights—Irrigation of lands in Aiyan village from Government tank—Waste lands, assignment of—Reclamation—Preferential right of owners of lands already under cultivation when tank unable to give normal supply—Presumption.

In the case of lands irrigated by a Government tank, the owners of wet lands have a preferential right to the supply of water in seasons when the tank cannot yield the normal supply over the assignees of waste lands which were subsequently brought under cultivation. [p. 735, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Chingleput, in Original Suit No. 12 of 1916 (Original Suit No. 38 of 1914 on the file of the District Court, Chingleput).

Mr. *V. Ramesam* (Government Pleader), for the Appellant.

Mr. *T. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.—This is an appeal by the Secretary of State against the decision of the Subordinate Judge of Chingleput granting the Mirasidars of the village of Damal certain preferential rights in regard to the water supply of their lands. The suit of the Mirasidars was based on the allegation that, as Mirasidars, they were entitled to certain immemorial rights. In this Court the claim was limited to easement rights arising from long use of the water of the channel and of the tank.

There are two sources of irrigation for the village. One is a Kasam or spring channel taking its source in the North Arcot District and irrigating solely the fields in Damal. In regard to this channel it was admitted by the learned Government Pleader that the Mirasidars of the village have all along been maintaining it in proper condition. The other source of irrigation is the tank. The Kasam or the channel passes along the northern *bund* of this tank. During the flood season when the tank is full the channel does not appear as a separate source of irrigation. But during the major portion of the year it is distinct from the tank and irrigates certain lands exclusively. When the tank is full no question of preferential right can arise. It is only when water goes below a particular level that difficulties are felt about the water supply. It was conceded that when there is the normal rainfall no difficulty is felt throughout the year in irrigating all the fields properly. But during the years when the rainfall is below the average, which happens only once in ten years or more, the question arises as to which of the fields in the village should have a priority of water supply.

It is common ground that originally the village had only 520 acres of cultivable land, which were divided into about 163 shares among the Mirasidars of the village. In addition to these lands the Mirasidars

had also some Samudayam lands, the income of which was shared by them in proportion to their holding. There was a long tract of unassigned waste in the beginning. These lands were subsequently assigned by Government on Darkhast. These have been technically known as Kaipath lands as opposed to the Pangu lands, which term denoted the 520 acres already referred to. At first the Mirasidars had practically all the waste lands assigned to them. We find in the year 1860 the total average of these lands was about 730 acres. Since then further assignments have been made and the present Ayacut of the village is nearly 2,500 acres. In these circumstances it seems to us that the presumption is the owners of the lands which were originally wet acquired a preferential right to water supply over lands which were subsequently brought under cultivation.

Looking at the question from another point of view the same result follows. Mr. Narasimha Aiyangar, in his very clear analysis of the nature of the cultivation in this village, drew our attention to the following facts. There are five blocks of land into which the original Pangu lands were divided. The blocks were known as Thenkazhani, Keezhkazhani, Velangadu, Perithipattu and Puthucherry. In Thenkazhani which is more favourably situated than the other blocks, there are about a hundred acres of double crop lands. The first crop cultivation in this block begins in or about April and is harvested in September. The second crop begins in October. In Keezhkazhani there are about two hundred acres of double crop lands. In this block the first crop is cultivated in July or August and is reaped in November. The second crop cultivation begins in December.

In the other three blocks there are no second crop lands. In these lands and in the Kaipath lands cultivation begins in September for the only crop grown on them. It was said that in the Pangu lands of the three remaining blocks, the cultivation is a few days earlier than in the Kaipath lands. Thus we find that about February, which is generally the season when the water begins to go down in the tank, the cultivators have to depend largely upon the spring channel. At this period the second crop in Thenkazhani will be about four months old, and the single crop in the other block and in the Kaipath lands will be five months old. Therefore, the necessity for a regular supply of water will be felt more in Thenkazhani and Keezhkazhani than in the Kaipath lands. The mode of cultivation being as we have above indicated, it seems to us that if there is to be a claim for preferential treatment, as there must be when the supply is insufficient, the three and four months' crops should have the preference over crops which are very nearly ready for harvesting. Looking at the question from any point of view, it seems to us that the claim of the Mirasidars to a preferential right in respect of their double crop lands is established. They are also entitled to take water to the single crop lands in the three other blocks in preference to the Kaipath lands.

The learned Government Pleader suggested that, whatever may be the right of the Mirasidars to the exclusive use of the Kasam water, the tank water should be equally distributed. His contention was that when the water falls below the fourth sluice, all the sluices in the tank should be kept open and that no attempt should be made to shut any of these sluices with a view to taking more water through the fourth sluice. If we accede to this contention, it would result in denying the preferential right which we have held that the Mirasidars possess. We, therefore, think that the Subordinate Judge, who has written a careful judgment, has come to the right conclusion on the question. The only modification that we think necessary to make in his decree is to define more precisely the meaning of the expression "in times of scarcity." In order that there may be no future disputes, we substitute the words "when the water goes below the fourth sluice" for the words "in times of scarcity" in line 11 of page 14 in the decree of the Subordinate Judge. In other respects we dismiss the appeal with costs. We also dismiss the memoranda of objections with costs of the Secretary of State. The order of the Subordinate Judge, directing that non-Mirasidars should receive their costs from the Mirasidars

who are in turn directed to receive some costs from the non-Mirasidars, would lead to difficulties. We think, under the circumstances, that the Mirasidars and non-Mirasidars should each be directed to bear their own costs in the Court below. The order as to costs in favour of the Secretary of State will stand. Subject to the above modification the appeal is dismissed with costs of the Mirasidar respondents.

M. C P.

Appeal dismissed;
Decree modified.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2587 OF 1916.

March 14, 1919.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, Kt.

KAMINI KUMAR ROY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HIRA LAL PAL CHOWDHURY AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 53, 67—Property hypothecated by security-bond, transfer of, validity of—Security-bond, manner of enforcement of—Transferee taking in good faith—Burden of proof.

The execution of a security-bond in favour of a Court has not the effect of avoiding all subsequent alienations of the property hypothecated by the security-bond. [p. 737, col. 2]

Where property is given as security for the payment of any money that might be decreed in a suit and the security is sought to be enforced, that should be done by bringing a suit under section 67 of the Transfer of Property Act, and it makes no difference whether the security-bond is in favour of the Court or of a party to the suit. [p. 737, col. 2.]

Under section 53 of the Transfer of Property Act it is not enough to show that a purchase of property given in security was for good consideration. It must also be shown that the purchase was in good faith. [p 738, col. 1.]

Defendant No. 2 got an *ex parte* decree in favour of the plaintiffs set aside by executing a security-bond in favour of the Court hypothecating certain properties as security for the payment of any money that might be decreed against him. Subsequently, the plaintiffs obtained a decree for money against the defendant No. 2, and in execution thereof some of the properties included in the security-bond were sold and purchased by the plaintiff. Before the sale, but after the execution of the security-bond the defendant No 1 purchased these properties for value from the defendant No. 2. The plaintiffs then brought this suit for a declaration that they by their auction-purchase had acquired a good title to the properties in suit and that the purchase by the defendant No. 1 was collusive:

Held, (1) that on the date of sale the defendant No. 2 had no saleable interest left in him, and, therefore, the plaintiffs, who had purchased the right, title and interest of the judgment-debtor, could not claim any title by virtue of their auction-purchase; [p. 737, col. 2; p. 738, col. 1.]

(2) that the defendant No. 2 had a right to transfer the properties hypothecated in the security-bond subject to the lien created by the security-bond, but that if the plaintiffs, instead of executing the decree as a simple money-decree, had taken proper steps to enforce the security-bond in favour of the Court, the sale to defendant No. 1 would have been ineffectual as against the lien created by the bond. [p. 737, col. 2.]

Appeal against the decree of the District Judge, Faridpur, dated the 15th June 1916, reversing that of the Subordinate Judge, 1st Court of that District, dated the 31st August 1915.

Mr. *B. Chakerbutty* (with him Babus *Dwarka Nath Chakerbutty, Hara Kumar Mitter* and *Rupendra Kumar Mitter*), for the Appellants.

Sir *Rash Behari Ghose* (with him Dr. *Sarat Chandra Basak* and Babu *Debendra Chandra Pal*), for the Respondents.

JUDGMENT.

SHAMSUL HUDA, J.—The facts of the case are fully set out in the judgment of the lower Appellate Court and need only be briefly recapitulated. Plaintiffs brought a suit against the defendant No. 2 and obtained an *ex parte* decree in the Court of the Subordinate Judge of the 24 Pergannas. Subsequently on defendant No. 2 giving security for payment of any money that might be decreed in the suit, the *ex parte* decree was by consent set aside. Ultimately plaintiffs obtained a decree against the defendant No. 2 for Rs. 12,579 odd. The decree was then transferred to the Dacca Court and was executed as a money decree, and some of the properties hypothecated in the security bond and situated within that district were sold and purchased by the plaintiffs. A balance of about Rs. 7,000 was still left and the decree was then transferred to the District of Faridpur. In execution some other properties included in the security bond were sold and purchased

by the plaintiffs on the 23rd of September 1913. On the 23rd of April 1914 plaintiffs obtained symbolical possession of the properties purchased by them. On the 2nd of December 1913 the defendant No. 2 was adjudged an insolvent. Subsequently when plaintiffs demanded rent from the tenants on the basis of their purchase, they were met with the objection that on the 6th September 1912 the defendant No. 2 had sold these properties to the defendant No. 1. The present suit was instituted for a declaration that the purchase by defendant No. 1 was collusive and that the plaintiffs by their purchase had acquired a good title to the properties in suit. The first Court decreed the suit but on appeal the decree was reversed and the plaintiffs' suit dismissed; the learned Judge found that the defendant No. 1 had purchased the properties in suit for adequate consideration in good faith, and without any intent to defraud, defeat or delay the creditors of defendant No. 2.

Plaintiffs appeal and on their behalf two points have been urged before us :—

(1) That the question whether the purchase was in good faith was a mixed question of law and fact, and upon the facts found by the lower Appellate Court as also upon the facts found by the first Court and not reversed by the Court of Appeal, it ought to have been held that the purchase was not in good faith and that its effect being to defeat or delay the creditors, the transfer was void under section 53 of the Transfer of Property Act.

2. That the effect of the execution of the security-bond in favour of the Subordinate Judge of 24-Pargannas was to place the properties in *custodia legis* and that any private transfer of the properties was wholly void.

The learned Subordinate Judge in dealing with the first point has found that the sum of Rs. 2,400 was actually paid by the defendant No. 1 to defendant No. 2 as consideration for the conveyance and that the consideration was adequate. On the question whether the defendant No. 1 at the time of his purchase knew that the defendant No. 2 was indebted to the plaintiffs, the learned Subordinate Judge without coming to any definite finding proceeded to decide the case on the assumption that defendant No. 1 had such knowledge. He, however, was of opinion that the defendant No. 1 was not aware that the properties in suit had already been given as security. He also expressed the opinion that even if it were held that defendant No. 1 was aware of the existence of the security, that would only go to strengthen the finding as to his *bona fides*.

Taking the second point first, no authority has been shown to us in support of the proposition that the execution of a security-bond in favour of a Court has the effect of avoiding all subsequent alienations. In support of his contention the learned Counsel for the appellant has relied on Ghose on Mortgage, 4th Edition, page 138, and Fisher on Mortgage, 6th Edition, page 249. In our opinion the contention of the learned Counsel for the appellant finds no support in either of those authorities. The defendant No. 2, it seems to us, had a right to transfer the properties hypothecated in the security-bond subject to the lien created by him in favour of the Court. If the plaintiffs, instead of executing the decree as a simple money decree, had taken proper steps to enforce the security-bond in favour of the Court either by taking an assignment or in such other way as the law permits, the sale to defendant No. 1 would have been ineffectual as against the lien created by the bond.

It has been held in a series of cases that where property is given in security and the security is sought to be enforced, that should be done by bringing a suit under section 67 of the Transfer of Property Act and it makes no difference whether the security bond is in favour of a Court or of a party to a suit. I need only refer to the cases of *Aubhoyessury Dubee* v. *Gouri Sunkur Panday* (1), *Tokhan Singh* v. *Girwar Singh* (2), *Musammat Chandrabati* v. *Babu Ram Prasad* (3) and *Brojendra Lall Dass* v. *Lakshmi Narain* (4). A somewhat different view was no doubt taken in *Shyam Sundar Lal* v. *Bappai Jainarayan* (5), but this case has not been followed in any of the later cases. The plaintiffs, therefore, having failed to enforce the security at most purchased the right, title and in-

(1) 22 C. 979; 11 Ind. Dec. (N. S.) 565.
(2) 32 C. 894; 1 C. L. J. 118; 9 C. W. N. 372.
(3) 27 Ind. Cas. 465; 18 C. W. N. 178.
(4) 29 Ind. Cas. 140; 19 C. W. N. 961.
(5) 33 C. 1069; 7 C. W. N. 914.

terest of the judgment debtor. If it be held that on the date of sale the defendant No. 2 had no interest left in him, plaintiffs cannot claim any title by virtue of such purchase.

The question then arises, had the defendant No. 2 any saleable interest on the date of plaintiffs' purchase in the execution sale? The question turns on the effect of section 53 of the Transfer of Property Act. I need not discuss all the cases to which we have been referred by either side. The principle seems to be well established since *Twyne's case* (6) and the words of the section are also clear that the mere fact that a purchase of this kind was for good consideration is not enough. It must also be shown that the purchaser acted in good faith. This was also laid down in *Hakim Lal* v. *Mooshahar Sahu* (7) and *Chidambaram Chettiar* v. *Sami Aiyar* (8). The decision in the last mentioned case was affirmed by their Lordships of the Judicial Committee in *Chidambaram Chettiar* v. *Srinivasa Sastrial* (9). The decision of Mookerjee and Holmwood, JJ., *in Hakim Lal* v. *Mooshahar Sahu* (7) was also affirmed by their Lordships of the Judicial Committee on appeal [*Musahar Sahu* v. *Lala Hakim Lal* (10)] and in doing so their Lordships laid down the law in the following terms:—

"When it was found that the transfer impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it followed that no ground for impeaching it lay in the fact that the plaintiff (appellant) who, was a creditor, was a loser by payment being made to the preferred creditor—there being in the case no question of bankruptcy."

It has, however, been urged that as upon the finding of the Court below the purchase was made with the knowledge that the defendant was indebted to the plaintiffs, the transaction cannot be held to be *bona fide*. I can find no authority for the proposition that the mere fact of the indebtedness of a person or the knowledge on the part of a purchaser that a sale may defeat or delay the creditors is sufficient to negative the *bona fides* of a purchaser. As stated by Mookerjee and Holmwood, JJ., if there was good consideration and the intention to part with the whole interest is proved and it is not shown that the transfer was a mere cloak for retaining a benefit to the vendor, it is valid against the creditors. But if the object of the transferor is to defeat or delay his creditors and that object is known to the transferee and he aids and assists in its execution, then the transfer is not in good faith. In this case there is no finding either that the intention of the transferor was to defeat his creditors or that the transferee aided the transferor in the execution of his object. Consequently upon the facts found by the Court below, the transfer cannot be impugned by the plaintiffs.

There is another circumstance which, in my opinion, establishes the *bona fides* of defendant No. 1. As pointed out in the judgments of the Courts below, if it be held that defendant No. 1 purchased with the knowledge that the property was given in security, he must have known that he could not by his purchase defeat those claiming under the security. If the plaintiff has been a loser, it is due to his own conduct in not enforcing the security-bond in the manner laid down by law.

The appeal fails and is dismissed with costs.

RICHARDSON, J.—I agree.

Appeal dismissed.

(6) (1601) 3 Coke 80 *b*; 1 Sm. L. C. (12th Ed.) 1; 76 E. R. 809,
(7) 34 C. 999; 11 C. W. N. 889; 6 C. L. J. 410.
(8) 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351.
(9) 23 Ind. Cas. 714; 18 C. W. N. 841; 36 M. 227; 26 M. L. J. 473; 16 M. L. T. 286; (1914) M. W. N. 754; 16 Bom. L. R. 783; 1 L. W. 963; 20 C. L J. 571 (P. C.).
(10) 32 Ind. Cas. 343; 43 C. 521; 30 M. L. J. 116; 3 L. W. 207; 20 C. W. N. 393; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406; 18 Bom. L. R. 378; 43 I. A. 104 (P. C.).

PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.

APPEAL FROM APPELLATE DECREE No. 41 OF 1917.

April 11, 1918.

Present:—Mr. Justice Roe and Mr. Justice Chapman.

BENUDHAR PANDA—DECREE-HOLDER—APPELLANT

versus

KANGOI KRISHNA CHANDRA DAS—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 97—Mort-

gage suit—Preliminary decree not appealed against —Final decree—Interest, rate of, whether can be objected to.

A preliminary decree is final if no appeal is filed against it. [p. 739, col. 1.]

In a mortgage suit the parties agreed to a particular rate of interest, such rate being in excess of the rate given in the bond. The Court passed a preliminary decree embodying this rate of interest and no appeal was filed against the decree, but when the mortgagee applied for a decree absolute, the mortgagor objected to the rate of interest as being in excess of the rate claimed in the plaint and questioned the jurisdiction of the Court in allowing such rate:

Held, that the Court had jurisdiction to increase the rate of interest, that it was at liberty to make an order for the payment of interest at any rate that seemed suitable, and that as no appeal had been filed against the preliminary decree, the order fixing the rate of interest could not be questioned in any subsequent proceeding. [p. 740, col. 1.]

Appeal from a decision of the District Judge, Cuttack, dated the 23rd March 1917, confirming that of the Sub Judge, Cuttack, dated the 23rd August 1916.

Mr. *Baikuntha Nath Dutta*, for the Appellant.

Mr. *Sarat Chandra Mukherji*, for the Respondent.

JUDGMENT.

ROE, J.—The facts of this case are that the appellant before us was a mortgagor against whom a suit had been instituted to enforce a mortgage. The suit was compromised, the terms being that the sum alleged to be due on the date of the compromise was reduced from something over Rs. 3,000 to Rs. 2,200, and the rate of interest given in the bond increased from Rs. 1-9-0 per cent. per mensem to Rs. 3-2-0 per cent. per mensem. Not only was this contract in regard to the increase of the rate of interest clearly set forth in the petition of compromise, it was also mentioned in unequivocal terms in the decree made upon the compromise. No appeal was laid against the preliminary decree, but when the mortgagee came to Court for a decree absolute and the sale of the property upon the taking of an account, the mortgagor-judgment-debtor objected that the interest agreed upon in the compromise was in excess of the rate claimed in the plaint, and that the preliminary decree made providing for interest at that rate was outside the jurisdiction of the Court making the decree. He, therefore, asked the Court in drawing up an account preliminary to the sale to reckon the interest at the rate of Rs. 1-9-0 per cent. only. The Court of first instance accepted the contention of the judgment-debtor. This decision was confirmed by the District Court in appeal. The mortgagee-decree-holder, therefore, appeals to this Court upon the ground that there having been no appeal against the decree made upon the compromise, the Court, in drawing up the account necessary to the sale, was bound by the terms of the preliminary decree. Two authorities have been quoted, decisions of this Court, in support of the respondent's contention, as against the whole body of authority that a preliminary decree is final, if no appeal is filed against it. The case quoted by the respondent is *Rai Brij Raj Kishun* v. *Rameshwar Singh* (1). I am unable to see that this decision is of assistance to the respondent. All that was done in that case was to make a provision in the final decree for interest at the Court rate from the date fixed for payment in the preliminary decree, in spite of the fact that there had been no provision made for interest in the preliminary decree beyond the date fixed for payment. This order was in accordance with the practice of the Calcutta High Court on the original side as reported by the Registrar, Mr. Belchambers, in the note annexed to the case of *Achalabala Bose* v. *Surendra Nath Dey* (2). Rule 324 provides that unless the Court shall otherwise order, the decree shall direct that the defendant do pay interest at the rate of 6 per cent per annum. This rule received the approval of the Judicial Committee in *Sundar Koer* v. *Rai Sham Krishen* (3). The second case quoted is a decision to which I was a party [*Gauri Dutt* v. *Dohan Thakur*(4)]. In that case it was not argued that the Court in the circumstances of the case had no power to go behind the original decree; I must assume that there were in that case facts which precluded that argument. In the case before us there is a distinct order in the decree that the rate of interest shall be at Rs. 3-2-0 per cent. per

(1) 39 Ind. Cas. 925; (1917) Pat. 212.
(2) 24 C. 766; 1 C. W. N. 550; 12 Ind. Dec. (N. S.) 1179.
(3) 34 C. 150; 34 I. A. 9; 4 A. L. J. 109; 9 Bom. L. R. 304; 5 C. L. J. 106; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75 (P. C.)
(4) 43 Ind. Cas. 459; 4 P. L. W. 209; 2 P. L. J. 673.

mensem; and the sole question for our decision is whether that decree can now be ignored. Referring again to the case of *Sundar Koer* v. *Rai Sham Krishen* (3), their Lordships say that they "think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount to be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of the judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree." In conformity with this decision the Courts in India have almost invariably lightened the burden of the mortgagor by fixing a rate of interest subsequent to the date of payment at something less than the bond rate, and their power to do so has never been challenged.

It seems to me impossible to say that the Court has jurisdiction to decrease the rate of interest stipulated for in the bond but has no power to increase it. I am of opinion that the Court, when passing the preliminary decree in the case before us, was at liberty to make an order for the payment of interest at any rate that might seem suitable; and I am further of opinion that if no appeal was made against the order fixing the rate of interest, then that order became final and should not be questioned in any further future proceeding. I would, therefore, set aside the decree made by the Courts below, and direct that execution be taken directly in accordance with the decree made. In the circumstances of the case I would make no order as to costs.

CHAPMAN, J.—I agree.

Decree set aside.

MADRAS HIGH COURT.

CIVIL APPEAL No. 239 OF 1917.

April 8, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Aiyar.

VATAVATTA RAMAN NAIR—DEFENDANT No. 1—APPELLANT

versus

KENATH PUTHEN VITTAL KUPPASSAN MENON AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Malabar Law—Melcharth, *grant of*—Kanom, *renewal of, before expiry of term, validity of*—*Duty of* karnavan—*Necessity or benefit to* tarwad, *proof of*—*Lender, duty of, to make enquiry, extent of*—*Renewal on surrender of term of* kanom *period, effect of.*

The granting of a *melcharth* before the expiry of the term of the *kanom* is invalid, save where the *melcharth*-holder proves necessity or benefit to the *tarwad*. [p 742, col. 1.]

Raman Nambiar v. *Raman Nambiar*, 25 Ind Cas. 578; 27 M. L. J. 175: 1 L. W. 540, *Cheria Cherikandan* v. *Krishnan Nambiar*, 16 Ind. Cas. 391; 27 M. L. J. 690; 12 M. L. T. 600 and *Moidin Kutti* v. *Kunhi Koyan*, 27 Ind Cas. 1007; 27 M. L. J. 691, followed.

The surrender of a term of a *kanom* and its renewal as from the date of the surrender does not affect the principle. [p. 742, col. 2; p. 745, col. 2.]

The *melcharth*-holder should, in such a case, show that there was necessity for the *melcharth* and that he satisfied himself by reasonable enquiries as to the existence of such a necessity. Ordinarily, it is enough if he satisfies himself that there is a pre-existing debt and he is not bound to pursue his enquiries and find out if there was a necessity for that debt. It is not enough, however, that he enquired of the *karnavan* granting the *melcharth* and rested content with the statements made by him. Where a member of the *tarwad* has already notified that the impending alienation is improper it is his duty to make enquiries of such member. [p. 742, col. 2; p. 743, col. 1; p. 744, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, South Malabar, at Palghat, dated the 26th March 1917, in Original Suit No. 33 of 1915.

FACTS appear from the judgment.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.—There are two circumstances which exclude this transaction from the reason of the ordinary rule. In the first place, the renewal was brought about as the result of mediation. Secondly, this is not a Melcharth granted before the expiry of the Kanom. A portion of the subsisting period of the Kanom was surrendered.

The 1st defendant acted *bona fide* and made reasonable enquiries as to the necessity for the renewal. He is, therefore, protected as a *bona fide* lender.

VATAVATTA RAMAN NAIR *v.* KENATH PUTHEN VITTAL KUPPASSAN MENON.

Mr. *T. R. Ramachandra Aiyar*, for the Respondents.—The ordinary rule is that a Melcharth granted before the expiry of the Kanom is invalid. The reason is that the hands of a person who might happen to be the Karnavan on the expiry of the Karnavan cannot be fettered. The fact that an outstanding term of the Kanom is surrendered to make it legal, does not affect the principle.

The 1st defendant did not act *bona fide*. The plaintiff had publicly notified that the transaction would not be recognised by the other members of the Tarwad. It was plainly the 1st defendant's duty to have enquired of the plaintiff.

JUDGMENT.

ASDUR RAHIM, J.—The plaintiff in the suit from which this appeal has been preferred is a senior Anandravan of the Tarwad of which the 2nd defendant is the Karnavan. The 1st defendant holds a Kanom, Exhibit II in the case, executed on the 24th August 1914. The object of the suit is to have that Kanom set aside on the ground that it was an imprudent transaction and was injurious to the interests of the Tarwad. The 1st defendant, who is the Karnavan of a rich Tarwad, has had dealings with the 2nd defendant's Tarwad for a long time prior to the suit. He holds Kanoms and Melcharths on large properties belonging to the 2nd defendant's Tarwad including the property in dispute.

In order to understand the questions arising in the case, it is necessary only to go back to Exhibit XX which is a Melcharth in favour of the 1st defendant in respect of the property comprised in Exhibit II executed in May 1916. The Melcharth, therefore, which is a sort of second charge, would expire in 1908. In 1902 the 2nd defendant's predecessor executed in favour of the 1st defendant's predecessor a Puramkadam—that is a second charge—on receiving a fee of about Rs. 1,350. That document contains a stipulation for renewal of the Melcharth, Exhibit XX. Then, disputes arose between the parties not merely with respect to this property but also with respect to properties belonging to the 2nd defendant's Tarwad in possession of the 1st defendant. A notice was given by the 2nd defendant in 1914 to the 1st defendant asking the latter to surrender the property comprised in Exhibit XX. There had been two suits instituted with respect to other properties of the 2nd defendant's Tarwad in possession of the 1st defendant. All these disputes, it appears, were arranged to be settled by the mediation of certain Pleaders practising at the Palghat Bar, and in the result, Exhibits II and III were executed. It appears that altogether Rs. 3,000 was paid by the 1st defendant to the 2nd defendant, out of which Rs. 1,000 was the fee for renewal. The case of the plaintiff is that Exhibit II is a renewal of Exhibit XXI which was to expire only some time in 1920.

It was strongly contended by Mr. Ananthakrishna Aiyar for the appellant that we must ignore Exhibit XXI altogether, as that was disputed by the parties and as Exhibit II was executed under an arrangement arrived at by way of compromise. But the whole case tried before the Court was that Exhibit II was executed before the expiry of the term mentioned in Exhibit XXI and, therefore, it was invalid unless the 1st defendant was able to show that the transaction was for the benefit of the family or was entered into for a necessary purpose. The document, Exhibit II, itself states that "though a period of 5 years and 8 months has yet to expire of the former Puramkadom demise for 12 years (meaning thereby Exhibit XXI), yet we have to-day given you this demise for 12 years as we are pressed for payment of the amount on the pronote with interest thereon executed to M. K. Krishna Menon." The written statement of the 1st defendant, paragraph 9, also proceeds on the same basis and the evidence of the 1st defendant himself is to that effect. And the question raised by the first issue, the issue bearing on the point is, "whether the demise, Exhibit II, was valid and binding on the Tarwad in view of the fact that the 1st defendant has surrendered his prior demise before he took this demise." By the prior demise here is meant the Puramkadam Exhibit XXI. I think it would be altering the entire case if we were now to accede to Mr. Ananthakrishna Aiyar's contention that Exhibit XXI must be ignored altogether and that we must hold that since the term in Exhibit XX

expired in 1908, Exhibit II should not be treated as a transaction entered into before the expiry of an existing demise.

Mr. Ananthakrishna Aiyar has next argued that since there were disputes between the parties as to the validity of Exhibit XXI and also about other transactions and as Exhibit II was executed in settlement of those disputes, no question of necessity or benefit to the Tarwad arises in connection with Exhibit II at all. But the suit raises the question, not whether Exhibit II is binding on the 2nd defendant, but whether it binds the Tarwad of which the 2nd defendant is the Karnavan. Exhibit II was executed long before the expiry of the term of Exhibit XXI. The contention on behalf of the plaintiff is that the 1st defendant must prove either necessity or benefit to the Tarwad. I do not think that the fact that the 2nd defendant executed Exhibit II under the mediation of some persons would by itself relieve the 1st defendant in the circumstances of the case from making out that this is a transaction which is binding on the Tarwad. The defendant did not attempt to make a case before the trial Court that the transaction should be upheld on the ground that it was part of the terms of a *bona fide* settlement of disputes. If he had set up such a defence, the nature of the entire dispute, would have to be looked into. All facts which will show that it was a *bona fide* settlement should have been placed before the Court.

It has been ruled in more than one case that if a Melcharth is granted before the expiry of the term of the Kanom, the Melcharth-holder must prove necessity or benefit to the Tarwad. See *Raman Nambiar* v. *Raman Nambiar* (1), *Cheria Chirikandan* v. *Krishnan Nambiar* (2) and *Moidin Kutti* v. *Kunhi Kayan* (3). In the first two cases Sundara Aiyar, J., and Sadasiva Aiyar, J., who had considerable experience of Malabar Law and litigation, took part. In fact Mr. Ananthakrishna Aiyar has not seriously contended that those rulings are wrong. But his argument upon which he has insisted a great deal is that the rule regarding the grant of a Melcharth has no application to the renewal of a Kanom. A Melcharth is what is granted to a person other than the Kanomdar or tenant, while if a Kanom is renewed to the holder of the Kanom himself that is a case of renewal. The ground upon which the rule relating to Melcharth has been based is two-fold:—firstly, if a Kanomdar grants a Melcharth before the expiry of the term of the Kanom, he is practically fettering the discretion of the person who may hold the office at the time of the expiry of the Kanom. Secondly, it is not possible always to ascertain beforehand what would be fair and reasonable terms for the Melcharth before the Kanom has expired. Both these considerations seem to apply with equal force in the case of renewals, *i. e.*, where a Kanom is renewed before the expiry of its term. Mr. Ananthakrishna Aiyar argues that there is no rule prohibiting the surrender of a portion of the term of a Kanom and that in fact such a surrender would be beneficial to the Tarwad. I am not prepared to say that the surrender of a portion of the term must necessarily be beneficial to the Tarwad; but even supposing it to be so, the grant of another Kanom which would expire after the date of the expiry of the term of the original Kanom would come within the purview of the ruling relating to Melcharth and the same considerations would apply. The question shortly put is, why should a Karnavan be in a hurry to renew a Kanom before its term expires. If he can show that there was necessity to renew the Kanom at that stage or that it was for the benefit of the Tarwad that he should do so, that would be sufficient justification. I think, therefore, that the principle of the rulings above cited applies to this case, and this is also the view of the Subordinate Judge who is presumably familiar with the Malabar Law.

Then remains the question whether Exhibit II is a valid transaction. The 1st defendant has not been able to prove actual necessity, but his real case has been that he made *bona fide* enquiries before obtaining Exhibit II and that he was satisfied after such enquiry that necessity existed for the transaction in question,

(1) 25 Ind. Cas. 578; 27 M. L. J. 175; 1 L. W. 540.
(2) 16 Ind. Cas. 391; 27 M. L. J. 690; 12 M. L. T. 600.
(3) 27 Ind Cas 1607; 27 M. L. J. 691.

What are the exact limits of the enquiry which a person obtaining a transfer or advancing money to a person in the position of a Karnavan, whose position is very much analogous to that of a manager of an ordinary Hindu family, is required by law to make are not capable of being defined for all cases. But I think it is amply clear from the authorities that it is not only enough for the alienee to show that he made enquiries of the Karnavan himself and that he was satisfied with the statements made by him. If that was all that was wanted, there would be hardly any case in which it would not be possible for the alienee to satisfy the letter of the law. In *Kameswar Pershad* v. *Run Bahadur Singh* (4), Sir James Colvile delivering the judgment of the Judicial Committee says that "Their Lordships in no degree depart from the principles laid down in the case of *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (5) which has been so often cited. They have applied those principles in recent cases not only to the case of a manager for an infant, which was the case there, but to transactions on all fours with the present, namely, alienations by a widow, and to transactions in which a father, in derogation of the rights of his son under the Mitakshara Law, has made an alienation of ancestral family estate. The principle broadly laid down is, that although the lender is not bound to see to the application of the money, and does not lose his rights if, upon a *bona fide* enquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, he still is under an obligation to do certain things. The words of the judgment in that case are:—'Their Lordships think that the lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate; but they think that if he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money.'...'Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived. The same principle was applied in *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh* (6), which was confirmed by the Privy Council on appeal. At page 751* it is pointed out that the enquiry was wholly insufficient and could not be said to be *bona fide* on the ground, among others, that the Maharajah of Durbhanga, who was the alienee there, merely satisfied himself with the enquiries made of his servants and did not make enquiries of the creditors and the heirs, and that it was not sufficient merely to ask the debtor if he was borrowing for necessity and to be satisfied with his answers. In this case it is alleged that there was a debt of Rs. 3,000 outstanding on a promissory note executed by the 2nd defendant to one Kutti Krishna Menon. The evidence is that the 1st defendant and his Pleader made enquiries of the 2nd defendant as well as of Kutti Krishna Menon. The promissory note was for Rs 3,000 and part of the amount, at any rate, is alleged to have been borrowed for the purpose of repairing a temple belonging to the 2nd defendant's Tarwad and for the performance of the purification ceremony after the repairs. This Kutti Krishna Menon is a close relation of the 2nd defendant, being his son's first cousin. The note was executed shortly before Exhibit II. The 1st defendant is a neighbour of the 2nd defendant and as he has had money dealings with him he may well be presumed to have some knowledge of his affairs. Now, the real point as regards this is that the plaintiff, the senior Anandravan of the Tarwad, a few days before the transaction had given a notice (Exhibit C) to the 1st defendant that the 2nd defendant was trying to execute documents to the

(4) 6 C. 843 (P. C.); 8 C. L. R. 361; 8 I. A. 8; 4 Shome. L. R. 81; 4 Sar. P. C. J. 210; 5 Ind. Jur. 157; 3 Ind. Dec. (N. S.) 545.

(5) 6 M. I. A. 393; 18 W. R. 81 note; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(6) 12 Ind. Cas. 931; 38 C. 721.

*Page of 38 C.—*Ed.*

injury of the Tarwad and to raise money for the purposes of his own extravagance. He also sent him a notice which he had published in a vernacular paper, and there it was stated that the 2nd defendant wanted to execute a renewal which was not for the benefit of the Tarwad nor was there any necessity for it. In spite of these notices, the 1st defendant, who is a Pleader of considerable experience and standing in the profession, does not think it worth his while to refer to the plaintiff and ascertain from him how far the allegations made by him were well-founded or not. The repairs of the temple were alleged to have been met by subscription from the tenants and there was no necessity, therefore, for borrowing any money. It ought to have also struck the 1st defendant that Kutti Krishna Menon being a near relation of the 2nd defendant, it would be safer to require some independent proof of the *bona fides* of the promissory note. It is difficult to understand why the 1st defendant should have refrained from taking what would appear to anybody, and especially to a Pleader, obvious steps for securing his position. He ought to have gone to the plaintiff and ascertained what was the true state of affairs. The Tarwad of the 2nd defendant consists of a large number of adult male persons and he ought to have asked some of them whether there was any necessity for the 2nd defendant to raise any money. I think if he had made proper enquiries, he would have learnt that the repairs of the temple were met by subscriptions from the tenants and I must hold that he should not have placed implicit reliance on the statement of the 2nd defendant or of Kutti Krishna Menon. I think there is great force in the argument of Mr. Ramachandra Aiyar that this payment of Rs. 3,000 or of Rs. 1,000 as renewal fee for Exhibit II could not have been for purposes of necessity, and it was more or less an afterthought that struck the 1st defendant to get hold of a promissory note in favour of Kutti Krishna Menon. Kutti Krishna Menon is a wealthy man and his evidence is that he obtained Rs. 60 out of this Rs. 3,000 as consideration for an agreement not to press for the loan. There is absolutely nothing to show any sort of necessity why only a few days afterwards money had to be raised by Exhibit II in order to pay off this loan. It is pointed out by the learned Subordinate Judge that the money alleged to have been repaid to Kutti Krishna Menon was not invested in any better security or to any greater advantage but in fact it was lent to a Bank at a lower rate of interest than under Exhibit I. I think the conclusion of the Subordinate Judge was amply justified that necessity is not proved or that any benefit accrued to the Tarwad from Exhibit II. It appears that the 2nd defendant is an old man and it is not at all unlikely, having regard to the fact that there are several Tavazhis in this Tarwad, that he wanted to enrich his own family at the expense of the Tarwad of which he was the Karnavan. It seems to me that if the 1st defendant had made proper enquiries, he would have found out that there was no necessity whatever for executing Exhibit II. On the other hand, it seems to me extremely probable, as suggested by Mr. Ramachandra Aiyar, that this transaction was really a term of the settlement of certain disputes with respect to other properties in respect of which suits were pending and that it was not a transaction entered into for purposes of Tarwad necessity. As already pointed out, it was not sought to be proved that, apart from the question of benefit or necessity, the settlement was binding on the Tarwad.

There has been much discussion before us as to a recital in Exhibit II in respect of the value of certain improvements amounting to Rs. 400 to Rs. 800, which is made payable along with the mortgage money secured by Exhibit II. Those improvements, it is abundantly clear, had already been paid for by the 2nd defendant's Tarwad, and therefore, nothing was due on that account. The 1st defendant, when in the witness box, gave up his claim saying at the same time that he was not satisfied that the improvements had been paid for. I think there can be no doubt whatever that the case of the plaintiff on this point is perfectly true and is borne out by Exhibit D, the draft of which Exhibit E was corrected by the 1st defendant himself. It is, however, possible that at the time of the execution of Exhibit II the 1st defendant had forgotten what was stated in Exhibit D and, therefore, it is unnecessary for me to hold that the recital

regarding the improvements in Exhibit II was deliberately false. However, in view of my finding that there was no necessity for the execution of Exhibit II at all, I do not think it necessary to discuss this part of the case any further. I agree with the finding of the Subordinate Judge that Exhibit II is not valid and binding on the 2nd defendant's Tarwad and the appeal must be dismissed with costs.

SESHAGIRI AIYAR, J.—I would have simply expressed my concurrence with my learned brother's judgment, had it not been for the fact that I am unable to agree unreservedly with what he says regarding the conduct of the 1st defendant. Therefore, I shall say a few words on the two questions of law argued by Mr. Ananthakrishna Aiyar with special reference to the conduct of the 1st defendant. I entirely agree in thinking that the document should not be regarded solely as the result of a compromise. There is no issue upon that question. If that question had been raised, there would have been a necessity to go into the evidence as to whether the 1st defendant was acting honestly in putting forward the claim that Exhibit XXI is not binding upon the Tarwad. Therefore, it is not open to the defendants now to set up that case.

Upon the further question argued by Mr. Ananthakrishna Aiyar that there was a surrender of the previously existing Kanom and that the renewed Kanom which dates from the date of the surrender is not affected by the same mischief which affects a Melcharth or renewal which is to take effect on the expiry of the existing Kanom, I fail to see how on principle the two questions are different. The reason why the Melcharths are discountenanced under the Malabar Law is this: there is an existing contract which the Karnavan has made which is binding on the Tarwad. It has a particular term to run. It is not, therefore, open to a Karnavan to anticipate the term and to get a new contract executed without showing that there was necessity for making a new contract. When the old Kanom expires, there may be a new man who will be able to apply his mind to the circumstances arising at the end of the period. He may probably think that the old tenant should not be given the Kanom again; or he may also think that it would be necessary in the interests of the Tarwad that fresh terms should be imposed upon the old tenant. Therefore, it is not ordinarily open to a Karnavan to anticipate what is going to happen some years after. It is a well known fact in Malabar that Melcharths and renewals are given mostly in the personal interest of the Karnavan for the time being who is anxious to enrich himself at the expense of the Tarwad. Those are the grounds on which these transactions have been discountenanced by Courts, and I fail to see how the fact that there is a surrender of the existing period and the Kanom is made to date from the date of the surrender could make any difference in the principles to be applied. Therefore, I agree with my learned brother in thinking that as in this case there was some time still to run for Exhibit XXI, the fact that the period was surrendered and a new Kanom was taken on that date, should not make any difference in considering the question.

Upon the second question I do not go the whole length which my learned brother has gone. I see nothing in the conduct of the 1st defendant to show that he has not been acting honestly and *bona fide*. In my opinion he has been mistaken in judging of his rights and duties. There were two suits, one in which he was himself the plaintiff and the other in which he was the defendant. A notice had been given by the 2nd defendant impeaching the validity of the Kanom by his predecessors; in these circumstances the 1st defendant asked his own Vakil and the Vakil for the 2nd defendant to settle the dispute between the parties. He apparently relied upon their mediation and entered into this arrangement. Now it may be that he felt himself very sure of his position and did not make any further enquiries. But I do not think it can be said that he shirked any enquiry or acted otherwise than honestly in this matter. In my opinion the evidence which has been given is entirely to his credit, and there is nothing suggested in the cross-examination to show that he was acting fraudulently or was not behaving properly towards the 2nd defendant, who is said to be an old man. After all it must be remembered that the 1st defendant, although a Vakil, was acting in the interests of his own Tarwad which he was bound to protect. In these circumstances I am not prepared to say that

he was acting otherwise than honestly and *bona fide* in conducting the negotiations. At the same time I am prepared to agree with my learned brother that the enquiry which he instituted was not sufficient in the eye of the law to justify the transaction. As has been pointed out by my learned brother, at the time of the transaction two notices were sent to the 1st defendant, Exhibit C and Exhibit L. Ordinarily it would be enough for a lender to be satisfied that there is a pre-existing debt, for if a lender is to be compelled to find out that that debt also was one contracted for necessity and if that is to be insisted upon in the case of each loan, the result would be that the lender would have to go back a number of years and to investigate the affairs of the family from the outset.

I do not think that is what the law requires of him to do. Nonetheless when the 1st defendant had the notices from the 2nd plaintiff that the money he was going to lend to the 2nd defendant was for the latter's personal use and would not bind the Tarwad, it was his duty to have gone to that person and made enquiries as to whether the representations made in the notices were true or not. His failure to make further enquiries was certainly wrong and certainly not legally justifiable. I think *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh* (6) lays down the principles applicable to the present case. I do not understand the decision to rule that in all cases where a man is lending to pay off a pre-existing debt, the lender must not only satisfy himself that there is a debt but that the debt is also one binding on the family. As I said before, in my opinion, the 1st defendant apparently believed that the mediation of the two Vakils was sufficient to enable him to lend the money; I do not think that he can be said to have acted dishonestly or not to have acted *bona fide* in having taken the renewal.

As regards the question about the insertion of the further charge in the document for improvement, the same remarks would apply here also. I am unable to agree with Mr. Ramachandra Aiyar that there was anything sinister in the conduct of the 1st defendant in getting this provision for a further charge inserted in Exhibit II. The first document which he attested, Exhibit D, was in 1898 and 16 years later he took this document, Exhibit II, from the 2nd defendant after the mediation of the two Vakils. He may say that he was under the impression that the money was not paid and he has sworn to the fact that his Karnavan, Thoppan Nayar, did not receive the money. I see no reason for not believing the evidence given by him in the witness-box. It is unnecessary to pursue this subject further because, in my opinion, if the matter rested only with Exhibit II, I would have come to the conclusion that the two transactions were entirely separable. But as I have come to the conclusion that no necessity or benefit to the Tarwad is proved by the 1st defendant in respect of Exhibit II, it is unnecessary to say whether the 2nd clause should be regarded as a clog on the equity of redemption and whether it would be valid and binding on the Tarwad.

I agree in the conclusion come to by my learned brother that the appeal should be dismissed with costs.

M.C.P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2712 OF 1917.

March 25, 1919.

Present:—Sir Ernest Fletcher, KT., and Mr. Justice Cuming.

KEDAR NATH SEN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

IDU KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Mortgage by tenant—Rent decree in favour of landlord—Mortgage decree in favour of mortgagee—Purchasers, contest between—Priority.

In a contest between the purchaser of the tenant's interest in execution of a mortgage decree and the purchaser in execution of a rent decree obtained against the tenant, the latter has priority over the former and it is not necessary for him to annul the encumbrance in order to support the priority of his purchase under the rent decree. [p. 747, col. 2.]

Appeal against the decree of the Subordinate Judge, Bankura, dated the 31st July 1917, affirming that of the Munsif, 1st Court at Bishenpur, dated the 27th of March 1916.

BALDEO RAI v. RAM EKBAL SINGH.

FACTS appear from the judgment.

Babu *Bijoy Kumar Bhattacharjee*, for the Appellants.—Plaintiff is the appellant. The appeal arises out of a suit for recovery of possession of lands which the plaintiff purchased in execution of his own mortgage decree on 26th October 1911. The mortgage was dated 16th January 1901. The land was a Mourasi Mokarari tenure. After the mortgage it was put up to sale by the landlord and purchased by him. Thereafter he leased the same to defendant No. 1 in 1905. After plaintiff had taken symbolical possession, the landlord gave notice to plaintiff under section 167 of the Bengal Tenancy Act in 1912. The present suit is for recovery of possession of the lands. My points are:—(1) It was not open to the landlord to proceed under section 167. A purchaser who has parted with his right cannot proceed to annul incumbrances. (2) No case was made out that notice was served within one year of plaintiff's knowledge (3) The mortgage having merged into the decree, no notice is necessary under section 167. (4) Plaintiff should be allowed to redeem the first charge, *viz.*, for rent. "Purchaser" includes also an assignee of the purchaser under section 167. See *Sreemunt Ram Dey* v. *Kookoor Chand* (1). In later cases also this Court has held that "purchaser" includes the assignee of a purchaser. See *Narayan Chandra Kansabanik* v. *Kasiswar Roy* (2), *Ananda Chandra Poddar* v. *Kunjo Behari Pal* (3), *Shosi Bhusan Majumdar* v. *Kramtullah Sheikh* (4).

The holding is a permanent Mokarari Jama. The mortgage having merged in the decree, notice under section 167 cannot be given. See *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (5), *Meherunnesa* v. *Sham Sundar Bhuiya* (6).

Babu *Brojendra Kumar Bose*, for the Respondents, was not called upon to reply.

JUDGMENT.—This is an appeal by the plaintiffs against the decision of the learned Subordinate Judge of Bankura, dated the 31st July 1917, affirming the decision of the 1st Munsif at Bishenpur. The plaintiffs brought the suit to recover possession of certain immoveable property, which they said they had purchased in execution of a mortgage decree passed in a suit which was brought to enforce a mortgage held by the plaintiffs' father. The defendants claimed as purchasers under a rent decree obtained by the landlords of the mortgagor of the plaintiffs, that is defendants Nos. 4 to 6. The competition, therefore, was, it is quite clear, one between the purchasers in execution of a mortgage-decree of the tenant's interest and the purchasers in execution of a rent decree obtained against the mortgagor, the tenant. The cases in this Court are quite clear that between those interests the purchaser in execution of the rent decree has priority over the purchase in execution of the mortgage decree. The cases of *Gopi Nath Mahapatra* v. *Kashi Nath Beg* (7) and *Bibi Taibatannessa Chowdhurani* v. *Pravabati Dasi* (8) are clear authorities on that point. The serving of notice, therefore, to annul the encumbrance was a work of supererogation, and it was not necessary for the defendants to do that in order to support the priority of their purchase under the rent decree as against the purchasers under the mortgage decree. In that view of the case the other points urged do not arise. The present appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) 15 W. R. 481 at p. 482.
(2) 1 C. L. J. 579.
(3) 8 C. L. J. 177.
(4) 10 C. W. N. 148.
(5) 29 C. 813 at p. 820.
(6) 6 C. W. N. 834.
(7) 1 Ind. Cas. 35; 9 C. L. J. 234; 13 C. W. N. 412.
(8) 4 Ind. Cas. 750; 10 C. L. J. 640.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 779 OF 1917.

December 11, 1918.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

BALDEO RAI—APPELLANT

versus

RAM EKBAL SINGH—RESPONDENT.

Mesne profits, assessment of, mode of—Trespasser—Cost of cultivation, whether can be allowed.

ALLA PICHAI v. PAPPATHIAMMAL.

In assessing the amount payable by a trespasser on account of mesne profits, the costs of cultivation and reaping should be allowed to him.

Appeal from a decision of the District Judge, Shahabad, dated the 26th March 1917, m difying that of the Munsif, Arrah, dated the 11th August 1916.

Mr. *Atul Krishna Ray*, for the Appellant.

Mr. *Raghunath Singh*, for the Respondent.

JUDGMENT.—The appellants in this case are aggrieved by a decree for mesne profits on the basis of the actual productive power of the land without taking into calculation the cost of labour for growing and reaping the crops. It is urged on behalf of the respondents that the view taken by the Allahabad Court has been that where the cultivation of the land has been done by a trespasser he is not entitled to such expenses. This, no doubt, was the view taken in the Full Bench decision in *Altaf Ali* v. *Lilji Mal* (1), but even that view has been considerably modified by the decision in *Abdul Ghofur* v. *Raja Ram* (2). Certainly the Calcutta view has always been that where there has been a trespass no more will be given against the trespasser than what a man of ordinary capacity and diligence would gain from the trespass, In this view it is clear that the costs of cultivation and reaping should have been allowed. We assess these costs at thirty-three per cent. and direct that the decree made by the lower Appellate Court be reduced by one third. The plaintiff respondents in the first instance seem to have grossly overvalued their claim. We, therefore, direct that each party pay his own costs throughout these proceedings.

Decree modified.

(1) 1 A. 518; 2 Ind. Jur. 500; 1 Ind. Dec. (N. S.) 357.
(2) 23 A. 252; A. W. N. (1901) 80.

MADRAS HIGH COURT.

CIVIL APPEAL No. 128 OF 1917.

April 19, 1918.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Seshagiri Aiyar.

ALLA PICHAI ROWTHAN—DEFENDANT No. 1—APPELLANT

versus

PAPPATHIAMMAL *alias* AMMAL BIBI AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Limitation Act (IX of 1908), s. 7—Muhammadan Law—Claim of heirs entitled to definite shares, whether joint cause of action—Administrator de son tort, liability of, to account.

In a Muhammadan family, where the heirs are entitled to definite shares as tenants-in-common the cause of action of such heirs in respect of the estate cannot be said to be a joint one for purposes of limitation. [p. 749, col. 2.]

An administrator *de son tort* is not responsible as an agent to render an account. He is only responsible to refund monies which he has received on behalf of the estate. [p. 749, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Madura, in Original Suit No 79 of 1914.

Mr. *K. V. Krishnasami Ayyar*, for the Appellant.

Mr. *K. Jagannadha Ayyar*, for the Respondents.

JUDGMENT.—Two Muhammadan brothers, Sanjiappa Rowthan and Shiek Muhammad Rowthan, acquired considerable properties. Shiek Muhammad died in 1894 and Sanjiappa Rowthan in 1901. The three plaintiffs are the widow, the son and daughter respectively of Sanjiappa. The 2nd and 3rd defendants are the widow and daughter of Shiek Muhammad. The 1st defendant is the husband of the 3rd defendant.

The case for the plaintiffs is that after the death of Sanjiappa Rowthan the properties were entrusted to the management of 1st defendant on behalf of the members of the Muhammadan family, that during the management the 1st defendant misappropriated the properties, that thereupon certain mediators interceded and obtained the transfer of some of the properties to the plaintiffs and that the 1st defendant is still retaining monies belonging to the plaintiffs. The 1st defendant denied his agency and his liability to account.

The Subordinate Judge in an unnecessarily long judgment has come to the conclusion that

the 1st defendant managed the properties honestly until 1909, that since then he had not been discharging his duties properly, and that, therefore, he should be held accountable for monies received by him since 1909. The 1st defendant and the plaintiffs have filed a memorandum of objections.

The legal position of the 1st defendant has not been correctly appreciated in the Court below. We are satisfied that the 1st defendant was asked to manage the properties belonging to the share of Shiek Muhammad. We do not agree with Mr. K. V. Krishnasawmi Ayyar that unless there is direct evidence of an appointment as agent the 1st defendant cannot be held liable; but the agency which is inferable from the course of conduct pursued by the 1st plaintiff and the 1st defendant cannot affect plaintiffs Nos 2 and 3. It is now well settled in this Presidency that a Muhammadan mother is not the *de jure* guardian of her children [*Hyderman Kutti* v. *Syed Ali* (1)]. Consequently the 1st defendant could not have been appointed either expressly or impliedly by the 1st plaintiff to be the agent for the management of the properties of the 2nd and 3rd plaintiffs. The position occupied by the 1st defendant must under the circumstances be taken to be as agent of the 1st plaintiff and as administrator *de son tort* of the properties of the 2nd and 3rd plaintiffs. This being the legal relationship of the parties, the question now for consideration is whether the claim for an account has become barred either wholly or in part. There can be no doubt that an administrator *de son tort* is not responsible as an agent to render an account. He is only responsible to refund monies which he has received on behalf of the estate. See William's Law of Executors and Administrators, Volume 1, page 190. See the observations in *Stevens, In re, Cooke* v. *Stevens* (2). Consequently the 1st defendant is bound to restore to plaintiffs 2nd and 3rd all the monies received by him from their estate. The estate consists of two classes of property: one consisting of lands which are in the possession of cultivating ryots, the other consisting of bonds for monies borrowed from the estate. As regards the former, the finding of the Subordinate Judge which is supported by the evidence is that until 1909 the 1st defendant had not misappropriated or retained any monies belonging to the share of the two minor plaintiffs. Therefore, he is liable to plaintiffs two and three only for monies received by him since 1909, and up to the beginning of 1911, when the decision of the arbitrators was given. As regards the latter class of property, apparently all the bonds, whether renewed in the name of the first defendant or still standing in the name of the minor plaintiffs, were handed over to the mediators in 1911. The mediators decided that if the 1st defendant was guilty of laches in collecting the monies on the bonds and had thereby allowed them to be barred by limitation, he should make good to the various plaintiffs the loss occasioned by his conduct. Therefore, the liability of the 1st defendant so far as the bonds are concerned is regulated by the decision of the arbitrators by Exhibit II, and not by his liability as administrator *de son tort*. The result will be that so far as the bonds are concerned, the 1st defendant should be held liable only in respect of any time barred debts between 1909 and 1911. After 1911 the 1st defendant having severed his connection with the management, any laches on the part of the two plaintiffs to collect monies due to them should not be charged against him. The decree of the Subordinate Judge as far as plaintiffs Nos. 2 and 3 are concerned will be modified as indicated above.

As regards the 1st plaintiff, the Subordinate Judge says that her right of suit is not barred, because the claim of the second and third plaintiffs is not barred by limitation. We are unable to agree with him. It is true that the decision in *Ahinsa Bibi* v. *Abdul Kader Saheb* (3) lends support to the view taken by the Subordinate Judge. But we fail to see how in a Muhammadan family where the heirs are entitled to definite shares as tenants-in-common, the cause of action of such heirs can be said to be a joint one. In the case of the 1st plaintiff she was a major and

(1) 15 Ind. Cas. 576; 37 M. 514; 23 M. L. J. 244; 12 M. L. T. 147; (1912) M. W. N. 889.

(2) (1898) 1 Ch. 162; 67 L. J. Ch. 118; 77 L. T. 508; 46 W. R. 177; 14 T. L. R. 111.

(3) 25 M. 26.

she entrusted the 1st defendant with the management of her property. She has not brought the suit within three years of the termination of the agency; consequently her claim so far as the income from landed properties is concerned is barred by limitation. So far as her right to get her share of the time-barred debts for which under the award of the arbitrators the 1st defendant was held responsible is concerned, her claim is saved by Exhibit II. The decree in favour of the 1st plaintiff can only be for the loss occasioned to her in respect of the bonds items Nos 1 to 31 mentioned in the plaint schedule.

As regards the memorandum of objections, in the view we have taken of the legal relationship of the parties, the claim on behalf of the 1st plaintiff and of the other plaintiffs is unsustainable. That is dismissed with costs. In the appeal parties will pay and receive proportionate costs.

M. C. P.

Decree modified.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 215 OF 1918.

March 11, 1919.

Present:—Mr. Heald, A. J. C.

OVANNA PERUMAL CHETTY—APPLICANT

versus

MAUNG MYIN AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 73 (b), O. XXI, r. 66 (4)—Execution of decree—Property subject to mortgage, whether can be attached and sold—Procedure.

Property subject to a usufructuary mortgage is liable to be attached in execution of a decree against the mortgagor and the decree-holder has a right to bring to sale his judgment-debtor's right or equity of redemption; but unless the mortgagee consents, the decree-holder has no right to bring the property itself to sale, all he can sell is the residual right of the mortgagor, that is, the right to recover the property on payment of the mortgage-money. [p. 750, col. 2; p. 751, col. 1.]

Procedure for execution against property under mortgage explained. [p. 751, col. 2.]

Mr. *C. G. S. Pillay*, for the Applicant.

Mr. *Maung Su*, for the Respondents.

JUDGMENT.—The petitioner obtained a decree against Maung Ka Ya and Ma Hla Min and in execution of that decree applied for attachment and sale of certain lands, which he alleged to belong to his judgment-debtors and to be in the possession of the present respondents, Maung Myin and Kyaw Dun, as usufructuary mortgagees for Rs. 300. He asked that the lands might be sold free of mortgage and that out of the proceeds the mortgage money might first be paid to the respondents, and that the balance, if any, might be paid to him towards satisfaction of his decree.

On this application the Court issued a warrant attaching the lands.

The respondents filed an application for removal of the attachment and produced their registered mortgage deed for Rs. 300. They said that the lands, being subject to usufructuary mortgage, could not be brought to sale.

The lower Court, reading the judgment of this Court in the case of *Mootia Chetty* v. *Maung Gyi* (1) as saying merely that property under mortgage with possession cannot be attached, and overlooking the order of the Court which set aside the order removing the attachment and directed that the attachment should be continued on the equity of redemption, committed the very mistake which was corrected in that case, and removed the attachment.

The petitioner applies for revision, on the ground that the lower Court misunderstood the ruling which it professed to follow and ought, instead of removing the attachment, to have allowed it to continue as against his judgment-debtor's equity of redemption.

There can be no doubt that this contention is correct.

It was pointed out in this Court in the case of *Maung Ohit Pon* v. *Maung Hmon* (2) that in such cases the decree-holder has a right to bring to sale his judgment-debtor's right or equity of redemption, and if he has a right to bring it to sale, he clearly has a right to attach it.

But unless the mortgagee consents, the decree-holder has no right to bring the property itself to sale. All he can sell is

(1) U. B. R. (1897-01) II, 261.

(2) U. B. R. (1892-96) II, 613.

the residual right of the mortgagor, that is, the right to recover the property on payment of the mortgage money.

When a Court receives an application for execution against property which is admittedly or is alleged to be subject to mortgage, it should give notice to the mortgagee, and ask him whether he consents to the sale of the property free of mortgage. If he consents and there is no dispute as to the fact of the mortgage or the amount of the mortgage money, the Court may under the provisions of section 73 (*b*) of the Code of Civil Procedure direct the sale of the property free of mortgage, giving the mortgagee the same interest in the proceeds of the sale as he had in the property sold. In that case no mention of the mortgage should be made in the proclamation of sale.

If the mortgagee does not consent to the sale of the property free of his mortgage, but the amount of the mortgage money is not disputed, the proclamation must state that what is sold is the right to redeem the lands for that amount.

If either the fact of the mortgage or the amount of the mortgage money be disputed the proper procedure is for the Court to make a summary enquiry under the provisions of Order XXI, rule 66 (4), with a view to ascertaining what the exact nature of the mortgagee's claim is and how far it is admitted by the decree-holder, and then to state the result of the enquiry in the proclamation of sale, which should show clearly that what is to be sold is only the judgment-debtor's interest in the property, and that a mortgage for so much is claimed against the property but is disputed or not admitted, or that the mortgage is admitted but the amount of the mortgage money is disputed or is admitted only in part.

In the present case the mortgage and the amount of the mortgage money are admitted by both parties, but the mortgagee does not consent to the sale of the property free of mortgage. All that can be sold, therefore, is the mortgagor's right to redeem the property for Rs. 300, and the proclamation of sale must make it quite clear that it is not the property itself but the mortgagor's right to redeem it for Rs. 300 which is being sold.

The lower Court's order removing the attachment is set aside and it is ordered that the attachment be continued in respect of the judgment-debtor's right to redeem the property for Rs. 300.

Each side will bear its own costs throughout because each has been partially successful.

Decree varied.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2768 OF 1915.

May 10, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

MAULA DAD—DEFENDANT—APPELLANT

versus

Musammat BEGAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Appeal—Appellate Court, duty of, to consider evidence—Pleadings—Court, whether can set up new case.

It is the duty of the Appellate Court to consider the evidence on the record and where this is not done, the judgment is liable to be set aside in second appeal. [p. 752, col. 2; p. 753, col. 1.]

A Court of Appeal cannot set up a case for any of the parties which is not put forward in the pleadings [p. 752, col. 2.]

Second appeal from the decree of the District Judge, Jhelum, dated the 12th June 1915, reversing that of the Senior Subordinate Judge, 1st Class, Gujrat, dated the 25th February 1915, dismissing plaintiff's claim.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

The Hon'ble Mr. *Fazal i-Hussain*, for the Respondent.

JUDGMENT.—In the suit out of which the present appeal arises *Musammat* Begam, the plaintiff, the sole surviving member of a family of prostitutes living in the town of Gujrat, sued for possession of certain property sold by *Musammat* Bakht Bhari, her aunt, to Choudhari Maula Dad, defendant-appellant, on the 6th of February 1914, on the ground that the property was acquired with the earnings of *Musammat* Jhandi, another aunt, and out of the property left by *Musammat* Shado, her grandmother, though the sale-deeds were

executed in the name of *Musammat* Bakht Bhari. The title-deeds being in the name of *Musammat* Bakht Bhari and the land having been entered in her name in the revenue records, the onus is clearly upon the plaintiff to show that *Musammat* Bakht Bhari was really only a *benamidar* and not the actual owner of the property. The first Court rightly laid the onus of proving the third issue,

"Did *Musammat* Bakht Bhari acquire the property in dispute with the earnings of *Musammat* Jhandi?"

upon the plaintiff, and found that the property was not acquired with the earnings of *Musammat* Jhandi but was acquired by *Musammat* Bakht Bhari herself out of the earnings of her two daughters, *Musammat* Piranditti and *Musammat* Udmi, who were well-known singers and dancers and earned large sums of money from their trade as such. It accordingly dismissed the plaintiff's suit. The lower Appellate Court reversed this decision, saying that it was on the whole satisfied that the land was bought with money contributed by *Musammat* Jhandi and *Musammat* Begam, possibly with the help of the two girls, *i.e*, the daughters of *Musammat* Bakht Bhari, but probably without their help. It held that the property was, therefore, family property which *Musammat* Bakht Bhari had no power to sell and it decreed the plaintiff's claim.

The vendee, Chaudhari Maula Dad, has filed a second appeal to this Court and Mr. Shafi has strenuously urged on his behalf that the lower Appellate Court has set up a new case for the plaintiff which was never raised by her and that the findings recorded by it are not based upon the evidence on the record. Now turning to the plaint, we find it clearly alleged therein that the property in suit was acquired with the earnings of *Musammat* Jhandi and with the property left by *Musammat* Shado. The lower Appellate Court at the commencement of its judgment says that the suit was brought on the ground that the land is part of the family estate of *Musammat* Shado's children. This, however, was not the allegation in the plaint. The lower Appellate Court was also wrong in stating the plaintiff's assertion to be that the land was acquired by the family with the earnings of *Musammat* Jhandi and *Musammat* Begam herself. *Musammat* Begam neither in the plaint nor in her oral statement said that any of the purchase money was contributed by herself. In discussing the findings of the Subordinate Judge to the effect that the land was acquired by the prostitution of *Musammat* Bakht Bhari's daughters the learned District Judge says: "There is considerable doubt as to this, because both these girls married respectable men early in life and it is not, therefore, very likely that they earned large sums by prostitution." Further on he says: "I think the probabilities are that they (*i.e.*, *Musammat* Bakht Bhari's daughters) remained perfectly respectable and did not amass wealth by prostitution." Now evidence was produced to the effect that *Musammat* Bakhat Bhari's daughters were famous singers and dancers and acquired sums of money which they handed over to their mother with which she purchased the land in suit. A local commissioner was also appointed whose finding is to the same effect. The learned District Judge has not referred to any of the evidence or to the report of the local commissioner and after a careful consideration of his judgment we are unable to say whether he has duly considered this evidence or not. His judgment in fact deals more with generalities than with the actual evidence on the record.

It is admitted that the plaintiff's son purchased a house from *Musammat* Bakht Bhari, which would seem to show that she had some separate property of her own of which the plaintiff's family admitted her to be the owner. This fact has not been referred to by the learned District Judge. In finding that the purchase money was supplied by *Musammat* Jhandi and *Musammat* Begam possibly with some help from the daughters of *Musammat* Bakht Bhari but probably without such help, the learned District Judge has set up a case for the plaintiff which was not put forward by her in her pleadings and is apparently not borne out by any evidence on the record. We do not think it was open to the Court below to set up a new case for the plaintiff in this manner and as we are not sure whether it considered the evi-

dence produced by the parties, we have no option but to remand the case for re decision.

We accordingly accept the appeal and setting aside the order of the lower Appellate Court remand the case thereto under Order XLI, rule 23, Civil Procedure Code, for re-decision on the merits. Stamp in this Court will be refunded and other costs will be costs in the cause.

Appeal accepted; Case remanded.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1200 OF 1917.

May 22, 1919.

Present:—Mr. Justice Das.

Raja DHAKESHWAR PRASAD NARAIN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MANNA LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Tort—Servant and master—Liability of master for tort committed by servant—Test—Burden of proof.

Before a plaintiff can succeed in a suit for damages against a master for a wrong done by his tenants and servants, he must show that the act complained of was done in the course of something which was authorised by the master to be done. [p. 754, col. 1.]

Appeal from a decision of the District Judge, Patna.

Messrs. *Ganesh Datt Singh* and *Gangadhar Das*, for the Appellants.

Messrs. *Kulwant Sahai* and *Nowal Keshore Prasad*, I, for the Respondents.

JUDGMENT.—The plaintiffs are the Maliks of Mauza Ghazipur and they instituted the suit out of which this appeal arises for recovery of Rs. 440 15 0 Their case is that the Bund which they had erected in the Nigar for the irrigation of their lands was cut by the Amlas and tenants of the defendants with the result that the crops were materially damaged. The suit, therefore, was a suit for damages against the masters for a wrong done by the tenants and servants of the master.

The lower Appellate Court has given a decree for the full amount.

The lower Appellate Court has found, firstly, that the plaintiffs were entitled to erect a dam in the Nigar and that the Bund was actually cut by the Amlas and the tenants of the defendants, secondly by reason of this tort committed by the Amlas and tenants of the defendants, the plaintiffs have suffered damages which the lower Appellate Court has assessed at Rs. 440-15-0. These findings are findings of fact and are, therefore, binding on me in second appeal.

But the question of law which has been argued by Mr. Ganesh Dutt Singh is that the masters would not be liable for the tort committed by the servants unless it is shown that the tort in question was committed within the scope of their employment. He says that there is no evidence and no finding that it was part of the duty of the Amlas to look after the irrigation work on behalf of the Maliks, and, therefore, in the absence of such a finding the Maliks would not be liable in an action for damages.

There is one matter that must be disposed of at once. The lower Appellate Court undoubtedly says in the course of his judgment that "it was the duty of the Amlas to look after the irrigation of the village and the interest of the proprietor generally."

It has been argued on behalf of the respondent that the lower Appellate Court intended to find this as a fact on the evidence that was adduced in the case. Mr. Ross, the learned District Judge, is always very precise and clear in his language, and reading the judgment as a whole I do not think that he intended to find it as a fact that the "duty of these Amlas in question was to look after the irrigation of the village and the interest of the proprietor generally." He assumed, I think, that it was the duty of the Amlas to look after the irrigation of the village and the interest of the proprietor generally, and I am confirmed in this opinion by the words "and the interest of the proprietor generally" that occur in the judgment. No doubt it is the duty of the Amlas to look after the interest of the proprietor generally, but the question still remains whether it was part of their duty to look after the irrigation of the village. That must depend upon the evidence before the Court. I do not think that Mr. Ross intended to find as a fact on the evidence that was produced before him that it was part of the duty of the

Amlas who actually committed the tort to look after the irrigation of the village.

The question, therefore, that arises in this case is whether, in the absence of a finding that it was part of the usual work of the Amlas who actually committed the tort to look after the irrigation work, there can be a decree against the Maliks.

It is conceded that before a decree can be passed against the Maliks, it must be shown that the tort committed by the servants was within what is usually termed the scope of their employment. But it is argued that since the Amlas were in the service of the Maliks, therefore, it was within the scope of their employment to do work on behalf of the Maliks. In the well-known work on Torts by Clerk and Lindsell, 6th Edition, page 82, the learned authors say:—

"An act is said to be within the scope of the servant's employment when, although itself unauthorised, it is so directly incidental to some act or class of acts which the servant was authorised to do that it may be said to be a mode, though no doubt an improper mode, of performing them. For an impropriety or excess on the part of the servant in the course of doing something which was authorised the master will be responsible but not for an act wholly unconnected with the class of acts which the servant was authorised to do. In short, the master's liability for the unauthorised torts of his servant is limited to unauthorised modes of doing authorised acts."

Therefore, before the plaintiffs can make the Maliks liable for the tort committed by the Amlas, it must be shown that the act that was done was done in the course of doing something which was authorised.

In the leading case of *Barwick* v. *English Joint Stock Bank* (1) Mr. Justice Willes, with reference to what may be deemed to be in the course of service, said as follows:—

"In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

Therefore, according to Mr. Justice Willes the test is, has the master put the agent in his place to do that class of acts, in other words, did the Maliks in this case put the Amlas to do irrigation work on their behalf? That seems to me to be the real test in cases of this kind. The view that I take is in complete accord with the decision in *A. Caspersz* v. *Kishori Lal Roy Chowdhari* (2). The question in that case was whether the master was liable for damages for the wrongful felling and carrying away of trees growing on part of the estate belonging to the plaintiff. The Judicial Committee in the course of their judgment says: "Several of the questions raised here may be disposed of very shortly. Both Courts have held that it is not proved that any cutting took place by actual order of the first two defendants. Mr. Arathoon was driven to contend that they must be held responsible for it in point of law, because the other defendants held some employments under them. But there is no evidence at all that to cut trees was in the ordinary course of the duty of any of them. The only statement to which their Lordships were referred bears the other way. The appeal wholly fails as against the first two defendants."

I am of opinion that it was essential that the plaintiffs should prove that it was part of the duty of the Amlas who actually committed the tort to do that class of work in connection with which the Bund was cut by them. There is no finding to that effect. It may be that there is evidence on the record which would enable the lower Appellate Court to come to that conclusion. I would, therefore, allow this appeal and remand the case to the lower Appellate Court for a finding on this issue. The lower Appellate Court will consider the evidence and dispose of the following issue:—

Was it part of the duty of the Amlas who actually committed the tort in question to do that class of work in connection

(1) (1867) 2 Ex. 259 at p. 266; 36 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877.

(2) 23 C. 922 (P. C.); 7 Sar. P. C. J. 31; 1 C. W. N. 12; 12 Ind. Dec (N. S.) 612.

with which the Bund was actually cut by them?

I reserve the question of costs.

Let the record be returned to the lower Appellate Court forthwith. The lower Appellate Court will return its finding on the issue framed by me to this Court with all convenient speed.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 86 OF 1916.

May 30, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

SHADI—PLAINTIFF—APPELLANT

versus

ABDUR RAHMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 134, 144—Suit by trustee against co-trustee for joint possession—Limitation applicable.

A suit for joint possession of trust property brought by a trustee against a co-trustee, who has alienated the trust property, and the person to whom it has been alienated is governed by the 12 years' rule of limitation and the article applicable thereto is Article 134 of Schedule I to the Limitation Act. [p. 756, col. 1.]

Second appeal from the decree of the District Judge, Jullundur, dated the 30th November 1915, reversing that of the Subordinate Judge, Jullundur, dated the 29th July 1914, decreeing claim.

Messrs. *Kofi* and *Ghulam Rasul*, for the Appellant.

Mr. *Niaz Muhammad*, for the Respondents.

JUDGMENT.—On the 5th March 1907 *Musammat* Hajran, one of the six Mujawars of the Khankah known as Khankah Punj Pir Sahib in the Jullundur City, effected a mortgage with possession of a plot of open site said to belong to the said Khankah. On the 18th March 1913 the plaintiff, who too claims to be a Mujawar of the institution, brought the present action for the joint possession of the property, alleging that the site was a part of the trust property, that the trustee had no authority to alienate it, and that the plaintiff along with the other trustees was entitled to the possession thereof.

The Court of first instance decreed the claim, but the learned District Judge has dismissed it, holding that the suit is governed by Article 120 of the Limitation Act, and that as it was not brought within six years from the date of the alienation, it was barred by time.

Now, we may say at once that we are not at present called upon to adjudicate upon the question whether the property is, as alleged by the plaintiff, trust property; and upon the further question whether he is entitled to the joint possession thereof. Neither of these matters has been determined by the lower Appellate Court. The sole issue before us is whether the claim as laid in the plaint is barred by limitation.

The principle of law has been repeatedly affirmed in a series of judgments that a suit by a worshipper of a religious institution for a declaration that an alienation made by the trustee thereof is void, and that the alienee be ejected from the property transferred to him, is governed by Article 120, *vide, inter alia, Asa Ram* v. *Paras Ram* (1). Further, there is a perfect unanimity of opinion upon the subject that if a trustee of a religious institution improperly alienates for value the trust property, the limitation applicable to a suit brought by his successor against the alienee to recover the property for and on behalf of the trust, that is to say, for restoring it to the trust, is that prescribed by Article 134; and the *terminus a quo* is not the date when the successor succeeds to the office but the date of the alienation, *vide Har Gian Deo* v. *Baldeo Das* (2), *Sajedur Raja Chowdhuri* v. *Gour Mohun Das* (3), and *Sagun Balkrishnashet* v. *Kaji Hussen* (4). The question arises what provision of the Limitation Act governs an action like the present brought by a trustee against his co-trustee, who has alienated the property, and the person to whom it has been alienated. It must be remembered that the suit is one for joint possession of the property, and we fail to

(1) 9 P. R. 1904.
(2) 127 P. R. 1903; 123 P. W. R. 1903 (F. B.)
(3) 24 C. [illegible] Unrep. Dec. (N. S.) 946.
(4) 27 B. [illegible]; 5 Bom. L. R. 303.

understand how it can be treated as a suit for a declaration or for ejectment. The plaintiff asserts that the trust property was in joint possession of all the trustees, and that one of them has in violation of the trust transferred a part of the trust property and has thus deprived the plaintiff of the joint possession thereof. The plaintiff consequently asks the Court to restore him to the joint possession of which he has been deprived wrongfully.

Now, the plaintiff may or may not be able to establish these allegations of facts or his right to joint possession. But the claim, as set out above, is not governed by Article 120. Indeed, Mr. Niaz Muhammad for the respondents is unable to cite any authority in support of the view taken by the learned District Judge, and asks us to hold that the property has not been established to be trust property. This is, as stated above, a matter to be determined by the District Judge.

Having regard to the nature of the claim as described in the plaint, we are of opinion that the action is governed by the 12 years' rule of limitation, and it is unnecessary to determine whether it is Article 134 or Article 144 which is applicable to it; though, as at present advised, we are inclined to think that it comes within the purview of the former Article. The suit is, in either case, within time.

We accordingly accept the appeal, and setting aside the decree of the lower Appellate Court remand the case for decision on the merits. The Court-fee on the memorandum of appeal shall be refunded, and other costs shall abide the event.

Appeal accepted.

PATNA HIGH COURT.
FULL BENCH.

MISCELLANEOUS JUDICIAL CASE No. 35 OF 1919.

May 28, 1919.

Present:—Mr. Justice Atkinson, Mr. Justice Jwala Prasad and Mr. Justice Das.

Kumar RADHIKA RAMAN PRASAD SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat JANKI KUER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 12 (2)—Appeal, dismissal of—Respondent, whether can be called upon to make up deficiency in respect of Court-fee payable in lower Court.

When the High Court dismisses an appeal from whatever cause, it ceases to have seisin of the appeal or case and is powerless to call upon the respondent to pay any deficiency due by him in respect of Court-fees payable in the lower Court, and consequently has no jurisdiction in such circumstances to restrain the respondent from executing the decree obtained by him. [p. 757, cols. 1 & 2.]

Mr. *Sultan Ahmad*, for the Crown.

Mr. *Gour Chandra Pal*, for the Respondents.

JUDGMENT.

ATKINSON, J.—This Full Bench has been constituted under an order of reference made by my learned brothers Mr. Justice Jwala Prasad and Mr. Justice Das, with the sanction of the Chief Justice, for the determination of a point arising on the construction of the Court Fees Act.

It appears that on the 10th March 1919 notice was issued, by leave of this Court, on the respondent, *Musammat* Janki Kuer, to show cause why she should not be restrained from executing the decree obtained by her in the lower Appellate Court until she paid and satisfied the deficit due in respect of Court-fees on her appeal to that Court.

At the time that this order was passed, the appeal presented to the High Court by the appellant against the order of the lower Appellate Court had been dismissed.

The respondent, *Musammat* Janki Kuer, appeared in response to the notice served upon her, and alleged that some of the respondents were dead, and she applied for time to substitute parties. The application was adjourned from time to time and eventually it came before a Bench constituted of Mr. Justice Jwala Prasad and Mr. Justice Das for disposal.

Their Lordships were of opinion that a decision of Mr. Justice Roe and myself in a

case entitled *Mahant Sadho Bhagat* v. *Ramrup Gossain* embodied in an order dated the 31st January 1919, conflicted with a subsequent ruling of Mr. Justice Mullick and Mr. Justice Jwala Prasad in the case of *Babu Baldeo Narain Singh* v. *Ramdil Singh*, both cases involving the same question of principle; and that thus there was a conflict of authority between two Division Benches of this Court touching the propriety of the matter now arising for decision; and consequently with the assent of the Chief Justice they referred the application now before us for a ruling by a Full Bench of this Court, seeking a judicial pronouncement as to what the law is in such cases.

The point requiring determination may be stated as follows:—

When an appeal by an appellant to this Court is dismissed owing to his failure to pay the deficit due in respect of the Court-fee payable by him on a memorandum of appeal or for other good and sufficient reasons, has the High Court any power or right, after dismissal of such appeal, to call on and require a respondent to make good any deficit in the Court-fee due in respect of the Court-fee payable by him in the lower Appellate Court?

Mr. Justice Roe and myself were of opinion that the High Court had such power. Mr. Justice Mullick and Mr. Justice Jwala Prasad took a different view, and held that once the appeal had been dismissed this Court was *functus officio*; and that the Court was powerless to make any order which could oblige or compel the respondent under the order of this Court to pay whatever deficiency might be due by him in respect of Court-fees payable in the lower Appellate Court, as a condition precedent to his right to execute such decree.

Having considered the matter very carefully, we all are of opinion that the view taken by Mr. Justice Mullick and Mr. Justice Jwala Prasad is the correct view; and that once an appeal has been dismissed, the High Court ceases to have seisin of the appeal or case and is powerless to call upon the respondent to pay any deficiency due by him in respect of Court-fees payable in the lower Court and consequently that the High Court has no jurisdiction in such circumstances to restrain the respondent from executing the decree obtained by him.

It might be different if the High Court had taken cognizance of the deficiency in the Court-fee payable in the lower Appellate Court before the appeal was dismissed, provided the appeal had come before the Court in a proper manner, under the provisions of section 12, clause 2, of the Court Fees Act of 1870. But once an appeal has been dismissed from whatever cause, then this Court is *functus officio*, and no subsequent order can be made for the recovery of any deficiency in Court fees due in the lower Courts. A similar principle was enunciated in a case reported as *Mahadei* v. *Ram Kishen Das* (1), in which Mahmood, J., said: "As soon as the Judge had passed the decree of the 1st March 1883 he ceased to have any power over it; and was incompetent to introduce new matters not dealt with by the judgment," and that to that extent the order was *ultra virse*.

We are of opinion, therefore, that the correct interpretation of section 12, sub-section 2, of the Court Fees Act of 1870 on general principles is as stated herein and in accordance with the decision of Mullick and Jwala Prasad, JJ., referred to above, and consequently we declare that the order in the case referred to us was illegal and improper and that this Court had no jurisdiction to pass the order of the 10th March 1919. The same is accordingly hereby set aside.

JWALA PRASAD, J.—I agree.

DAS, J.—I concur.

Order set aside.

(1) 7 A. 528; A. W. N. (1885), 140; 4 Ind. Dec. (N. S.) 554.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 3137 OF 1915.

May 21, 1919.

Present:—Sir Henry Rattigan, KT., Chief Justice, and Mr. Justice Dundas.

SHANKAR LAL—DEFENDANT—APPELLANT

versus

ARJMAND KHAN—PLAINTIFF, ABBAS ALI—DEFENDANT—RESPONDENTS.

Civil Procedure Code Act V of 1908), O. VI, r. 17—

SIVA NARAYAN RAM *v.* HARI NARAYAN.

Honest mistake of fact—Amendment of plaint, whether permissible.

The plaintiff in a suit for pre-emption included in his plaint some land not actually sold but taken by the vendee in exchange for an equal area of the land sold. On finding his mistake he applied to amend his plaint so as to include the actual lands sold:

Held, that the plaintiff may well have been misled as to the identity of the lands which he could claim and there was no sufficient reason why he should not be allowed to correct his mistake.

Miscellaneous second appeal from the decree of the District Judge, Hissar, dated the 30th August 1915, reversing that of the Subordinate Judge, first class, Hissar, dated the 16th April 1915, dismissing plaintiff's claim, and remanding the case for re-decision.

Bakhshi *Tek Chand* and Mr. *Muhammad Rafi* for the Hon'ble Mr. *Muhammad Shafi*, for the Appellants.

The Hon'ble Mr. *Fazl-i-Husain*, for the Respondents.

JUDGMENT.—The plaintiff in bringing a suit for pre-emption included in his plaint some land which had not actually been transferred by the sale of which pre-emption was claimed but had been taken by the vendee in exchange for an equal area of the land sold. Finding that he would be unable to acquire this land by pre-emption, the plaintiff applied to amend his plaint so that his claim should include the actual lands sold and not any land which had been acquired by the vendee in exchange. This application was disallowed, but on appeal the District Judge directed the necessary amendment to be made. An appeal has been lodged by a rival pre-emptor who was impleaded as a defendant in the suit. We see no reason to doubt that the plaintiff did intend to pre-empt the sale as a whole and if he was misled as to the identity of the lands which he could claim, this may well have been an honest mistake and there is no sufficient reason why the plaintiff should not be allowed to correct it. We, therefore, think that the order of the District Judge was a proper order and we have not thought it necessary to call upon the respondents to answer the appellant.

The appeal is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 26 OF 1918.

May 15, 1919.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

SIVA NARAYAN RAM MARWARI—DEFENDANT No. 13—APPELLANT

versus

Babu HARI NARAYAN AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 101—Mortgage—Mortgagee purchasing equity of redemption—Lien, whether subsists.

Where a mortgagee purchases the interest of the mortgagor, the presumption is that his mortgage lien would continue to subsist for his benefit. [p. 759, col. 2]

Appeal from a decision of the District Judge, Monghyr, dated the 8th June 1917.

Messrs. *A. Majid Khan* and *L. M. Ganguli*, for the Appellant.

Messrs. *Akbari*, *Jagannath Prasad* and *D. N. Sircar*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—This is an appeal against the order and decree of the District Judge of Monghyr, dated the 8th June 1917, directing the sale of properties for the realization of money due on foot of a mortgage bond, dated the 13th November 1899, executed by the defendants Nos. 1, 2 and 3 and the father of defendant No. 1 in favour of the plaintiff No. 2. Among the properties directed to be sold was property No. 1. The defendant No. 13, who is the appellant before us, had a prior mortgage over the said property along with others by virtue of a mortgage bond executed in his favour, dated the 31st May 1897, for Rs. 3,833. His contention in the Court below was that the mortgage in favour of the plaintiff was subject to his prior mortgage of 1897. The Court below overruled this contention and held that the mortgage lien of defendant No. 13 was extinguished by the Kabala (sale-deed) taken by him in respect of the property in question from the mortgagors on the 7th September 1901 for Rs. 5,000. Subsequent to the said Kabala, the property was sold along with other shares for arrears of Government revenue on the 20th of March 1911 subject to incumbrances under section 54 of the Revenue Sales Act, II of 1859. At that sale the defendant No. 13 himself purchased the

property and thus he occupied the same position as he had under the sale-deed of 7th September 1901.

The sole question, therefore, for consideration in this case is whether the prior lien of the appellant is extinguished.

It has been contended by Mr. Majid appearing on behalf of the appellant that the intention of defendant No. 13 was to keep alive his prior mortgage lien in spite of the sale of the property in 1901. In support of this contention reliance has been placed upon paragraph 18 of the sale-deed, Exhibit B.

The translation of the Kabala that was handed to us by Mr. Majid was not correct, as will appear from the translation now made of this document by the Court translator. In the translation handed to us the clause in question in paragraph 18 ran as follows:—"So the effect of the mortgage of the said bond is and shall remain in this Kabala, and also in the case of any dispute in these proceedings the said bond shall remain intact to the extent of consideration money mentioned in this Kabala."

It was not clear from this translation that the prior lien was intended to be kept alive, and the true construction appeared to us to be that the prior lien was by this clause merged into the Kabala. The translation was, therefore, liable to misconstruction. On the original document being read to us, we thought it desirable to have a true and faithful translation of that clause made by the Court translator. This has been done and the clause as translated by the Court translator runs as follows: "Hence the entire mortgage lien under the aforesaid bond shall remain intact and in force with reference to this deed of sale." It may be mentioned that in order to make it good English the words "with reference to this deed of sale" have been put down for the vernacular word "Mai" in the document which literally means "in this deed of sale." The effect, however, of both renderings of the word "Mai" in the document, is the same and the Court translation is substantially correct. We would, therefore, accept the translation made by this Court for the purpose of considering the effect of the clause in question. There cannot possibly be any doubt that the mortgagee intended that his prior lien should remain intact and in full force, and the obvious object of it was that the prior lien should continue for his own benefit and as a shield against the subsequent mortgagees.

Under section 101 of the Transfer of Property Act where the holder or the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance is extinguished, unless there is a declaration in express words or necessary implication that the charge shall continue to subsist or such continuance would be for his benefit.

There cannot be any manner of doubt that the subsistence of the lien of defendant No. 13 in this case was for his benefit and it is reasonable to presume that his intention in taking the Kabala was to keep alive his prior lien. Even if the words in paragraph 18 of the Kabala were of doubtful interpretation, the presumption would be made in favour of the prior mortgagee and as against merger. The cases of *Gokuldas Gopaldas* v. *Puranmal Premsukhdas* (1) and *Mahalakshammal* v. *Sriman Madhva Siddhantha Oonahini Nidhi, Ltd.* (2), *Gopal Chunder Sreemany* v. *Herembo Chunder Holdar* (3) are authorities for the aforesaid proposition.

I, therefore, hold that the lien of the defendant No. 13 over property No. 1 created by the mortgage bond of 31st May 1897 was not extinguished by the Kabala of 1901.

The learned District Judge does not appear to have considered the said clause in the Kabala, and no reason has been given by him for holding that the mortgage of the defendant No. 13 was extinguished.

The result is that the appeal is allowed with costs and the decree of the learned District Judge is modified with respect to property No. 1. The property No. 1 will, therefore, be sold subject to the prior lien of defendant No. 13.

(1) 10 C. L. J. 35 (P. C.), 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 503; 5 Ind. Dec. (N. s.) 602.
(2) 14 Ind. Cas. 865; 35 M. 642; 10 M. L. T. 169; 21 M. L. J. 804; (1912) M. W. N. 21.
(3) 16 C. 538; 8 Ind. Dec. (N. s.) 845.

We also uphold the order of the District Judge that this property will be put up for sale after the other properties mentioned in the decree are sold.

ATKINSON, J.—I agree.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

June 4, 1918.

Present:—Lord Buckmaster, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

NAFAR CHANDRA PAL CHOWDHURY —PLAINTIFF—APPELLANT

versus

SHUKUR SHEIKH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 100—Bengal Tenancy Act (VIII B. C. of 1885), s 109A (3)—Appeal, second, grounds for—Appellate Court entertaining appeal where none lies—Jurisdiction—Questions of law and fact, distinction between.

The right of appeal from the decision of a Special Judge to the High Court given by section 109A (3) of the Bengal Tenancy Act is limited, by the provisions of section 100 of the Civil Procedure Code, to the grounds specified in that section, and the functions of the High Court are completely circumscribed by these provisions, which were enacted for the express purpose of securing some measure of finality in cases where the balance of evidence, verbal and documentary, arises for decision. [p. 761, col. 2; p. 763, col. 1.]

Where, therefore, the real dispute between the parties cannot be brought within any of the grounds stated in the section and the appellant's objection to the judgment is that the Judge has misweighed the evidence, the High Court is not competent to entertain the appeal; if it does so, and interferes with the judgment appealed against, such interference is without jurisdiction. [p. 763, col. 1.]

Questions of law and fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of the admissibility of evidence, and the question whether any evidence has been offered on one side or the other; but the question whether a particular fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact. [p. 762, col. 1.]

Appeal from a decree of the Calcutta High Court (Brett and Sharfuddin, JJ.), dated the 4th February 1910, reversing the judgment and 14 decrees of the District Judge of Nadia, dated the 28th March 1907.

Mr. *A. M. Dunne, K. C.*, for the Appellant.

JUDGMENT.

LORD BUCKMASTER.—In this case the respondents have not been represented before their Lordships, who have, therefore, been deprived of the advantage of hearing Counsel in support of the judgment of the High Court of Bengal, which is the subject of this appeal, but, having given careful consideration to all the circumstances, they are unable to discover sound argument by which that judgment can be supported.

The real question which the appeal involves is whether or no the High Court were at liberty to reverse upon the grounds assigned by them a judgment and fourteen decrees of the District Judge of Nadia, dated the 28th March 1907.

The case arises under the following circumstances: —

The plaintiff, who is the present appellant, is the Zemindar of eight villages, and on the 25th February 1902, the Government of Bengal ordered a survey to be made covering these villages and a Record of Rights to be prepared under section 101 of the Bengal Tenancy Act of 1885. The survey was accordingly made and the Record of Rights was duly published, but the appellant was dissatisfied with certain of the decisions of the Revenue Officer; and, on the 9th March 1904, instituted 290 suits for determination of the matters in dispute between himself and his tenants, and at the same time a number of applications were made both by the appellant and certain of the tenants for the settlement of rents in respect of the lands.

The lands to which the dispute related were of two classes—Jamai lands, in which the tenant had permanent rights, and Utbandi lands, in which their rights were not permanent.

It was alleged that the Record of Rights had not properly apportioned the lands between these two headings, and this was one of the questions that arose for determination, while others related to the means by which excess lands held by the tenants were to be assessed under section 52 of the Act.

The main feature of the dispute, however, related to the standard to be used in measuring the lands. The agreed unit was a *rashi* or chain, the appellant claiming that its length should be 14040 inches, while the tenants claimed that the length should be 15095 inches, the result of the tenants' contention being that the area they held was increased, the rent properly assessable

and payable to the Zemindar being accordingly diminished.

On the 4th December 1905, the Revenue Officer delivered judgment in all the suits, which were tried together. He decided that as regards one village the proper standard of measurement was that claimed by the appellant, and was applicable to both classes of lands, while as regards the remaining villages the standard of the appellant was applicable to the Utbandi lands only, and that the larger standard claimed by the tenants was applicable to the Jamai lands. He also held that the appellant had failed to prove, except in one instance, that the lands entered as Jamai were Utbandi, and he directed that in settling the rents an allowance of 10 per cent. should be made in favour of the tenants.

The appellant instituted an appeal in 109 of the said suits to the Court of the District Judge of Nadia; ten of the tenants also filed appeals to the same Court. Settlement took place with regard to many of the cases before the hearing, and only fifty-three of the appellant's appeals and eight of the tenants' were heard and decided by the District Judge. He delivered judgment on the 28th March 1909, dismissing the tenants' appeals and deciding the plaintiff's substantially in his favour. The substance of his judgment was that upon the evidence the standard of measurement claimed by the appellant was the proper standard to be adopted both as to the Utbandi and the Jamai lands in seven of the villages, that the lands entered in the Record of Rights as Jamai and claimed by the appellant to be Utbandi were in fact Utbandi lands, and that the excess lands should be measured as claimed by the appellant, but he confirmed the provision as to the allowance of 10 per cent. in favour of the tenants.

Appeals were brought to the High Court at Calcutta by the tenants in fourteen of the said cases and in twenty-two others by the appellant under section 109A (3) of the Bengal Tenancy Act, which is in these terms:—

"Subject to the provisions of Chapter XLII of the Code of Civil Procedure, an appeal shall lie to the High Court from the decision of a Special Judge in any case under this section (not being a decision settling a rent) as if he were a Court subordinate to the High Court within the meaning of the first section of that chapter:—

"Provided that if in a second appeal the High Court alters the decision of the Special Judge in respect of any of the particulars with reference to which the rent of any tenure or holding has been settled, the Court may settle a new rent for the tenure or holding, but in so doing shall be guided by the rents of the other tenures or holdings of the same class comprised in the same record as ascertained under section 102 or settled under section 105 or section 108."

By the operation of this section it is plain that the right of appeal is limited by the provisions regulating the right of appeal to the High Court from a subordinate Court, and these are to be found in section 584 of the Code of Civil Procedure, the power as to the regulation of rents being dependent and consequent upon the alteration of the judgment upon the specified grounds. Section 584 of the Code is in the following words:—

"Unless when otherwise provided by this Code or by any other law, from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds, namely:—

(*a*) The decision being contrary to some specified law or usage having the force of law;

(*b*) The decision having failed to determine some material issue of law or usage having the force of law;

(*c*) A substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits."

The appellant's present contention is that the real dispute between the parties could not be brought within any one of those provisions. The High Court, however, entertained all the tenants' appeals, reversed the decrees of the District Judge, restored the decrees of the Revenue Officer, and

dismissed the appeals of the present appellant, and the question that arises is, whether their judgment depended upon the District Judge having decided contrary to some specified law or usage having the force of law, or on having failed to determine some material issue of law or usage having the force of law. There was no suggestion that there had been any error or defect in the procedure.

Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact.

Their Lordships have carefully considered the judgment of the High Court with these matters present to their minds, but they are unable to find that the decision of the District Judge stood in any shadowy borderland between fact and law. The question for determination was as to the character of certain lands, and as to what was the measurement properly applicable, and the real objection to the judgment of the District Judge was that there were underlying assumptions which vitiated his decision and that the form of his judgment showed that he had misweighed the evidence.

An examination of the judgment of the High Court makes this plain. The District Judge appears to have expressed the opinion that it is unusual that different standards of measurement should prevail at the same time in the same village, one for Utbandi and one for Jamai lands, and the High Court seems to think that that assumption was one which coloured his whole judgment, a proceeding which, they say, was not justified in law. But it certainly is important to observe that both the parties were in agreement that, whatever the standard of measurement, it was the same for both classes of lands, and though it may well be, as the High Court points out, that this in no way precluded the learned Judge from holding that the standard was different, yet when both parties agree that whatever the standard is it must be the same, it is difficult, in the absence of more specific material than is before their Lordships, to decide that there was something fundamentally wrong in the statement of the District Judge, who would know the local conditions, that a difference in measurement would be unusual. A further and a severe criticism is made by the High Court because the learned Judge stated that "Upon a consideration of the evidence I come to the conclusion that the standard which is one of 80 cubits prevails in the seven villages in dispute," and after this statement proceeded to deal with the evidence.

Their Lordships are quite unable to follow the reasoning that is adverse to a judgment so framed, and yet it appears from the judgment of the High Court that they accepted the contention on behalf of the tenant appellants that by reason of this statement the learned Judge, in his subsequent careful and critical examination of the evidence, approached the question not with an open mind, but influenced by the fact that he had already arrived at a conclusion on certain assumptions. In the course of the judgment of the High Court this contention is set forth in the following terms:—

"It has been contended on behalf of the tenants that, in dealing with the evidence in the way in which the Special Judge has dealt with it, he has not given full effect to the evidence adduced on behalf of the tenants, that he has erred in the estimate which he has formed of its value, being misled by the conclusion at which he arrived on the assumption made at the commencement of his judgment, and that his conclusions are not sufficient to rebut the presumption that the entries in the Record of Rights are correct, or to displace the findings on the evidence which had been arrived at by the Revenue Officer. We admit that in the present cases the findings on some of the points, which are findings of fact arrived at by the lower Appellate Court, are findings which we should hesitate to displace, but in dealing with this matter we have to consider, whether, in arriving at those findings, the lower Appellate Court has really approached the consideration

of the evidence in an impartial spirit, or has been prejudiced by the conclusions arrived at from assumptions based on pure hypothesis. In our opinion the evidence adduced on behalf of the tenant, supported as it is to some extent by the evidence of some of the witnesses for the landlord, and supported also by the result of the enquiries made on the spot, is sufficient to support the conclusion at which the Revenue Officer has arrived on a careful consideration of the whole of the evidence."

This seems to be the keynote of the judgment, and apart from the suggestion of prejudice and unreasonable assumptions, for which their Lordships can find no justification, it really amounts to no more than a finding that upon the documents and evidence placed before the learned District Judge the High Court would have come to a different conclusion, but it is precisely this revision of evidence which is excluded by the limited character of the appeal.

It may well be that before different tribunals the witnesses summoned and the documents used would have created an opinion upon the merits of the controversy different from that which was formed by the District Judge. But upon this the High Court was not competent to enter; their functions were completely circumscribed by the provisions of the Statute passed for the express purpose of securing some measure of finality in cases where the balance of evidence, verbal and documentary, arose for decision.

In their Lordships' opinion, therefore, the High Court have exceeded their jurisdiction and this appeal must succeed.

When special leave was granted to the appellant by Order in Council, dated 12th August 1913, to bring this appeal, conditions were imposed that the appellant should, in any circumstances, pay the respondents' costs. The respondents have not appeared, and this obligation, therefore, does not arise; but it follows that there will be no costs of this appeal, and their Lordships see no reason for interference with the order as to costs made by the High Court from which this appeal is brought. The dismissal of the appellant's appeals to the High Court has not been challenged.

Subject to this, the decrees of the High Court ought to be set aside and those of the District Judge restored, and their Lordships will humbly so advise His Majesty.

Appeal allowed.

Solicitors for the Appellant: Messrs. *W. W. Box & Co.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1246 OF 1917 AND NOS. 84 TO 94 OF 1918.

April 8, 1919.

Present:—Mr. Justice Atkinson and Mr. Justice Coutts.

SURAJ PROSAD MAHAJAN—APPELLANT

versus

KARU SINGH—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 69, 70—Notice to landlord, failure to give, effect of—Order by Collector directing deposit in treasury without direction for payment, whether final.

A failure to give a landlord an opportunity of being heard in a proceeding under section 70 of the Bengal Tenancy Act is an irregularity going to the root of jurisdiction and vitiates the whole proceeding. [p. 765, col. 1.]

In order to bring proceedings under sections 69 and 70 of the Bengal Tenancy Act, it must be shown that, as required by section 70 (5), the Collector has passed an order having complete finality and enforcible as a decree. An order directing the deposit of money in the treasury without any direction for payment of the amount to any one is not such an order. The fact that, generally, under the *batai* system the division is half and half, is not enough to dispense with the necessity of a final order enforcible as a decree. [p. 765, col. 2.]

Appeals from a decision of the District Judge, Gaya, dated the 6th September 1917, modifying that of the Subordinate Judge, Gaya, dated the 29th January 1917.

Mr. *Manuk* (with him Mr. *Rai Guru Saran Prasad*), for the Appellant.

Mr. *H. L. Nandkeolyar* (with him Mr. *Kailas Pati*), for the Respondents.

JUDGMENT.

COUTTS, J.—These appeals arise out of certain suits for rent. The plaintiff in each of the suits is the landlord and the suits were brought against tenants for rent for 1321

and 1322 F. S. according to the *danabandi* system. The defendants contended that the system under which they held was the *batai* system; that the whole crop of 1321 and the paddy crop of 1322 had been divided by an order of the Deputy Collector under sections 69 and 70 of the Bengal Tenancy Act; that this order was final and could not be questioned in a civil suit, and that consequently there was nothing due for the year 1321 F. S. or on account of the paddy crop of 1322 F. S.

The Court of first instance found that the system under which the defendants held was *batai*; but that the proceedings of the Deputy Collector under sections 69 and 70 of the Bengal Tenancy Act were no bar to the plaintiffs' suit, because the tenants had been guilty of fraud by removing a portion of the crop before the final division. The Subordinate Judge also found that the order of the Deputy Collector was vitiated by the fact that the plaintiff had not been given an opportunity of being heard as required by section 70 (4). He, therefore, decreed the suits at certain modified rates.

Against these decrees appeals were preferred to the District Judge, both by the plaintiff and by the defendants. The District Judge, in regard to the suits with which we are at present concerned, held that the tenants had not committed fraud, that the landlord had been given an opportunity of being heard within the meaning of section 70 (4) and that the proceedings and order of the Deputy Collector sufficiently complied with the law and were binding.

Against these decrees of the learned District Judge the twelve appeals now before us have been filed. There can now be no question of the system under which the tenants hold, because there is a concurrent finding of the Courts below that it is *batai* and with this finding we cannot interfere in second appeal. Mr. Manuk, however, for the appellant, has contended that the whole of the proceedings before the Deputy Collector, not being in accordance with the provisions of sections 69 and 70, are bad; that the order of the Deputy Collector, dated the 19th March 1914, is not such an order as is contemplated by section 70, and that it cannot, therefore, oust the jurisdiction of the Civil Court.

We are in these appeals concerned with only three proceedings before the Deputy Collector. The order-sheets of these proceedings and certain petitions in connection with them have been placed before us, and they certainly show a most extraordinary disregard by the Deputy Collector of the procedure which has been laid down in sections 69 and 70 of the Act. It is unnecessary to deal separately with each of the proceedings, because they are all of the same character. I will accordingly deal only with the proceeding No. 103 of 1913-14.

This proceeding was started on the 22nd December 1913 by a petition filed by the tenants for a division of the crop on the *batai* system. On this petition a notice was issued to the opposite party, the plaintiff, who filed a two-fold objections, first, that the system was not *batai* but *danabandi*; and, secondly, that the tenants had removed a great portion of the produce and that, therefore, a fair division could not be made. The Deputy Collector, entirely disregarding the first objection, gave an order to one Babu Tribeni Prasad to make a local inspection and to report whether the tenants had removed the crops so as to prevent a due division being made. Babu Tribeni Prasad, after considerable delay, did as he was ordered, and on his report the Deputy Collector, on the 26th February, passed the following order:—

"I am not satisfied that the tenants have removed any appreciable portion of the produce, and, therefore, order the produce to be divided. Let Babu Madho Prasad divide on payment of Rs. 25."

This order was followed by an order of the 19th March 1914 to the following effect:—

"*Khasra* of division filed, Rs. 991-2-0 on account of sale-proceeds of *hakmi* share not being accepted has been brought by *amin*. Let Rs. 15 out of it be given to the *amin* as costs. The balance of Rs. 976-2-0 has been deposited in treasury by *chalan* No. 291, dated the 16th March 1914: case disposed of."

Mr. Manuk's first contention is that these orders show that the Deputy Collector did not consider the first objection. On the other hand, it is argued that the fact that

the first objection is not mentioned in the orders shews that it had been dropped. I do not think the wording of the orders in any way supports the latter argument. The orders appear to show clearly that the question of whether the system was *danabandi* or *batai* was never considered at all. It may be that this does not go to the root of the matter and does not in itself show that the proceedings of the Deputy Collector were without jurisdiction, but it is material as showing the entire disregard of the procedure laid down which the Deputy Collector has shown throughout these cases. It is unnecessary to say more on this point, and I shall now consider the orders with which we are more directly concerned.

The first of these is the order of the 26th February 1914. The learned Judge is of opinion that the plaintiff was heard, but he says that even if the landlord was not heard he is not prepared to say that this was a fact which went to the root of jurisdiction, and, in support of this view, he refers to a judgment of Prasad, J., in an unreported case of this Court. This judgment is also relied on by the learned Counsel for the respondents. I am unable to accept the finding of the learned District Judge that the opposite party was heard or given an opportunity of being heard: the order of the 26th February makes no mention of any hearing or of any opportunity for hearing being given and I cannot believe in view of the wording of section 70 (4) that, if an opportunity for hearing had been given, the fact would not have been mentioned. Nor, in my opinion, is the decision on which the learned District Judge relies one which has any application to the case now before us. It is true that the learned Judge has said in that judgment that a failure to hear under section 70 would amount only to an irregularity, but the remark was merely *obiter*, because there was no doubt in that case that there had been a hearing and the whole of the rest of the proceedings were regular. I may be permitted to remark, however, that an opposite view has been taken by Mr. Justice Mitter that a failure to give the landlord an opportunity of being heard is an irregularity which would vitiate the whole proceeding and that with this view I am in agreement. Whether we accept the view of Prasad, J., or Mitter, J., however, is not very material, because in this case the decision depends more particularly upon the next contention which has been urged before us by Mr. Manuk, namely, that the order of the Deputy Collector does not amount to a final order such as is contemplated by section 70 (5). It was held by Jenkins, C. J., and Mookerjee, J., in *Kailaspati Narain Singh* v. *Gango Singh* (1) that in order to bring proceedings under sections 69 and 70 of the Bengal Tenancy Act, it must be shown that, as required by section 70 (5), the Collector has passed an order having complete finality and enforcible as a decree. With this view I am in entire concurrence. I have already referred to the wording of the order. It has been conceded that the *amin* acted without jurisdiction in selling the crop, and on this ground alone I think that the order is without jurisdiction, but apart from this the order simply states that the balance of Rs. 976 2 0 has been deposited in the treasury by *chalan*, without any direction for the payment of this amount to any one. It would be impossible to execute such an order as a decree; it is, in my opinion, without finality and is consequently not such an order as is contemplated by section 70 (5).

It has been urged on behalf of the respondents that in cases under the *batai* system there is no necessity for any final order in the nature of a decree at all, because the division is always half and half. In the first place, although generally under the *batai* system the division is half and half, it cannot be said that this is an absolutely universal rule. In any case, however, the contention is without force. Section 69 applies equally to cases of division of produce and of appraisement, as also does section 70. There is no distinction between these two classes of cases, and a final order enforcible as a decree is as necessary in the one case as in the other. In the result then I would set aside the decrees of the District Judge. The failure of the Deputy Collector to give an opportunity for hearing, as required by section 70 (4) of the Bengal Tenancy Act, was, in my opinion, to the

(1) 5 C. L. J. 59, 10 C. L. J. 592.

root of jurisdiction, and in any case his orders which purported to be final orders were in no sense final, nor were they enforcible as decrees. These orders are, therefore, bad and are no bar to the present suits. I would remand these appeals for re-hearing in order to enable a decision to be come to as to the amount to which the plaintiff-appellant is entitled. It is agreed that the rates, as found by the learned District Judge, are correct, but there is a dispute as to the area and on this point the respondents desire an adjudication. The respondents are entitled to withdraw the amounts deposited in the treasury as stated in the orders of the Deputy Collector under the *chalans* specified by him in his orders, dated the 19th March 1914, 5th May 1914 and 3rd February 1915. The appellant will recover the costs of this Court and the lower Appellate Court.

ATKINSON, J.—I agree.

Appeals remanded.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 1334 OF 1915.
May 3, 1919.
Present :—Mr. Justice Broadway and Mr. Justice Abdur Raoof.
PINDI DAYAL AND OTHERS—DEFENDANTS—APPELLANTS
versus
KISHUN KUNWAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (2), O. XXIII, r. 1, O. XLIII, r. 1—Order giving plaintiff leave to withdraw suit, whether decree—Appeal, whether lies.

An order passed under Order XXIII, rule 1, Civil Procedure Code, permitting the plaintiff to withdraw his suit, does not come under the definition of "decree" as given in clause (2) of section 2 of the Civil Procedure Code, nor is it included in the list of appealable orders given in Order XLIII, rule 1, and is consequently not appealable. [p. 767, col. 1.]

Second appeal from the decree of the Additional District Judge, Delhi, dated the 30th March 1915, reversing that of the Subordinate Judge, 1st Class, Delhi, dated the 1st February 1915, dismissing the claim.

Lala *Moti Sagar*, R. S., for the Appellants.

The Hon'ble Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—The facts out of which this appeal has arisen are the following:—

Pindi Dayal and Deoki Nandan, the defendants Nos. 1 and 2, executed a mortgage on the 13th of February 1905 in favour of the plaintiff, Manohar Lal. Piare Lal and Madho Ram, defendants Nos. 3 and 4, stood sureties for the mortgage debt. It appears that the plaintiff brought a suit about 4 years ago for the recovery of interest which had fallen due, but failed to include in that suit a claim for the principal which had become payable under the terms of the mortgage. The suit was decreed. The present suit he has brought for the recovery of the principal against the mortgagors and the sureties.

In the plaint it is stated that the plaintiff is in possession of the mortgaged property and that when he instituted the suit for interest the period of the mortgage had been extended by mutual consent by 2 years. The suit was contested by the principal defendants upon several grounds. Two of the pleas set up in the defence were that the suit was barred by Order II, rule 2, of the Code of Civil Procedure and that the allegation as to the extension of the period of mortgage by 2 years was without foundation. The defendants Nos. 3 and 4 resisted the suit on the plea that the plaintiff, by his own act having lost his remedy against their principals, was not entitled to sue them as sureties.

The Court of first instance sustained these pleas and having come to the conclusion that the claim was barred by Order II, rule 2, held that the suit was not maintainable either against the principals or their sureties. The claim was, therefore, dismissed against both sets of defendants.

An appeal was preferred by the plaintiff in the lower Appellate Court impugning the findings of the Court of first instance. The tenth ground in the memorandum of appeal filed in the lower Appellate Court was

taken as an alternative plea and ran thus:—

"Should the Court consider that the plaintiff is not entitled to a decree and his remedy by a suit for money is barred, it is submitted that the plaintiff be allowed to withdraw with liberty to enforce any other remedies he may in law possess, *e. g.*, for rent, etc., on the basis of defendants' lease in plaintiff's favour."

On the appeal coming on for hearing the learned Judge of the Court below gave effect to the last plea and granted the prayer for the permission to withdraw the suit. He held that the money claimed was, undoubtedly, due to the plaintiff and that the defendants in consequence of the dismissal of his suit might raise difficulties as to plaintiff's right to continue in possession. In his opinion, the case was eminently one in which permission to withdraw should have been allowed. An order was consequently passed allowing the plaintiff to withdraw the suit with liberty to sue against the principal defendants Pindi Dayal and Deoki Nandan.

Against this order the present appeal was filed by the defendants in this Court and was admitted to a Division Bench on the 7th of July 1915. On the appeal coming on for hearing before us a preliminary objection to its hearing was raised by Pandit Sheo Narain, the Counsel for the plaintiff-respondent. He contended that the order appealed against was passed under Order XXIII, rule 1, and as such was not appealable under the Code. It does not come under the definition of "decree" as given in clause (2) of section 2 of the Civil Procedure Code, nor is it included in the list of appealable orders given in Order XLIII, rule 1. Rai Sahib Moti Sagar frankly admitted the force of the objection, but he asked us to treat his memorandum of appeal as a petition for revision and set aside the order of the lower Appellate Court. This, having regard to the facts of this case, we declined to do. It is doubtful whether an order passed by a Court in the exercise of its discretion under Order XXIII, rule 1, can be revised by a High Court under section 115 of the Code. It is not, however, necessary to express any definite opinion on this point in this case. The appellant has chosen to file an appeal and all that we have to decide is whether an appeal lies. It is clear, as admitted by Rai Sahib Moti Sagar himself, that an appeal does not lie.

We, therefore, dismiss it with costs and refuse to accede to the prayer of Rai Sahib Moti Sagar to convert it into a revision.

Appeal dismissed.

PATNA HIGH COURT.

STAMP REFERENCE.

March 28, 1919.

Present :—Mr. Justice Roe.

LACHMAN SAHU—PLAINTIFF—APPELLANT

versus

Sheikh ABDUL KARIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 17—Landlord, suit by, against several sets of tenants, for declaration that they pay batai *and not cash rents—Court-fee payable.*

Where a landlord sues a number of tenants, each having a separate interest in his particular holding, for a declaration that their lands are held under the *batai* system and that they are wrongly recorded as paying cash rent, he must pay a Court-fee of Rs. 10 in respect of each set of tenants. [p. 768, col. 2.]

Appeal from a decision of the District Judge, Gaya, dated the 5th December 1918, modifying a decree of the Munsif, 2nd Court, Gaya, dated the 28th February 1918.

FACTS of the case appear from the following Order of Reference by the Taxing Officer:—

This is a Court-fee matter. The landlord plaintiff sued a number of tenants having land in these villages for a declaration that their lands were held under the *batai* system, and that they were wrongly recorded as paying cash rent in the recent settlement. The plaint was filed on a Court-fee stamp of Rs. 11-4-0 calculated *ad valorem* on Rs. 150, the value of the suit. The suit was decreed by the trial Court. The tenants appealed on the same Court-fee, and the decree of the lower Court was modified. The plaintiff landlord has appealed to this Court. Defendants' allegation was that the *bhaoli* lands were commuted into *nakdi* lands in 1319 by registered [illegible] and *kabuliyats*. There are 25 different [illegible] in the possession of 25 different sets of tenants. Each set has interest only in their particular holding. Only one cause of action is given, namely, that the hold-

ings are *bataí* but have wrongly been entered as *nakdi* in the recent settlement. The date of the final publication of the Record of Rights is taken as the date of cause of action. The Stamp Reporter is of opinion that the suit, so far as it concerns each set of tenants, constitutes a distinct subject within the meaning of section 17 of the Court Fees Act, and that, therefore, the total fee should be Rs. 10 *into* 25= Rs. 250, as the plaintiff has really united 25 suits into one. Appellant's Vakil does not accept the report. He refers me to 22 "Calcutta Law Journal," page 57, [*Dhakeshwar Prosad Narain Singh* v. *Iswardhari Singh* (1)]. In that case a landlord instituted a suit against a number of tenants, alleging that the proprietor's share of the produce rent had been entered wrongly in the Record of Rights and in the *fard reqauz bhaoli*, and that the rates of rent payable by the tenants varied according to their occupation and to the caste to which they belonged. It was held that a separate suit ought to have been instituted with respect to each class of tenants, *i.e.*, such of the tenants as belonged to the same caste or followed the same occupation. If there were ten such tenants belonging to one caste and occupation, the High Court were of opinion that one suit might have been brought against the ten tenants with a Court-fee of Rs. 10 because the same declaration would have to be made with respect to all ten tenants. The Stamp Reporter has mentioned a ruling of the Taxing Judge [*Chethru Mahton* v. *Khaja Muhammad Karim Nawab*(2)]. The position in that case was practically the opposite to the present one. There 78 sets of tenants as plaintiffs brought one suit with regard to 78 separate holdings, alleging that the settlement authority recorded rents considerably higher than the proper rents, and that subsequently the Zemindar had obtained decrees for these higher rents. In that case the Taxing Officer's opinion, with which the Taxing Judge agreed, was that there were 78 causes of action in regard to the declaration as to the rent and 59 causes of action in regard to the decrees which the plaintiffs desired to have set aside, and each of these 137 causes of action carried a Court fee of Rs. 10. In that case each tenant wanted two declarations in regard to his holding; in this case the landlord wants one declaration against all the 25 sets of tenants. In the present case I do not think that there can be any question that under Order I, rule 3, plaintiff can join all the defendants in one suit, because the right to relief arises from the publication of the Record of Rights, and if separate suits had been brought, a common question of law and fact would arise. This would seem clear from the pleadings of both parties. Section 17 of the Court Fees Act refers to a suit which comprises two or more distinct subjects. The question is whether, when each set of defendants has no interest in the holding of any of the other defendants, the rent of each holding is a distinct subject. The question is of real importance, because such cases may often arise after publication of the Record of Rights, when a landlord may have to bring suits against groups of tenants on the allegation that the Record of Rights is incorrect in regard to the *khatian* of each separate holding. As the position would seem to be exactly the reverse of that in *Chethru Mahton* v. *Khaja Muhammad Karim Nawab* (2), the present case should be placed before the Taxing Judge for orders. If Rs. 10 has to be paid for the declaration against each set of tenants, there will be a deficit of Rs. 238-12 0 in all three Courts.

Mr. *Kailas Pati*, for the Appellant.

JUDGMENT.—The *ratio decidendi* must be the same as in *Chethru Mahton* v. *Khaja Muhammad Karim Nawab* (2). Each separate subject requires a fee of Rs. 10. The rent of each *raiyat* is a separate subject.

Order accordingly.

(1) 30 Ind. Cas. 862; 22 C. L. J. 57.
(2) 50 Ind. Cas. 328; 4 P. L. J. 297.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION NO. 579B OF 1918

January 20, 1919.

Present:—Mr. Justice Pratt.

AH KWAY—APPLICANT

versus

EMPEROR—RESPONDENT.

Burma Excise Act (V of 1917), s. 30 (b)—Selling liquor without license—Restaurant keeper procuring liquor for customers, whether commits offence.

A restaurant keeper, who holds no license for the sale of liquor and who, to oblige a customer, procures for him a bottle of beer from a liquor shop, cannot be convicted under section 30 (*b*) of the Burma Excise Act of selling liquor without a license.

Mr. *Hay*, for the Applicant.

JUDGMENT.—The applicant, a restaurant keeper, has been convicted under section 30 (*b*) of the Excise Act of selling two bottles of beer without a license.

The defence of the accused was that he sent out for the two bottles of beer from a liquor shop to oblige his customers and that he did not sell the beer himself. His defence was disbelieved by the Magistrate but there is no reason to doubt its truth.

The Excise Officer sent two men with a five-rupee note with instructions to buy beer and refreshments. It seems clear from the Magistrate's remarks that they are almost professional excise witnesses. One of them says they purchased edibles and the other says nothing about it, but one of them admits that they had to wait twenty-five minutes for their beer.

It must be taken, therefore, that they handed the money to the accused when they purchased the other refreshments and asked him to get them some beer. He accordingly sent out for two bottles of beer which he made over to them at cost price. In doing so, I am of opinion, he has not been guilty of any offence. His action does not amount to a sale of the beer. I set aside the conviction and the sentence.

Conviction and sentence set aside.

PATNA HIGH COURT.

CIVIL CRIMINAL REVISIONS NOS. 8 AND 9 OF 1919.

May 30, 1919.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

IN C. CR. R. No. 8 OF 1919

MATHURA PRASAD SINGH—PETITIONER

IN C. CR. R. No. 9 OF 1919

KUNJ BEHARY SINGH—PETITIONER

versus

EMPEROR—RESPONDENT IN BOTH.

Criminal Procedure Code (Act V of 1898), s. 476—Bihar and Orissa Public Demands Recovery Act (IV of 1914)—Certificate Officer, whether Court—Order directing prosecution, legality of.

A Certificate Officer, when acting in the discharge of his duties under the Bihar and Orissa Public Demands Recovery Act, 1914, acts as a Court, and while so acting he is a Revenue Officer presiding over a Revenue Court and as such is competent to make an order under section 476 of the Criminal Procedure Code. [p. 772, col. 1.]

Civil Criminal revisions against the order of the Certificate Officer, Patna, dated the 20th March 1919, directing the prosecution of the petitioners under section 476, Criminal Procedure Code, for filing and using a forged Challan.

FACTS of the case are fully set out in the judgment of the High Court.

The case originally was heard by Das, J., who passed the following order, dated the 16th May 1919: —

"One of the questions raised in this application is whether a Certificate Officer who has drawn up proceedings under section 476 of the Criminal Procedure Code in connection with an enquiry under the Road Cess Act is a 'Court' and whether the matter came before him in the course of a 'judicial proceeding' within the meaning of section 476 of the Criminal Procedure Code. Mr. P. K. Sen on behalf of the petitioner says that there is no direct authority covering this point. I think the matter is an important one and should be disposed of by a Divisional Bench."

The case was then argued before the Divisional Bench.

Mr. *Jalpal[illegible] Prasad* (with him Mr. *Atul Krishna Ghose*), for the Petitioners—The order directing the prosecution of the peti-

tioner is without jurisdiction, because a Certificate Officer is not a "Court" and if a Court, is not a Revenue Court

A Court is not defined anywhere, but it means an officer appointed by the Government to dispense justice in accordance with law. For example a Land Acquisition Deputy Collector is held to be not a Court.

[The learned Vakil referred to certain sections of the Public Demands Recovery Act of 1895, when the Assistant Government Advocate pointed out that under section 2 of the Bihar and Orissa Act IV of 1914, this Act of 1895 had been repealed and referred to sections 57, 58, 60, 66, etc., of the Act and submitted that these sections were a complete answer to the contention of the petitioner.]

I submit then that assuming that the Certificate Officer is a Court he is not a Revenue Court, because revenue is what goes to the coffers of the Government whereas the cess is for building roads, etc.

The Assistant Government Advocate, for the Crown, was not called upon.

JUDGMENT.— Revisional applications Nos. 8 and 9 of 1919 come before us in Civil Criminal Revision from an order of the Certificate Officer under the Public Demands Recovery Act sanctioning the prosecution of the petitioners before us pursuant to his order of the 20th March 1919. The petitioners are Mathura Prasad Singh and Kunj Behari Singh.

The sanction to prosecute was granted by the order of the Certificate Officer, dated the 20th March, for offences alleged to have been committed by the petitioners under sections 471 and 465 of the Indian Penal Code.

The petitioners appear in this Court before us in Civil Criminal Revision under the provisions of section 115 of the Code of Civil Procedure by separate petitions. Mathura Prasad Singh's petition is No. 8 of 1919 and Kunj Behari Singh's petition is No. 9 of 1919.

These two persons are co-sharers of certain Lakhraj revenue-free land situate in the District of Patna. The land in their joint occupation is liable to road-cess, and the respective co-sharers have in times past mutually discharged their obligations in certain proportions. The total road cess leviable per annum is Rs. 14 8-0. Mathura Prasad Singh contends that his share of the road-cess amounts to Rs. 3-12-0 and that the balance Rs. 10 12-0 is properly payable by Kunj Behari.

Mathura Prasad alleges that he has been paying more than his fair share, inasmuch as he contends that the fair and proper proportion of road cess which he should pay is the sum of Rs. 3-12-0. The total annual road cess payable by both the co-sharers in respect of the entire land is the sum of Rs. 14-8-0. This amount is payable by the two half yearly *kists*, one in January and one in June of each year, and the half yearly amount is Rs. 7 4 0 for each *kist*.

Mathura Singh undertook as between the co sharers the liability of discharging in the month of May the road-cess due for the January *kist*; and accordingly he went to the Collectorate and defrayed the liability by a money order for Rs. 6-8 0 but on being informed that the amount due was Rs. 7 4-0, that there was a shortage between the amount of the money order and the actual amount due for road-cess, Mathura paid up the difference and received a *challan* for twelve annas. The money was paid in May, and nothing further occurred until December of 1918.

On the 12th December 1918 the Certificate Officer issued a certificate in pursuance of the Bihar and Orissa Public Demands Recovery Act, 1914, claiming from the petitioners as co-sharers the amount due for the June *kist*, *viz.*, Rs. 7-4-0; and on the 16th December 1918 Kunj Bihari who was liable to pay the road cess for the June *kist* filed a petition, dated the 16th December 1918, in which he alleged that the money due for the road cess for the June *kist had in fact been paid*; and he produced a money order receipt for Rs. 6 8-0 and a *challan* for Rs. 7-12-0—adding these two sums together they would make Rs. 14 4-0, which would be the total amount of the road-cess due for the entire year in respect of the two half yearly *kists* for January and June.

Upon this petition being filed the Certificate Officer directed an inquiry to be made in his office with a view of testing the *bona fides* of the case made by Kunj Behari.

It is right to say that the petition filed by Kunj Behari on the 16th December 1918 was a petition on behalf of himself and Mathura; but he, Kunj Behari, was the person who alone signed the petition and filed the petition.

A report by the office to the Certificate Officer clearly demonstrated that the *challan* that was produced and relied upon by Kunj Behari had been altered in such a way as to make it appear that Rs. 7 12-0 had been paid whereas in truth and in fact only 0-12 0 had been paid; and that, therefore, the *challan* relied upon in the petition of Kunj Behari, dated the 16th December 1918, was in fact alleged to be a forgery. It is stated that the *challan* referred to in the petition of Kunj Behari was in fact the *challan* issued to Mathura for ½ annas in respect of the payment of road cess which he made in the month of May for the January *kist*; and the co sharers had fraudulently altered the *challan* to make it appear as a receipt for Rs. 7-12 0 instead of 12 annas.

The learned Certificate Officer called upon Kunj Behari to show cause why he should not be prosecuted.

Kunj Behari did show cause; and called some five or six witnesses on his behalf. The learned Certificate Officer was satisfied that there was a *prima facie* case against the petitioner sufficiently strong to justify the prosecution of Kunj Behari; and he also came to the conclusion that inasmuch as Mathura was a party to the petition and one of the persons on whose behalf the petition was filed, that he too should be prosecuted and that under the circumstances it was not necessary to call upon Mathura individually to show cause why proceedings should not be instituted against him.

Accordingly on these facts the two petitioners Mathura Prasad Singh and Kunj Behari Singh now apply to this Court and seek to challenge the authority and power of the Certificate Officer to sanction their prosecution under the provisions of section 476 of the Code of Criminal Procedure.

It is contended, firstly, that the Certificate Officer is not a Court; and secondly, that if a Court, he is not a *Revenue Court*; and thirdly, that if the Certificate Officer be a Court, and a Revenue Court, that then the matters in connection with the sanction granted by him under section 476 did not come before him in the course of a judicial proceeding.

Now these applications originally came before my learned brother Mr. Justice Das, and he thought that the matters arising for decision require careful consideration, and he directed that the Government should be served with notice of these applications. It was fortunate that he adopted this course, because on the previous occasion it was asserted that the question for determination depended upon the construction of the old Public Demands Recovery Act of 1895. As a matter of fact that Act has been repealed in its application to this Province by section 2 of the Bihar and Orissa Act IV of 1914; and by this new Act dealing with the recovery of public demands, and various other demands specified in the schedule thereto, a complete and extensive code has been provided; and the rights of the parties and of the Courts constituted and appointed to determine such rights have been fully and clearly defined; and by virtue of the Bihar and Orissa Public Demands Recovery Act, 1914, the entire substance of the respective petitioners' contention, as formally presented to us, is without foundation.

The Bihar and Orissa Act defines what are the functions of a Certificate Officer, and by section 58 it is provided that "a Certificate Officer shall have the powers of a Civil Court for the purpose of receiving evidence, administering oaths, enforcing the attendance of witnesses and compelling the production of documents." Section 66 of the same Act provides that "A certificate Officer shall be deemed to be a Court, and any proceeding before him shall be deemed to be a civil proceeding within the meaning of section 14 of the Indian Limitation Act."

Section 67 [illegible] that "A Certificate Officer [illegible] discharge of his duty under this Act shall be deemed to be

acting judicially within the meaning of the Judicial Officers' Protection Act of 1850."

There can be no question now that a Certificate Officer under the powers conferred upon him by the Bihar and Orissa Public Demands Recovery Act, 1914, for the recovery of a public demand, or adjudicating upon a petition filed in respect thereof by a person upon whom a demand is made, is, while acting in such capacity, a *Court*. The question remains to be considered, what kind of Court it is?

Section 476 of the Criminal Procedure Code vests Civil, Criminal and Revenue Courts with the right to exercise the powers conferred by section 476 of the Criminal Procedure Code.

Section 60 of the Bihar and Orissa Public Demands Recovery Act, 1914, seems to indicate very clearly that a Certificate Officer is a Revenue Officer; and while acting judicially as a Revenue Officer his decisions are subject to review by the Collector, the Commissioner and eventually by the Board of Revenue. Appeals lie from the Certificate Officer to the Collector and the Commissioner; and decisions of the Certificate Officer and the Collector and the Commissioner are all capable of being reviewed and re-considered by the Board of Revenue by virtue of section 62 of the Act.

Appended to the Schedule of the Act itself is a list showing the classes of public demands which may be recovered by Certificate Officers in pursuance of the Bihar and Orissa Public Demands Recovery Act, 1914, as applied to this Province, in their capacity as Revenue Officers, recovering items of revenue; and amongst the enumerations will be found arrears of road cess and public works cess.

We have no doubt whatsoever that a Certificate Officer is a Court while acting in discharge of his duties under the Bihar and Orissa Public Demands Recovery Act, 1914, and that while so acting as a Court he is an officer presiding over a Revenue Court for the purpose of recovering all the claims specified in the Schedule to the Act as revenue claims, and that in such capacity he comes within the provisions of section 476 of the Code of Criminal Procedure.

It only remains to consider whether the matters referred to were brought to the Certificate Officer's notice in the course of a judicial proceeding within the meaning of section 476 of the Criminal Procedure Code. We are of opinion that they were. An issue was raised directly by the petitioner Kunj Behari on the 16th of December 1918. The petition alleged payment, and it became necessary for the Certificate Officer to enquire in his office as to the validity of the case alleged by the petition. The petition initiated a necessary judicial enquiry; inasmuch as the petitioner claimed to seek exoneration from payment of the June *kist* of road cess claimed by the certificate issued on the 12th December 1918 by the Certificate Officer. Thus there was a clear *lis* pending for determination as to the fact of payment of the road cess claimed, as alleged by the petition. Therefore, we think there is no substance in any of the three points raised on behalf of the petitioners respectively; and that the Certificate Officer was competent to direct the prosecution of the petitioners under the powers vested in him by section 476 of the Code of Criminal Procedure.

However, we think there is a distinction between the case of Mathura Prasad Singh and the case of Kunj Behari Singh. Kunj Behari Singh was given an opportunity of showing cause why he should not be prosecuted, on the other hand Mathura Prasad Singh was given no opportunity of showing cause.

Strictly speaking, it is not necessary that notice should be given to show cause; but in this case we feel that some prejudice might be done to Mathura Prasad Singh if he does not have an opportunity of dissipating the suspicion attaching to him from the *prima facie* case which has been established as against Kunj Behari Singh.

The learned Certificate Officer in the explanation which he has offered to this Court states that he did not think it was necessary or obligatory upon him to give notice to Mathura Prasad Singh. Strictly speaking, in point of law he is right; but in fairness Mathura should have been given an opportunity of being heard, just in the same way as Kunj Behari was, to endeavour to free himself from the taint of the commission of a very serious crime.

Accordingly we will affirm the order, dated the 20th March 1919, made by the Certificate

Officer directing the prosecution of Kunj Behari Singh for offences under sections 465 and 471, Indian Penal Code.

As against Mathura Prasad Singh we will direct that the order directing his prosecution be set aside, until notice requiring him to show cause why he should not be prosecuted has been served on him and he has had an opportunity of being heard. Therefore, we will allow the petition in Mathura Prasad Singh's case; but we will dismiss the petition in Kunj Behari Singh's case, *viz.*; Petition No. 9.

The Assistant Government Advocate applies for costs, which application is refused.

Petition No. 8 *allowed*;
Petition No. 9 *dismissed.*

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 61 OF 1919.
March 27, 1919.
Present:—Mr. Saunders J. C.
MI CHIT—ACCUSED—PETITIONER
versus
MI NYUN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *s.* 403 (4)—*Trial for assault before village Headman—Subsequent trial for hurt before Magistrate, legality of—Burma Village Act* (*III of* 1889), *s.* 9.

A person, having been tried and convicted by a Village Headman under the Burma Village Act for assault, cannot be tried for assault by a Magistrate, but he is liable subsequently to be tried by a Magistrate for the causing of hurt upon the same facts, the Village Headman not being competent to try the offence of voluntarily causing hurt. [p 774, col. 1.]

Mr. *H. M. Lutter*, for the Crown.

JUDGMENT.—The accused was tried and convicted for an offence under section 323 of the Indian Penal Code by a Sub-Divisional Magistrate. She then applied to the District Magistrate to set aside the conviction and sentence on the ground that she had already been tried upon the same facts and convicted for assault and criminal trespass by the Village Headman. The District Magistrate has submitted the proceedings with the recommendation that the conviction and sentence by the Sub-Divisional Magistrate should be set aside.

The conviction by the Village Headman was authorised by section 9 of the Burma Village Act, which allows a Village Headman to try persons accused of assault, theft, mischief, criminal trespass, and any other offence which the Local Government may by notification declare to be triable by a Headman. No definition is given of any of the offences referred to in section 9. They are offences as defined in section 2, clause (42) of the Burma General Clauses Act, 1898, since they are acts or omissions made punishable by a law for the time being in force, in this case, by the Village Act. They do not, however, appear to be offences as defined by section 40 of the Indian Penal Code, since they are not made punishable by that Code but by the Village Act. The fact that the same words are used in the two Acts to denote the things referred to, does not make the things punishable under the Village Act offences because they are punishable under the Indian Penal Code but because they are punishable under the Village Act. The language used in section 9 of the Village Act is somewhat loose. There is no provision in the Indian Penal Code which makes an assault as defined in that Act alone punishable. Under section 352 of the Indian Penal Code an assault or the use of criminal force is made punishable.

The Penal Code, moreover, deals with various kinds of theft and mischief, for instance, theft in a house as well as simple theft, while there are several offences of mischief, and there would seem to be no reason why the offence of theft, wherever or under whatever circumstances it is committed, should not be triable by a Village Headman provided the value of the property does not exceed Rs. 5, and the same inference may be drawn with regard to the offence of mischief. There is no reason why "assault," "theft" and "mischief" should not be given the same interpretation in the Village Act as in the Penal Code. It is, I think, indeed desirable that this should be done but in the absence of any definition of the terms in the Village Act this is a matter of convenience only.

The offences punishable under section 9 of the Village Act are, however, acts or

omissions constituting offences under two or more enactments within the meaning of section 26 of the General Clauses Act, 1897, and the question is whether the provisions of section 403 of the Code of Criminal Procedure were or were not a bar to the second trial by the Sub-Divisional Magistrate. I think the term "assault" used in section 9 of the Village Act must be interpreted strictly as an act which in the words of section 351 of the Indian Penal Code causes the persons present to apprehend that the person performing the act is about to use criminal force. The definition in section 351 of the Indian Penal Code appears to be in agreement with the definition of the term "assault" as used elsewhere, see for instance Wharton's Law Lexicon and other similar works. It does not include the use of criminal force nor does it include the causing of hurt. Under section 26 of the General Clauses Act, 1897, the accused, having been tried for assault by the Village Headman, could not again be tried for assault by a Magistrate.

But I am of opinion that the Sub-Divisional Magistrate was right in that the Village Headman was not competent to try the offence of voluntarily causing hurt with which the accused was subsequently charged, and that under clause 4 of section 403 of the Code of Criminal Procedure, the accused, having been convicted of an assault by the village headman, was liable subsequently to be tried by a Magistrate for the causing of hurt upon the same facts.

The proceedings will, therefore, be returned.

Proceedings returned.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 8 OF 1918.

January 30, 1919.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

MOHAMMAD KABIR UDDIN—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 465, 467—Forgery—Proof—Similarity of handwriting, whether sufficient proof of offence.

To convict an accused person as the forger of a document, the mere similarity of the handwriting of the forged document with the writing of the accused, without other evidence of complicity, is insufficient. Where a signature purports to have been forged, the strong similarity between the genuine and the forged signature is suggestive merely of a conspiracy that the genuine signature was obtained by a fraud upon the person whose signature was forged. In neither case can a conviction for forgery be maintained. [p. 779, col. 2.]

Criminal appeal against the order of the Judicial Commissioner of Chota Nagpur, dated the 3rd January 1918, convicting the appellant under sections 465, 467 and 420, Indian Penal Code, and sentencing to rigorous imprisonment for three years and fine of Rs. 2,960.

The Hon'ble Mr. *Mazharul Haque*, Messrs *Jadubans Sahai* and *Rai Guru Saran Prasad*, for the Petitioner.

The Government Advocate, for the Crown.

JUDGMENT.

JWALA PRASAD, J.—The appellant Mohammad Kabir Uddin has been convicted by the Judicial Commissioner of Chota Nagpur for having forged two bills, Exhibits 1 and 2, for Rs. 2,460 and Rs. 500 respectively, and Exhibit 3, which purports to be a true copy of a letter No. $\frac{3221}{3M.16}$, dated 24th May 1916, from the Director of Public Instruction to the Inspector of Chota Nagpur Division, sanctioning Rs. 3,000 for the purchase of machinery and scientific materials for the new Sub-Overseer Class of the Ranchi Industrial School. This copy purports to have been signed by one Soloman Tirkey, Head Clerk of the Industrial School, certifying that the document is a true copy of the letter mentioned above. The bill Exhibit 1, mentions this letter. In bill Exhibit 2 another sanctioning letter No. $\frac{3815,}{3\,S.\,G.}$, dated 5th May 1916, has been referred to, but this is not on the record and it is not known whether or not it was attached to the said bill.

The bills bear date 8th September 1916, on which date they were presented to the Ranchi Treasury. They purport to have been drawn and signed by Mr. Alfred D'Silva, Superintendent of the Ranchi Industrial School. The Treasury paid the amount mentioned in the bills, namely, Rs 2,460 in respect of Exhibit 1 and Rs. 500 in

respect of Exhibit 2, making a total of Rs. 2,960. The accused has also been convicted of cheating under section 420 of the Indian Penal Code.

According to Kali Saran Mukherji, Assistant Auditor (P. W. No. 10), these bills were received in the Accountant-General's Office about the middle of September, and as the letters referred to in the bills as sanctioning authority had not been received in the Accountant-General's Office and as the bills were not countersigned by the Inspector of Schools, the Assistant Auditor placed them under objection and noted them in the Objection Book, Exhibit 16.

On 2nd November, a memo., Exhibit 17, was sent to the Inspector of Schools, Chota Nagpur Division, for detailed countersigned bills in respect of the said sums. The Director of Public Instruction was also written to, to supply the number and date of the memo. with which the sanctioning letters referred to in the bills were forwarded to the Accountant-General's Office (Exhibits 18 and 19). The bills were then locked in a safe in the Accountant-General's Office by the Office Superintendent, N. K. Mozumdar.

On 9th November, Mr. Alfred D'Silva (P. W. No. 1), Superintendent of the Industrial School, received a letter Exhibit 5, dated the 8th November 1916, from the Inspector of Schools, Mr. Fawcus, asking him to submit detailed bills for the two sums of Rs. 500 and Rs. 2,460 drawn by him from the Treasury on 8th September 1916. D'Silva's son was an assistant in the Accountant-General's Office. In consequence of some statement made by him to Mr. Napier, Assistant Accountant-General (P. W. No. 2), the latter wrote a D.O. Exhibit 16, on 11th November 1916, to Alfred D'Silva, telling him that he was informed by his son that a fraud had been committed in respect of the said sum drawn from the Treasury on 8th September on two bills purporting to have been signed by him, and asking him to place the matter immediately in the hands of the Police. Accordingly Mr. Alfred D'Silva on 11th November 1916 wrote a letter, Exhibit 4, to the officer in charge of Kotwali Police Station, Ranchi, informing him of the fraud committed in respect of the two bills. This has been treated as the first information and under the orders of the Sub Divisional Officer the Police took up the investigation of the case. The investigation was first in the hands of Amar Nath, Sub-Inspector, and Mr. Morel, Inspector of Police. These two officers were not examined at the trial. The latter has since joined the Army at Belgaum and was examined on commission under orders of this Court during the hearing of the appeal, dated the 25th February 1918.

The two bills were received by Mr. Morel on 12th November from the Accountant-General's Office. On the 17th November at 8 P. M. he arrested Madhumasih and Johan Hirange, the two peons of the Industrial School. Madhumasih made a statement to him that the forged bills were given to him by Soloman Tirkey and that he was asked to draw the bills from the treasury in notes and rupees; that Johan would be sent to help him as the amount was large; that Johan accordingly followed him to the treasury and gave his thumb impression on the treasurer's book, and that he brought the money back to the Head Clerk of the Industrial School and made it over to him, who counted it.

Madhumasih was taken to Deputy Magistrate Mr. K. C. Ray (D. W. No. 2) at his house, by Morel and Sub-Inspector Amar Nath, at 10-40 A. M. of the 18th November for his confession to be recorded. Mr. Ray in his evidence says that he directed the man to be taken to Court. He gives his reason for this that according to Government orders a man's confession should not be taken at once but that there should be an interval, and that D'Silva of the Industrial School had personally spoken to him and said that his peon had been wrongly arrested. Madhumasih was produced before him in Court at 2-30 P. M. on that day. Mr. K. C. Ray considered it unsafe to record his confession then and directed Madhumasih to be taken to jail, ordering that his statement would be taken in jail next day. Madhumasih's statement was accordingly taken next day in jail, with the usual warning that his confession was to be voluntary and that it would be used against him. Mr. Ray says that he explained this to Madhumasih for half an hour and that Madhumasih told him that he was penitent and had not been tutored and was willing to make the statement. Mr. Ray then gave the usual certificate that he

believed the statement to be voluntary and says that he had then no doubt that the statement was voluntary. The statement was read over to, and signed by, Madhumasih and is marked Exhibit D. Madhumasih has been examined by the defence. He admits having made the confession, but says that he made it under threat from Mr. Morel and as tutored by him. He admits that when bills are cashed for the Industrial School, it is usually he who takes them since 1910. Madhumasih was, however, released from jail two or three days later.

Mr. Morel says that on 24th November 1916, at 5 P. M., peon Chaman Ram of the Deputy Magistrate's Department at the Treasury identified Madhumasih as the man whom he saw taking away a bag of rupees. Peon Chaman Ram has not been examined in the case. According to Mr. Morel, Madhumasih's confession was voluntarily made. He says he was informed in his office that Madhumasih who was in *hajat* wished to see him and that Madhumasih was accordingly brought into the office and then voluntarily confessed to having been given the bills by clerk Soloman Tirkey in Mr. D'Silva's office and that there was no pressure put on the man to make any statement.

On 28th November Soloman Tirkey was arrested. On 19th Dhirendra Nath Ganguly was arrested. They were released on bail.

About 15th December, Abdus Samad Khan, P. W. No. 22, Inspector of Police, made some confidential enquiries. He took formal charge of the case from Mr. Morel on 2nd January, and on 3rd January arrested Dhom Ali. Dhom Ali was sent up but was released later. Before Dhom Ali was released, the Inspector arrested the accused on the 19th January.

Inspector Abdus Samad submitted a charge-sheet on 13th February 1917. On that date Soloman Tirkey, Madhumasih, Johan Hirange and Dhirendra Nath Ganguly were released from bail and Dhom Ali was released from custody, as the Police reported that there was no evidence to connect them with the occurrence. The case proceeded against Kabir Uddin alone, who was committed to the Court of Session and was ultimately convicted.

There can hardly be any doubt that the offences of forgery and cheating have been committed. The bills purport to have been drawn by Alfred D'Silva and to bear his signature. D'Silva denies having drawn or signed the bills. He further swears that no such bills were sent from him for encashment to the treasury and that his office does not use such forms for contingent bills. The amounts mentioned in the bills were not sanctioned by the Director of Public Instruction nor was any application made for such a sanction. P. W. No. 11, Mahadeo Prasad, Assistant, Director of Public Instruction's Office, corroborates D'Silva in the fact that no sanction for the amounts mentioned in the bills was given by the Director of Public Instruction. He also proves that Exhibit 3, which purports to be a sanctioning letter, was never issued from his office nor the letter referred to in the bill Exhibit 2, the trace of which is not at all found. The documents in question were, therefore, forged ones. The fact that they were presented at the treasury and the amounts covered by the bills were paid out has been amply proved by the evidence of the Treasury Officer (P. W. No. 3), the Treasurer (P. W. No. 8) and the Accountant (P. W. No. 9), and also by entries in the payment register (Exhibit 14), items Nos. 72 and 73. The unauthorised register (Exhibit 11) kept by the Potedars shows that the money covered by the bills was actually paid. It is unfortunate, however, that the Potedars who actually made the payments and took the thumb impression of the payee in the unauthorised register (Exhibit 11) have not been examined, but that does not affect the question as regards the payment of the bills by the treasury. The bills were in due course sent to the Accountant-General's Office, from where Inspector Morel received them on 12th November.

The only question for consideration in this case is whether the accused forged the bills and got them cashed at the treasury and thus cheated Government. The Court below has held against the accused. The direct evidence against the accused consists of one Dhom Ali alone, who swears that the bills were handed over to him by the accused for encashment from the treasury and that he accordingly did present the

bills, receive the money and make it over to the accused. The first and the foremost question, therefore, is whether Dhom Ali's evidence can be accepted in this case as reliable. A careful consideration of his evidence and the surrounding circumstances will leave no manner of doubt that he is not telling the truth.

Dhom Ali's antecedents are unsatisfactory. He was a Civil Court peon and was dismissed on 8th July 1915 for making a false affidavit. Previous to that he had been punished and had a bad record according to D. W. No. 3, Civil Court Nazir, Ranchi. He was a *punkha* puller in the previous hot weather in the Ranchi Zila School and was discharged a month prior to this occurrence.

There are traces of falsehood internally in his evidence. According to him, all of a sudden at 10-30 A. M. on the day of the occurrence the accused, while on his way to the school, went to his house and suggested to him that he should go with him and see the Head Master about some post and while they were thus going to the school and reached the town outpost, the accused gave him the documents in question with a slip asking him to go and get them passed by the treasury and that the accused would shortly meet him there. He said to the accused that he had never cashed school bills before, but Kabir said that the school *chaprasi* was ill and so he must cash them. According to the evidence of this man the accused took out the bills from his pocket and handed them over to him near a public place (outpost) without any previous concert between them. This implies that the bills (Exhibits 1 and 2) and the sanctioning letter (Exhibit 3) as well as the slip showing that the accused wanted cash and notes were all written out and were complete in every respect with dates and everything before the accused met this man. How could the accused be sure that he would meet Dhom Ali at his house that day and that Dhom Ali would consent to cash the bills at the treasury? This is most unlikely. If perchance Dhom Ali had not agreed to the proposal of the accused, all labour in preparing the bills with the dates thereon would have been lost. Dhom Ali most gladly goes to the treasury, brings the money and hands it over to the accused, and does not take anything for his trouble. There can hardly be any doubt that Dhom Ali is lying when he pretends to be so innocent in the matter. He was not even told what was the amount of the bills, nor what he would say in case the treasury people asked him who had handed the bills to him.

The story told by Dhom Ali that some days later he left Ranchi in order to fetch Ghee for the accused from Hussainabad and that he went to his cousin Mada at Sahabazpur, appears to be wholly concocted. His anxiety to go to his ancestral home is mysterious. He was born at Ranchi, is 50 years of age, and had never before been to Sahabazpur. His cousin Mada had not asked him to visit him. In fact they were not even known to each other. Dhom Ali had not written to his cousin for the last 12 years and has no property in the village, nor a house even. Mada says that he had never seen him before and when he saw Dhom Ali, questioned him who he was. Dhom Ali did not go to Hussainabad at all and fetch the Ghee. He was not even told what quantity he was to bring. His wife *Musammat* Khedarva's evidence on the point is worthless. She says that he was arrested 8 days after he arrived, but no Police had come to her and asked about Dhom Ali before he returned. It is, therefore, clear that if Dhom Ali at all went away at the instance of the accused, he did so with mutual understanding to keep away from the Police. He is thus lying upon this point also.

From the evidence of the prosecution itself it would appear that he has been put forward as an accomplice, and not as an innocent tool. Inspector Abdus Samad Khan, P. W. No. 22, says that Anwar Khan might be an accomplice; the Judicial Commissioner also says that there could be no doubt that Dhom Ali was an accomplice and not a mere tool. Dhom Ali, therefore, is not telling the whole truth and it is unsafe to convict the accused upon the sole testimony of such a witness.

Except the statement of Dhom Ali, there is no external evidence to show that Dhom Ali actually cashed the bills. The payment at the treasury is made by the Peteders, who take either signatures

of payees, or in the case of illiterates their thumb impressions. Where the thumb impression is taken, the Potedars write the name of the payee against the thumb impression. This is done in a book (Exhibit 11). Dhom Ali says that he can read and write, and he told so to the Babu (probably the Assistant Treasurer, Makhan Lal, not examined in the case), who gave him the notes, but the Babu said that there was no pen and ink handy and that he could thumb the book. His signature was not taken in the book. The thumb impression in the book is so blurred that the expert failed to give any definite opinion as to whether it tallied with that of Dhom Ali on slip Exhibit 8. The names of the payees who gave thumb impressions in Exhibit 11 are written except that of the payee in the present case: so that from this payment book it cannot be shown that the money covered by the bills was paid to Dhom Ali.

There were four Potedars at the treasury, Raghu Nandan, Sarwan, Anwar Khan and Madho Prasad. None of them has been examined to prove that the payment was made to Dhom Ali. According to evidence, probably Raghunandan or Anwar Khan Potedars made the payment, and their not having been called by the prosecution is not only highly suspicious but also deprives the prosecution of the important evidence in the case regarding the identity of Dhom Ali with the payee at the treasury. It is strange that there is no evidence that any of the treasury people saw Dhom Ali at the treasury in connection with the presentation or cashing of the bills. The prosecution has not examined the Assistant Treasurer, Satyendra Nath Sen, to whom Dhom Ali first handed the bills, nor Makhan Lal, another Assistant Treasurer (called short, young, fair, spectacled Babu), who according to Dhom Ali handed the notes to him. Dhom Ali further says that when he was taking the tray between the rails, some money fell down. At that moment one Punit helped him and handed the tray over the rails. Punit was known to Dhom Ali from 8 or 10 years before; they had worked in the same place. Yet Punit has not been examined. No explanation has been given as to why these persons were not examined as witnesses.

There appears to have arisen some question at the treasury about the correctness of the bills (*vide* the evidence of the P. W. No. 9). This was the first abstract contingent bill from the Superintendent of the Industrial School, which, the Accountant says, he passed. He had some suspicion about the form. He consulted his assistant. The bills of the Industrial School generally used to be presented by one of the *chaprasis* of the School, Madhumasih or Johan. In fact the bills of public offices were generally brought to the treasury by *chaprasis* of the respective offices. The Accountant says that only a day before (7th September 1916) Madhumasih had drawn two bills. The treasury people as well as the Potedars who immediately used to make the payments would certainly have known that Dhom Ali was not the man who would ordinarily present the bills; and when there was some doubt as to the form used, the treasury people would hesitate to make the payment and at least would have their attention fully fixed upon the payee. In order not to rouse the least suspicion, it would have been more natural to have the bills presented by one of the peons in the Industrial School than to entrust them to a man like Dhom Ali. Whether Madhumasih's confession is true or not, it is not unlikely that he might have presented the bills to the treasury. On this point also the prosecution failed to examine Chaman Ram, peon of the treasury, Deputy Magistrate's Department, who on the 24th November 1916, at 5 P. M. identified, before Mr. Morel, Madhumasih as the man whom he saw taking away a bag of rupees (*vide* the evidence of Inspector Morel taken on commission).

From all the circumstances in the case it is certain to my mind, as it was to the Judicial Commissioner, that the treasury people, and notably the Potedars, were in the conspiracy to cheat Government in respect of the money covered by the bills and that has thrown a great obstacle in the way of the prosecution to place before the Court the most important and material evidence in the case with regard to the actual payee.

The Judicial Commissioner has relied upon the evidence of Kolha Dusadh as corro-

borating Dhom Ali, but Kolha Dusadh did not see him cashing the bills but saw him at some distance. Besides, it is not safe to rely upon his evidence in face of what has been said above. There is, therefore, no reliable evidence that Dhom Ali presented or cashed the bills. His statement cannot be relied upon, as already shown, and hence the accused cannot be convicted upon the sole testimony of Dhom Ali.

I have shown that the oral evidence connecting the accused with the offence of which he has been convicted is utterly unreliable. My learned brother has dealt with the question of the similarity of the writing of the forged letter and bills with the writing of the accused. I agree in thinking that mere similarity of writing, without a tittle of other evidence of complicity in the conspiracy in pursuance of which the forgery was committed, is insufficient to justify a conviction for forgery; as observed by Best in his book on "Evidence", 11th Edition, page 238, "Standing alone, any of the modes of proof of handwriting by resemblance are worth little; in a criminal case nothing,—their real value being as adminicula of testimony." It is not, therefore, necessary for me to consider the value of the expert's evidence on the question of similarity, not the patent points on which it may be suggested that the accused without doubt made the documents which are the basis of the charge against him.

I agree that the appellant should be acquitted and discharged.

It has already been noticed in this judgment that the treasury people were probably in the conspiracy and that there was great carelessness in not comparing the signature of D'Silva in the treasury office with those on the bills, particularly when they were not on proper form and when this was the first time that such bills were presented on behalf of the Industrial School.

ROE, J.—I had the advantage of reading the judgment in which my learned brother deals with the oral evidence against the accused. It is not necessary, therefore, for me to state the facts of the case, or to deal with this part of it. It is sufficient to say that, in my opinion, the investigating officers have touched only the fringe of the case, and have discovered nothing beyond the fact that it was the accused who wrote the body of the false document, the basis of the charge. The strong similarity between the forged signature and Mr. D'Silva's genuine signature suggest that his office must have been in the conspiracy, that is, that his genuine signature was obtained to these bills by a fraud upon him by his own office. The pretended ignorance of the Treasury *amla* as to who cashed the bills suggests that they were in the conspiracy. Both Dhom Ali and Madhumasih must have been known to them. The Treasury *amla* must know which of them it was who took the money. The blurred thumb impression confirms the suspicion arising from their pretended ignorance. Madhumasih's confession is far more probably true than false. Both Mr. K. C. Ray and Mr. Morel were convinced of its truth. If indeed the accused made the false documents, he made them as a minor member of this widespread conspiracy. Owing to the fact that the Crown witnesses were equally prepared to inculpate Soloman Tirkey before the Police and the accused before the Courts as the primemover, there is no evidence at all as to what share the accused had in the conspiracy. That he was implicated in the conspiracy I have no doubt I have never been prepared to accept the evidence of an expert in handwriting, unless it tallies with the evidence of my own senses. In this case Mr. Brewester deals with the case as one of feigned writing A comparison of that part of the forged document which is written with a fine pen with the ordinary handwriting of the accused when using a fine pen, and of that part written with a broad pen with his handwriting when using a broad pen, shows that the handwriting in each case is his ordinary writing and not feigned at all. I am satisfied that the accused wrote the body of the false document, but that is not in itself sufficient to justify his conviction. It was necessary to prove further that he fraudulently obtained upon them the signatures of Mr. D'Silva and Soloman Tirkey or made those signatures himself. This the Crown has failed to prove. I am not in the circumstances of

the case prepared to assume that he did so.

I am of opinion that the appellant should be acquitted and discharged.

Appeal accepted.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 38 OF 1919.

March 13, 1919.

Present:—Mr. Saunders, J. C.

NGA HAN—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—Guilty, plea of, when should be accepted—Sentence, measure of.

Before a plea of guilty is accepted in a case in which the accused is charged with murder, the record should clearly show that the person who is charged understands and admits such facts as would bring the offence within the definition of murder and that he does not plead any of the exceptions set out in the Penal Code.

Accused was placed upon his trial for the murder of his child and stated to the Committing Magistrate that he thought he was the cause of the child's death, he was drunk and did not know what he did. The plea of drunkenness was repeated to the Sessions Judge, who convicted him of murder and sentenced him to death:

Held, that the sentence was, in the circumstances, most undesirable, without any evidence to ascertain whether there was or was not anything to justify a conviction for a lesser offence or for passing a sentence of transportation for life upon a conviction of murder.

Mr. *C. G. S. Pillay*, for the Appellant.

JUDGMENT.—The appellant was placed upon his trial for the murder of his child. A plea of guilty was recorded at once; no evidence was taken and the appellant was sentenced to death. He now appeals on the ground that he did not in fact commit murder and did not intend to plead guilty to such a charge, that he did not understand the nature of the charge and that his answer to it was not, therefore, an answer which should have been accepted.

It was pointed out in the case of *Emperor* v. *Ohinia Bhika Koli* (1) that it is not in accordnce with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death. I am not prepared to say that there are no cases in which such a plea should be accepted, but before it can be accepted, the record should clearly show that the person who is charged understands and admits such facts as would bring his offence within the definition of murder, and that he does not plead any of the exceptions set out in the Indian Penal Code. It is probably rare that a Burmese cooly, as the accused was in this case, can be in a position to understand the nature of a charge of murder against him, though it is possible that if an accused person, upon being examined, stated that he deliberately and intentionally killed his victim, for the purpose, for example, of robbery, a plea of guilty might be accepted. Here the appellant was examined in the Committing Magistrate's Court and he stated there that he thought he was the cause of the child's death, he was drunk and did not know what he did. There is no reason to suppose that he adopted a different attitude in the Sessions Court and the judgment shows that his Advocate urged in his defence that he was not responsible for his actions, that he was maddened by drink and did not know what he was doing. Even assuming that the plea of drunkenness was not a good defence, it was clearly most undesirable that the Sessions Judge should, under the circumstances, have convicted the appellant and sentenced him to death without recording any evidence, and without being in a position from having seen and heard the witnesses to ascertain whether there was or was not anything to justify him in convicting the accused for a lesser offence, or in sentencing him, upon a conviction for murder, to the alternative sentence of transportation for life.

The appeal must be allowed and the case must be sent back for trial in accordance with law. In view of the examination of the accused recorded in the Committing Magistrate's Court and the arguments urged by his Advocate, the Sessions Judge should record a plea of not guilty.

Appeal allowed; Case sent back.

(1) 8 Bom. L. R 240; 3 Cr. L. J. 337.

PATNA HIGH COURT.

CIVIL CRIMINAL REVISION No. 12 OF 1919.

May 30, 1919.

Present:—Mr. Justice Das.

KALWA GOPE—PETIT.ONER

versus

MR. ANTONINI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Enquiry, mode of—Discretion of Court—Sanction, when not to be granted.

Although no hard and fast rule can be laid down as to the manner in which an inquiry should be made under section 195 of the Criminal Procedure Code, it is necessary that the inquiry should be complete in every detail. [p. 782, col. 1.]

An inquiry confined to an examination of the accused and his witnesses is not sufficient. The inquiry should proceed on the allegations made by the party who asks for sanction and on the basis of materials placed by him before the Court, and the Court should abstain from pronouncing any opinion on the merits of the case. The Court has a wide discretion in the matter of granting or withholding sanction, but that discretion should be used with caution and discernment to further the ends of justice and not to permit the use of the penal law to satisfy private ends or personal spite. Where it appears that there is considerable ill-feeling between the parties, and there are grounds for believing that there is a likelihood of a misuse of the law, sanction ought not to be granted. [p. 782, col. 2; p. 783, col. 1.]

Rule against the order of the Sub-Divisional Magistrate, Bhagalpore, granting sanction to Mr. Antonini to prosecute the petitioner under section 211, Indian Penal Code.

FACTS appear from the judgment.

Mr. *A. A. Asghar* (with him Mr. *Khurshed Husnain*), for the Petitioner, argued that the Magistrate had granted the sanction to prosecute the petitioner without examining Antonini, the opposite party, or his witnesses. Such an order is illegal, because when the witnesses produced by me all supported me, there were no materials for the Court to disbelieve them or to grant sanction to the oppcsite party. Further, it is admitted in this case that the feelings between the parties are very bitter and, therefore, if sanction is granted to the opposite party, he is certain to use it as an engine of oppression against me. Sanction is not sought for the ends of justice but to satisfy a private grudge. Reads *In re An Attorney* (1). Lastly the order granting sanction practically amounts to my conviction, because while granting sanction the Magistrate has decided the case against the petitioner and tried him out.

Mr. *Fakhruddin* (Government Pleader), for the Crown, submitted that in every case where a private party asks for sanction the feelings of the parties are bound to be strained, unless it is the Crown that asks for sanction. The law does not require that the Court, before granting sanction, must examine the opposite party or his witnesses. It is enough if there are materials in the records which entitled the Court to find that the petitioner's case was false. Here the Police after an elaborated inquiry has reported the case to be false. Lastly, the Court was no doubt wrong in putting down a clear finding that the complainant's case was found by him to be false. It would have been better if the Court had said that there was a *prima facie* case made out against the petitioner. But this order or finding of the sanctioning Court will not be binding on the Court which ultimately tries the case.

JUDGMENT.—This application is directed against an order passed by the Sub Divisional Magistrate of Bhagalpore granting sanction to Mr. Antonini to prosecute the petitioner under section 211 of the Indian Penal Code.

It appears that there was considerable ill feeling between the parties. The occurrence in respect of which the petitioner lodged a complaint against Mr. Antonini is alleged to have taken place on the 27th October 1918. On the 26th October 1918, however, the petitioner's brother lodged a complaint against Mr. Antonini charging Mr. Antonini with having assaulted him. On the 28th October, that is to say, two days after the last mentioned incident, Mr. Antonini himself filed a complaint against Sadho Gope and others, including the petitioner, charging them with having assaulted him and wrongfully confining him. It appears from the affidavit filed before this Court on behalf of the petitioner which has not been denied on oath by Mr. Antonini, that the complaint of Sadho Gope, which it must be remembered was filed on the 26th October 1918, was ordered to be put up after the disposal of the case instituted by Mr. Antonini against Sadho Gope and others. In respect of the complaint filed by Mr. Antonini Sadho Gope and others have been convicted.

The case of the petitioner in respect of the incident of the 27th October 1918 was that Mr. Antonini came with a gun, abused him and fired the gun which he had with him and killed a goat belonging to him.

(1) 22 Ind. Cas. 321; 41 C. 446; 15 Cr. L. J. 49.

That was the complaint which he filed on the 28th October 1918. On this point he was examined on oath and the Magistrate ordered a Police enquiry into the allegations made by the complainant. The Police reported the case to be false. The petitioner was not satisfied with the enquiry held by the Police and asked for the judicial enquiry. This was refused by the Magistrate, who thereupon dismissed the complaint under section 203 of the Code of Criminal Procedure.

On the 6th November 1918 Mr. Antonini presented a petition asking for sanction under section 195 to prosecute the petitioner under section 211 of the Indian Penal Code. Upon this the learned Sub-Divisional Officer called on the petitioner to show cause why he should not be prosecuted under section 211 of the Indian Penal Code for bringing a false case against Mr. Antonini. He was further ordered to adduce evidence on that date in support of his own case. It is unnecessary to go through all the orders recorded by the learned Sub Divisional Officer, but it is necessary to mention that he never examined Mr. Antonini or any witness on his behalf but proceeded to examine the opposite party on oath and the witnesses produced by the opposite party. Having done that, he proceeded to record his finding, namely, "for the reasons already given I hold that the complainant instituted the present case against the accused, Mr. J. Antonini, with intent to cause injury to him, knowing that there was no just or lawful ground for such proceeding and that the charge was a false one." In other words, he has decided the whole case against the petitioner. The subsequent trial is intended to be a mere formality for passing sentence on the petitioner. In my opinion the procedure adopted by the learned Sub-Divisional Magistrate cannot be supported on any principle at all. It is a procedure which is condemned by the learned and distinguished Judges who decided the case of *In re An Attorney* (1). Had the learned Sub-Divisional Magistrate carefully perused that decision, he would have seen that an enquiry complete in every detail was made by the High Court into the complaint made before that Court, but it was not an enquiry by the examination of the person against whom sanction was sought and his witnesses. It is impossible to lay down any hard and fast rule as to the manner in which the enquiry should be held by the sanctioning Court, but it is clear that the enquiry must proceed on the allegations made by the party who asks for sanction and on the basis of the materials placed by him before that Court. It is greatly to be regretted that the learned Sub Divisional Officer should have recorded a finding which obviously must operate to the prejudice of the petitioner. The learned Government Pleader argues that this order will not be binding on the Magistrate who ultimately tries the case. That may be so in a technical sense, but at the same time it is impossible for any Court to avoid looking into the order itself which gives it power to try the case. It is exactly for this reason that the learned Judges in *In re An Attorney* (1) point out that it is in the highest degree inexpedient to pronounce an opinion on the merits of the case. The late Chief Justice of the Calcutta High Court says: "I purposely refrain from discussing the merits of the present case; it would be wrong that I should." Mr. Justice Chaudhuri in the same case points out: "If it was held to be the law that the sanctioning Court must be satisfied of the guilt of the accused, his trial might degenerate into a mere formality. It might obviously operate to his prejudice." It is in my opinion idle for the Government Pleader to argue that the opinion of the sanctioning Court would have no effect at all in the subsequent trial of the person against whom sanction is sought.

I have already stated that there is considerable ill-feeling between the parties. It must be remembered that a bar has been deliberately imposed by the Legislature on prosecution for certain offences enumerated in section 195 of the Code of Criminal Procedure. The sanctioning Court undoubtedly has a wide discretion in the matter, but it is a discretion which must always be used with caution and discernment, having regard to the well known principle that a weapon should not be placed in the hands of a private party who may hold it *in terrorem* over the party against whom sanction is sought. One of the rules of prudence which has been recognized from the earliest times is that "the Court will be astute to see that there shall be no

abuse of the administration of criminal justice. No one, therefore, would be permitted to use the penal law merely to satisfy his private ends or personal spite; that would be to misuse it." I do not hold in this case that the sanction if granted would be used by the opposite party to satisfy his private spite, but I do hold that there are grounds for believing that he might do so. If he might do so, then in my opinion it is obviously not a case where sanction should be granted under section 195 of the Code of Criminal Procedure.

I would, therefore, set aside the order passed by the Sub-Divisional Magistrate and direct that no further proceedings be taken.

Order set aside.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 283 OF 1918.

November 13, 1918.

Present:—Mr. Justice Heaton and Mr. Justice Pratt.

SYED YACOOB SYED LALLAMIAN—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 106—Security to keep peace—"Offences involving a breach of the peace," meaning of—Penal Code (Act XLV of 1860), s. 504, conviction under—Order requiring security to keep peace, legality of.

A breach of the peace or a probable breach of the peace being an ingredient of the offence made punishable by section 504 of the Penal Code, it is not illegal to direct a person convicted under that section to furnish security to keep the peace under section 106 of the Criminal Procedure Code. [p. 784, cols. 1 & 2.]

Per *Heaton, J.*—The words "other offences involving a breach of the peace" in section 106 of the Criminal Procedure Code are applicable where there actually has been a breach of the peace, and also where the definition of the offence involves a breach of the peace. [p. 784, col. 2.]

Per *Pratt, J.*—The phrase "other offences involving a breach of the peace" includes offences which are offences because a breach of the peace has occurred or because a breach of the peace is likely to occur. [p. 783, col. 2.]

Criminal application for revision from an order passed by the Second Presidency Magistrate, Bombay.

Mr. *Munshi* (with him Mr. *M. B. Dave*), for the Accused.

Mr. *S. S. Patkar*, Government Pleader (with him Mr. *E. F. Nicholson*, Public Prosecutor), for the Crown.

JUDGMENT.

PRATT, J.—The applicants in this case have been convicted of offences under sections 341 and 504 of the Indian Penal Code, and further the applicant No. 1 has been ordered under section 106 of the Criminal Procedure Code to furnish security for keeping the peace.

The application for revision in regard to the convictions and sentences has not been pressed, and in regard to applicant No. 1 it is contended that the order for security is illegal, as the offence which he has committed under section 504 is not one which involves a breach of the peace.

In my opinion, the phrase "other offences involving a breach of the peace" includes offences which are offences because a breach of the peace has occurred or because a breach of the peace is likely to occur. This is consistent with the cases of *Jib Lal Gir* v. *Jogmohan Gir* (1), *Baidya Nath Majumdar* v. *Nibaran Chunder Gope* (2), *Kannookaran Kunhamad* v. *Emperor* (3), *Raj Narain Roy* v. *Bhagabat Chunder Nandi* (4) and *Abdul Ali Choudhury* v. *Emperor* (5), where it was held that the offence under section 143, Indian Penal Code, of unlawful assembly does not necessarily involve a breach of the peace. This is so, for the common object of the unlawful assembly may not be to commit a breach of the peace. I do not agree with the decisions in *Arun Samanta* v. *Emperor* (6) and *Kannookaran Kunhamad* v. *Emperor* (3) that offences which are likely to lead to a breach of the peace are excluded. This is contrary to the decision in *Jib Lal Gir* v. *Jogmohan Gir* (1) that the Court "should be satisfied that the acts do involve a breach of the peace or an evident intention of committing the same."

Of course a breach of the peace or a probability of the breach of the peace must be an ingredient of the offence. A breach of the peace must be the common object of the

(1) 26 C. 576; 12 Ind. Dec. (N. S.) 970.
(2) 30 C. 93; 6 C. W. N. 471.
(3) 26 M. 45[illegible]; 5 Weir 28.
(4) 35 C. 316; 7 Cr. L. J. 382.
(5) 34 Ind. Cas. 701; 43 C. 671; 20 C. W. N. 197; 23 C. L. J. 108; 17 Cr. L. J. 241.
(6) 30 C. [illegible].

unlawful assembly in a conviction under section 143, Indian Penal Code, or the intention of the accused in a conviction under section 448, Indian Penal Code: *Subal Chunder Dey* v. *Ram Kanai Sanyasi* (7). Section 106 could not be applied after a conviction for defamation, although the person defamed was provoked to commit a breach of the peace, for that is something beyond the scope of the offence charged.

But in regard to section 504, Indian Penal Code, it is clear that a breach of the peace or a probability of a breach of the peace is an ingredient of the offence. For insult is not an offence unless it is given with the intention or knowledge that it would be likely to provoke the breach of the peace.

I am fortified in this construction by the fact that section 106 also includes the offence of criminal intimidation. It would be remarkable if the section justified security in the case of language used with the intention of causing alarm and not language with the intention of provoking a breach of the peace.

I would accordingly discharge the Rule.

HEATON, J.—I agree that the Rule should be discharged. We have from time to time had a good deal of argument as to the meaning of the words "other offences involving a breach of the peace" which occur in section 106 of the Criminal Procedure Code, and at last we have determined to record what we have to say in relation to these words as they apply to the particular case before us. It seems to me that they are difficult words to construe, and there is no doubt that their meaning has been differently interpreted by different Judges at different times. I have a pretty clear view of my own as to what the words mean and why they are used. But I do not profess to suppose that my particular view will be accepted at any rate by the majority of other Judges, because the words are so illusive that they must of necessity attract different interpretations from different minds. To my thinking the words cover at any rate two classes of cases. They may cover more, but I am quite satisfied in my own mind that they cover two classes of cases. The first class of cases is where there actually has been a breach of the peace, not where it has been intended merely or been likely to occur, but where in fact it has occurred. That is one class. The other class is where the definition of the offence involves a breach of the peace, as it does in one of the two classes of cases which occur under section 504. There insult as a criminal offence is defined. One class of cases is where the insult is perpetrated with the intention or knowledge that it is likely to give provocation which will cause another person to break the public peace; the other class is where it is perpetrated with the intention or knowledge that it is likely to provoke another person to commit some other offence.

Now in the kind of case we are dealing with the result was an offence. It was perpetrated with the intention or knowledge that it would be likely to cause a breach of the peace. So the determination of what is an insult in this case involves a determination of what is a breach of the peace. You cannot do the first without the second. You cannot decide that the insult is punishable under section 504 unless you know what you mean by the words "breach of the peace." And where that is so, I think that the words in section 106 have operation. The case we are dealing with is a case of that type.

Therefore, I think the Rule should be discharged.

I only wish to mention one other point. I have said nothing about what actually constitutes a breach of the peace, and that is a matter that also is very frequently argued. It is questioned whether in order to reach what is known as a breach of the peace you have to go so far as to inflict blows. One view is that you must go that length. The other view is that you may have a breach of the peace long before you come to the infliction of blows. This view contemplates that the mere assembling of men for a criminal purpose is a breach of the peace and that the mere use of language, if it is violent enough, is a breach of the peace. But on this topic I do not wish to express any opinion, because to do so is not necessary for the purposes in hand.

Rule discharged.

(7) 25 C. 628; 3 C. W. N. 18; 13 Ind. Dec. (N. S.) 418.

NARENDRA NATH SANYAL *v.* EMAMAN.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 867 OF 1917.

February 19, 1919.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

NARENDRA NATH SANYAL AND OTHERS —PLAINTIFFS—APPELLANTS

versus

Sheikh EMAMAN AND OTHERS— DEFENDANTS—RESPONDENTS.

Landlord and tenant—Encroachment by tenant—Suit for possession of land encroached upon—Burden of proof.

Where a suit is brought to recover possession of a plot of land from a tenant on the allegation that the land was not included in the holding but, being contiguous to it, was encroached upon by the tenant, the onus is upon the plaintiff to prove that the land sued for is outside the land demised to the tenant. [p. 786, col. 1 .]

Appeal against the decree of the Subordinate Judge, 3rd Court, Hooghly, dated the 18th December 1916, modifying that of the Munsif, 2nd Court at Howrah, dated the 18th March 1915.

FACTS appear from the judgment.

Babu *Manmatha Nath Roy*, for the Appellants.—This appeal is on behalf of the plaintiffs and the question is whether the land in suit forms part of the leasehold granted to the plaintiffs' tenants. The Court below has decided the case by wrongly throwing the onus on the plaintiffs to show that the land in suit does not form part of the leasehold granted to the lessor of the defendants. The question of onus has been wrongly decided, because when admittedly the plaintiffs are the superior landlords of the land in suit, it is for the defendants to show that the land in suit is included in the lease granted by the plaintiffs. It is for the defendants to prove that the land is included in the leasehold. When the superior title is in the plaintiffs, the plaintiffs cannot be called upon to prove the negative fact that the land is not included in the leasehold.

[TEUNON, J.—If the landlord says that the tenant has encroached upon his land, he must show that the land in suit is not included in the lease.]

The plaintiff is not bound to prove the negative fact. The defendant is required to prove the positive fact that the land forms part of the leasehold: *Protap Chandra Roy* v. *Judhister Das* (1).

Then as regards plot No. 2, there is no evidence either way as regards the extent of encroachment.

Babu *Jyotish Chandra Hazra*, for the Respondents.—The question of onus has been correctly decided by the Courts below. The plaintiffs can easily show, and they must show to get a decree in their favour, that the land in suit does not form part of the leasehold. Without proving actual encroachment they cannot succeed. Here the land sought to be recovered is contiguous to the leasehold occupied by the tenants, and that distinguishes this case from the case of *Protap Chandra Roy* v. *Judhister Das* (1). I rely on *Rhidoy Kristo Mistri* v. *Nobin Chunder Sen* (2).

Babu *Manmatha Nath Roy* briefly replied.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs to recover one plot of land on establishment of plaintiffs' title thereto and for a declaration that another plot is part of the plaintiffs' pathway used by them for the purpose of going to a tank.

It appears that out of $3\frac{1}{2}$ *bighas* of land belonging to the plaintiffs, they let out one *bigha* more or less to defendant No. 2. The land thus let out to defendant No. 2 was again sublet by him to the predecessor-in-interest of defendant No. 1. The pathway in question lies immediately west of the land demised and two tanks, of which one belongs to the plaintiffs, lie to the south. The plaintiffs' case then was that the defendants had encroached upon their pathway and also upon their tank. The findings of the Subordinate Judge are that there has been no encroachment upon the pathway and that the extent of the encroachment upon the tank, if any, has not been established. In coming to these findings the learned Subordinate Judge laid the onus of proof upon the plaintiffs, and the contention of the appellants before us is that in so doing he has misplaced the onus. In support of that contention reliance is placed on the case of *Protap Chandra Roy* v. *Judhistir Das* (1). But we are of opinion

(1) 23 Ind. Cas. 69; 19 C. L. J. 408 at p. 413; 19 C. W. N. 143

(2) 12 C. L. R. 457.

that the present case is to be distinguished from the case of *Protap Chandra Roy* v *Judhister Das* (1). Here we have it admitted by the plaintiffs that the lands sought to be recovered are contiguous to the holding or land demised to the defendants and the further allegation that it has come into the possession of the defendants by encroachment. This case thus falls within the rule laid down in the case of *Rhidoy Kristo Mistri* v. *Nobin Chunder Sen* (2). That being so, we cannot say that the onus has been misplaced.

The appeal is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 55 OF 1919.

March 28, 1919.

Present :—Mr. Justice Roe.

PREMSUKH DAS—APPELLANT

versus

SHAH GOPI SARAN—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (10) (c)—Mortgage suit—Declaration that property was not subject to certain lien, prayer for—Court-fee payable.

Plaintiff brought a suit to recover money due on a mortgage-bond by sale of the mortgaged properties; it was also prayed that as defendant No. 3 had a deed of conditional sale reciting a mortgage prior to plaintiff's mortgage, the property might be sold subject to defendant No. 3's mortgage, or that he might be granted an opportunity to redeem. The suit was decreed and the property was ordered to be sold subject to the mortgage of defendant No. 3. The plaintiff appealed against the latter part of the decree, praying for its modification "by removing the condition as to priority of the deed of defendant No 3 and its redemption by the appellant." He valued the appeal for purposes of jurisdiction at Rs. 14,000, the amount of defendant No. 3's mortgage, but he paid a Court-fee of Rs. 10 only for the declaratory relief that defendant No. 3's bond had no priority of charge over his own:

Held, that the relief sought was not declaratory, but sought to obtain an order that the property be sold free of the lien declared by the trial Court, and that, therefore, *ad valorem* Court-fee must be paid on the value of the lien which it was sought to destroy. [p. 787, col. 1.]

FACTS appear from the following order of the Taxing Officer:—

This appeal arises out of a suit for recovery of money due on a mortgage bond by sale of the mortgaged properties. Defendant No. 3 was impleaded because he had a deed of conditional sale, in which there was a recital of a mortgage of the same properties, which was prior to plaintiff's mortgage. Plaintiff impugned the documents as collusive, but he prayed that if they were held to be genuine, the mortgaged property might be sold subject to defendant No. 3's mortgage or that he might be granted equity of redemption. The mortgage suit was decreed, but it was ordered in the decree that the property should be sold subject to the mortgage of defendant No. 3. Plaintiff has appealed against this part of the decree. He prays that the lower Court's decree should be modified "by removing the condition as to priority of the deed of defendant No. 3 and its redemption by the appellant." For the purposes of jurisdiction he has valued the appeal at Rs. 14,000, the amount of defendant No. 3's mortgage bond. But he has paid a Court-fee of only Rs. 10 for the declaratory relief that defendant No 3's bond has no priority of charge over plaintiff's bond. The Stamp Reporter says that obviously such a declaration cannot be made without a consequential relief that the property will be sold free from prior incumbrances; that the appellant in this appeal seeks to get rid of the liability imposed upon him by the decree, and the appeal is, therefore, one for a declaration with consequential relief. The appellant's Vakil does not accept this report, and he contends that the appeal is for a declaration, pure and simple, and that no consequential relief is required. I may note that the lower Court held that plaintiff can get the property sold without redeeming defendant No. 3's mortgage, and that it being a prior mortgage, it was not necessary even to bring him on the record. It would appear that in the present appeal what the appellant wants is to get rid of the charge of Rs. 14,000 on the property. He is in effect appealing against so much of the decree as declares that defendant No. 3's mortgage is a charge on the property, and he desires to be relieved from the liability under the decree to that extent. The ruling in *Bayi Lal* v. *Gobardhan Singh* (1) does not seem to be of

(1) 1 Ind. Cas. 1000; 31 A. 265; 6 A. L. J. 155.

assistance in this case, as there the decree for sale was passed conditionally on the plaintiff redeeming the prior mortgage. In the present case plaintiff has obtained the mortgage decree subject only to defendant No. 3's lien on the property. In *Venkappa* v. *Narasimha* (2) the appeal was by the defendant mortgagor against so much of the decree as declared the liability of his property to sale. In that appeal it was held that the proper stamp was on the value of the debt not exceeding the value of the property. The question would seem to be whether the simple declaration asked for is sufficient for plaintiff's purpose, and whether, once it is declared that defendant No. 3 has no priority of charge, the property can be sold free of any incumbrance. I am of opinion that the appellant is appealing against so much of the decree as places a prior charge of Rs 14,000 on the mortgaged property, and is trying to get rid of that part of the decree by asking for a declaration only. I cannot find that any case of this kind has arisen before in this Court, and it is of importance as there are likely to be other cases of the same kind. I direct that it be placed before the Taxing Judge for orders.

My attention has also been called to *Moti Begam* v. *Har Prasad* (3).

JUDGMENT.—I am satisfied that the relief sought in this appeal is not a declaratory relief at all. The Court of Appeal is clearly asked to order that the property sold be sold free of the lien declared by the Court of first instance. On this relief an *ad valorem* Court fee must be paid, that is to say, a fee calculated on the value of the lien which it is sought to destroy.

Order accordingly.

(2) 10 M. 187; 3 Ind. Dec (N. s) 882.
(3) 47 Ind. Cas 311; 16 A. L. J. 81.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2191 OF 1914.

May 1, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

CHAIL BEHARI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KIDAR NATH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), *O. XXI, rr.* 97, 103, *scope of—Decision as to possession, how far final—Suit to establish title—Limitation Act (IX of* 1908), *Sch. I, Art.* 11.

Rules 97 to 103 of Order XXI, Civil Procedure Code, contemplate that the decision in favour of a party, not being a judgment-debtor, under rule 99 of the Order is conclusive so far as the question of possession is concerned, unless and until a suit is brought, by the party against whom the order is made, under rule 103, and such a suit must be brought within one year from the date of the order. [p. 790, col. 2.]

Mahadev v. *Babi*, 26 B. 730; 4 Bom. L. R. 513, followed.

Sarat Chandra Bisu v. *Tarini Prasad Pal Chowdhry*, 34 C. 491; 11 C. W. N. 487, *Raghunath Jha* v. *Birjnandon Singh*, 31 Ind. Cas. 444 and *Bhagwanti* v *Goman*, 1 Ind. Cas. 742; 42 P. R 1909; 52 P. W. R. 1909; 58 P. L. R. 1909, distinguished.

First appeal from the decree of the Divisional Judge, Delhi, dated the 13th July 1914, dismissing the plaintiffs' claim.

Bakhshi *Tek Chand*, for the Appellants.

Lala *Moti Sagar*, R. S., for the Respondent.

JUDGMENT.—This is an appeal from the order of the Divisional Judge of Delhi dismissing plaintiff's suit for possession of certain immoveable property as time barred under Article 11-A of the Limitation Act, it having been brought more than one year after the date of an order in favour of *Musammat* Ambo, defendant, passed under Order XXI, rule 99, Civil Procedure Code. *Musammat* Ambo, the sole defendant, having died, Kidar Nath, her adopted son, and Baij Nath and Ram Rachhpal, who claimed to be legatees under an alleged Will executed by *Musammat* Ambo in their favour, have been brought on the record as her legal representatives. Plaintiff-appellant disputes this Will and says that Kidar Nath is in reality the sole heir and legal representative of *Musammat* Ambo. Counsel for both parties agree that Ram Rachhpal and Baij Nath's sons, Baij Nath himself having died, shall be considered to be representatives of *Musammat* Ambo for the purposes of this appeal only, no adjudication being given

by this Court as to the genuineness or validity of the alleged Will. Rai Moti Sagar has argued the appeal both on behalf of the heir Kidar Nath and Ram Rachhpal and the sons of Baij Nath.

The property in suit belonged to one Bishen Lal, who died in 1856 leaving a widow, *Musammat* Munia, who on the 5th of March 1866 sold it to Rammi Mal, a stranger. *Musammat* Ambo was the widow of Rammi Mal. On the 29th of September 1904 *Musammat* Munia died and on the 8th of March 1905 Mathu Mal, plaintiff-appellant, as daughter's son of Bishen Lal, sued for possession of the property making Kidar Nath, the adopted son of Rammi Mal, the sole defendant. His suit was dismissed by the District Judge but on the 7th of July 1906 the Chief Court passed a decree in his favour, holding that he was the heir of Bishen Lal and that the sale to Rammi Mal was without necessity; it fixed the sum of Rs. 1,400 to be paid to *Musammat* Ambo as compensation for improvements. Kidar Nath appealed to the Privy Council, which upheld the decree of the Chief Court on the 14th of February 1913. Meanwhile Mathu Mal had executed the Chief Court decree and had tried to get possession of the property decreed to him in execution proceedings but was obstructed by *Musammat* Ambo, who said that she was in possession in her own right under a Will made by Rammi Mal. He was also obstructed by Ram Dit, a tenant of *Musammat* Ambo. Mathu Mal complained of the obstruction to the executing Court under section 328, Civil Procedure Code of 1882. *Musammat* Ambo also filed an application under section 331 of that Code. An investigation into the merits of the rival claims was started. On the 1st of January 1909 the present Civil Procedure Code came into force and the investigation was accordingly cut down into a simple enquiry as to the existence of a claim made in good faith by *Musammat* Ambo to be in possession on her own account. The enquiry was held under the provisions of Order XXI, rule 99, of the new Code and Lala Sri Ram held that *Musammat* Ambo was in possession of the property on her own account and was claiming in good faith. He accordingly made an order dismissing the present plaintiff decree-holder's application to be put into possession of the property. That order was passed on the 18th of June 1909. Lala Sri Ram in his order definitely refrained from going into the question of title. On the 20th of October 1909 Mathu Mal made an application for revision to the Chief Court. That application was rejected on the 22nd of April 1911, on the ground that it would be improper for the Court to interfere on the revision side as Mathu Mal had another remedy available to him, namely, a suit under Order XXI, rule 103, of the Civil Procedure Code. On the 2nd of March 1914 the present suit was filed and as already stated, has been dismissed on the ground that it is barred by Article 11-A of the Indian Limitation Act.

Bakhshi Tek Chand on behalf of the appellant says that his client is questioning the title of *Musammat* Ambo within twelve years of the death of Bishen Lal's widow and that, therefore, the suit is within time under Article 141 of the Limitation Act. The question which we have to decide is whether plaintiff's suit is time-barred by reason of his failure to bring a suit under Order XXI, rule 103, within one year of Lala Sri Ram's order of the 18th of June 1909.

Before referring to the arguments of Counsel and the authorities cited by them, we propose to examine the provisions of Order XXI, rules 97 *et seq.*, Civil Procedure Code. These rules deal with cases where:—

(1) the holder of a decree for the possession of immoveable property, or the purchaser of any such property sold in execution of a decree, is resisted or obstructed by any person in obtaining possession of the property;

(2) any person other than the judgment debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or where such property has been sold in execution of a decree, by the purchaser thereof.

We have only to deal with the first class of cases. In the present case Mathu Mal the decree-holder was obstructed by *Musammat* Ambo, the person actually in possession of the property decreed to him. It was, therefore, the duty of the Court under rule 97 (2) to fix a day for investigating the matter. This the Court did

and after investigation it found that the obstruction was occasioned by *Musammat* Ambo claiming to be in good faith in possession of the property on her own account. It accordingly made an order dismissing the decree-holder's application under rule 99 of Order XXI. The effect of this order was, in our opinion, to confirm *Musammat* Ambo in possession as against the decree-holder. She accordingly could not be dispossessed in the execution proceedings, and was entitled to remain in possession unless and until the decree-holder proved his own superior right by a suit. Now rule 103 of Order XXI provides that any party not being a judgment debtor against whom an order is made under rule 29 may institute a suit to establish the right which he claims to present possession of the property; but subject to the result of such suit, if any, the order shall be conclusive. Under this rule, therefore, Mathu Mal could bring a suit to establish the right which he claimed to present possession of the property in dispute, and subject to the result of such suit the order allowing *Musammat* Ambo to remain in possession was conclusive as against him. His only way of removing the obstacle caused by the order in her favour under rule 99 was to bring the suit referred to in rule 103. His present suit is one for possession as an heir and has no doubt been brought within twelve years of the death of *Musammat* Mania. But in order to succeed he has to establish the right which he claims to present possession of the property. The fact that the question of title was not decided by the order of Lala Sri Ram on the 18th of June 1909 does not appear to us to make any difference. Lala Sri Ram decided what he had to decide, namely, whether *Musammat* Ambo's possession was in good faith and on her own account, and in order to get rid of this decision in her favour plaintiff had to sue under section 103 and establish his right or title It is common ground now that a Court acting under rule 99 need not adjudicate upon any question of title and that the investigation made by Lala Sri Ram was all that he was bound to make in accordance with law. In regard to the decision that *Musammat* Ambo was in possession in good faith on her own account we may refer to the provisions of section 110 of the Evidence Act, in accordance with which possession is presumptive evidence of title. We think that the Legislature may well have borne this in mind in framing rule 99 of Order XXI.

Bakhshi Tek Chand on behalf of the appellant says that his client had a right under rule 103 to sue *Musammat* Ambo on the ground that she was not in possession in good faith or that the finding as to her long possession was incorrect, or that she was not in possession on her own account but on account of Kidar Nath. He says that the failure to bring the suit under rule 103 only debars his client from challenging Lala Sri Ram's finding, which he says he does not dispute. If, however, he does not dispute that finding, it is difficult to see how the plaintiff can get possession, because the effect of it was to hold *Musammat* Ambo entitled to possession as against the decree-holder, and also to maintain her in possession unless and until a regular suit was brought against her. Bakhshi Tek Chand also urges that rule 103 only gives the right to challenge the finding under rule 99, but we are unable to agree with him. What the plaintiff had to do under rule 103 was to institute a suit to establish his own right to present possession and not merely to show that the intervenor *Musammat* Ambo was claiming in bad faith or was holding for the judgment-debtor. Plaintiff could not succeed under rule 103 without establishing his own title. He could not succeed merely by showing that the finding under rule 99 was erroneous.

The learned Divisional Judge, in holding that the suit was barred by limitation, relied chiefly upon the Privy Council case reported as *Surdhari Lal* v. *Ambika Pershad* (1). In that case it was held that a decree-holder against whom the release of property, attached in execution of his decree, has been ordered, after investigation under section 280 of the Code of Civil Procedure, is limited, by Article 11 of Schedule II of Act XV of 1877, to one year within which to institute a suit to establish that the property is that of his judgment debtor. Bakhshi Tek Chand seeks to distinguish this case on the ground that

(1) 15 C. 521 (P. C.); 15 I. A. 123; 5 Sar. P. C. J. 172; 12 Ind. Jur. 210; 7 Ind. Dec. (N. s) 931.

in it a question of title was gone into and decided under section 280 of the Civil Procedure Code, and no suit had been brought under section 283. It may be that in that case the question of title was gone into but all that was necessary for a Court in enquiring into an objection under section 278 or 279 of the former Code of Civil Procedure was to see whether the objector had some interest in or was possessed of the property. In the case of immoveable property it would not be necessary to go into title at all. All that would be necessary would be to see whether the objector was in possession on his own account and not on that of the judgment-debtor. The Privy Council ruling, therefore, appears to us to be in point in the present case. Their Lordships pointed out that the order under section 280 of the Code was not conclusive. They said that a suit might be brought to claim the property, notwithstanding the order; but then the Law of Limitation said that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently was to secure the speedy settlement of questions of title raised at execution sales and for that reason a year was fixed as the time within which the suit must be brought. Similarly we think that the policy of the present Limitation Act is that questions of title, such as the one in this case raised in execution proceedings and summarily adjudicated upon under rule 99 of Order XXI, should be decided speedily and for that reason a year was fixed as the time within which the suit must be brought under rule 103. In *Khub Lal* v. *Ram Lochun Koer* (2) it was held, following the Privy Council case, that the effect of an order made under section 281 of the Civil Procedure Code of 1882 disallowing a claim to attached property is to give the auction purchaser a title as against the claimant unless the order is set aside by a suit. At page 262 the following passage occurs:—

"Section 283 expressly provides that if the suit mentioned in that section is not brought, the order shall be conclusive; and it seems to us that the effect of this is, that the order gives the auction-purchaser a title as against the claimant, unless it is set aside by action, and an action for that purpose can only be brought within a year."

Similarly it may be said in the present case that the order of Lala Sri Ram under rule 99 gave *Musammat* Ambo a title as against the decree-holder, present plaintiff, unless that order was set aside by a regular suit under rule 103, limitation for such a suit being one year.

Bakhshi Tek Chand says that no enquiry was made into the question of title by Lala Sri Ram, and he has cited various authorities in support of the proposition that an order passed without any enquiry is not one under section 335 of the former Civil Procedure Code. He cited, *inter alia*, *Sarat Chandra Bisu* v. *Tarini Prasad Pal Chowdhry* (3). In that case there had been an application under section 335 of the Code of Civil Procedure but it was held that as there was no enquiry within the meaning of section 335, the order made was not conclusive and a suit subsequently brought was not barred by the special limitation of one year. He also cited *Raghunath Jha* v. *Birjnandon Singh* (4), in which it was held that an order passed without any enquiry was not one under section 335, Civil Procedure Code of 1882, and the suit for possession of the property brought one year after the order was not barred by Article 11 of Schedule II to the Limitation Act, 1877. *Bhagwanti* v. *Goman* (5) was a somewhat similar case. None of these authorities are, in our opinion, in point in the present case, because here an enquiry was made in the manner laid down in rule 97 of Order XXI.

We have already shown that, in our opinion, rules 97 to 103 of Order XXI clearly contemplate that the decision in favour of a party, not being a judgment-debtor under rule 99, is conclusive as far as the question of possession is concerned unless and until a suit is brought by the party against whom the order is made under rule 103, and such a suit must be brought within one year from the date of the order. We are fortified in our view by certain authorities quoted by Rai Moti

(2) 17 C. 260; 8 Ind. Dec. (N. S.) 712.

(3) 34 C. 491; 11 C. W. N. 487.

(4) 31 Ind. Cas. 444.

(5) 1 Ind. Cas. 742; 42 P. R. 1909; 52 P. W. R. 1909; 58 P. L. R. 1909.

Sagar on behalf of the respondents. The most important of these is *Mahadev* v. *Babi* (6). The facts of that case were that an order was passed against an auction-purchaser under section 335 of the Code of Civil Procedure of 1882. Subsequently his heirs assigned their rights to a third person, whose suit for possession was held to be barred by time because it was not brought within a year of the date of the order under section 335. Section 335 dealt with the case of an obstruction by a person other than the judgment-debtor to the purchaser of property sold in execution of a decree, such person claiming in good faith a right to the present possession of the property. Similarly Order XXI, rule 99, deals with obstruction by a person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account. The wordings are very similar in the two cases. Again the second paragraph of section 335 of the old Code is:—

"The party against whom such order is passed may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit, if any, the order shall be final."

Rule 103 of Order XXI of the present Code is with some immaterial additions word for word exactly the same as this. We, therefore, consider that the case reported as *Mahadev* v. *Babi* (6), which related to section 335 of the old Code, is in point in the present case. Other similar cases are *Bhimappa* v. *Irappa* (7), *Shagun Chand* v. *Shibbi* (8) and *Chandi Prasad* v. *Nand Kishore* (9).

To sum up, therefore, we hold that the order of Lala Sri Ram of the 18th of June 1909 was one entitling *Musammat* Ambo to remain in present possession of the property in suit as against Mathu Mal, and such order was conclusive as against Mathu Mal subject to the result of any suit brought by him under rule 103 with the object of establishing the right which he claimed to the present possession of the property. The present suit, which is for possession of the property and in which he seeks to establish his title as against *Musammat* Ambo, was brought more than one year after the date of the order under rule 99 and is, therefore, barred by time under Article 11A of the Indian Limitation Act.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(6) 26 B. 730; 4 Bom. L. R. 513.
(7) 26 B. 146; 3 Bom. L. R. 594.
(8) 10 Ind. Cas. 401; 8 A. L. J. 626.
(9) 20 Ind. Cas. 369.

PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.

APPEAL FROM APPELLATE DECREE No. 22 OF 1917.

April 12, 1918.

Present:—Mr. Justice Chapman and Mr. Justice Roe.

SATYA CHARAN CHANDRA—PLAINTIFF—APPELLANT

versus

SATPIR MAHANTY—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Father becoming surety for stranger's crime—Suit against father—Decree—Sale of family property—Sons, liability of—Sons' share, whether affected by sale.

The father of a Mitakshara family became surety for a stranger and pledged the family property against any money misappropriated by the latter in the discharge of certain duties. On a failure by the stranger to account for certain moneys entrusted to him, a suit was brought against the father and a decree obtained for the amount embezzelled. In execution of the decree the whole of the family property was sold, whereupon the sons brought the present suit for a declaration that by the auction-purchase the share only to which the father would have been entitled on partition passed by the sale:

Held, that the suit must succeed, as the debt incurred by the father in becoming security for another's crime was, in the eyes of Hindu Law, an illegal debt as affecting the liability of the sons therefor and could not be enforced against them. [p. 792, col. 2.]

Appeal from a decision of the District Judge, Cuttack, dated the 12th December 1916, confirming that of the Munsif, Cuttack, dated the 30th May 1916.

Mr. *Satya Narain Sen Gupta*, for the Appellant

Messrs. *Damodar Kar* and *B. N. Das*, for the Respondent.

JUDGMENT.

ROE, J.—The appellant in this case is a decree-holder, who in execution of his decree

against the father of a Mitakshara family purchased the whole property of the family. The sons brought the present suit for a declaration that by the auction-purchase the share only to which the father would have been entitled on partition passed by the sale. The Courts below decreed their suit, on the ground that the debt for which the father's share was sold was not an antecedent debt incurred by himself, but a liability incurred in a surety bond given by him for the good behaviour of a stranger as Tahsildar to the decree-holders. In appeal it is argued that the lower Courts were not competent to go into the question of the nature of the debt beyond an enquiry as to its illegality or immorality, and in this regard the decision in the case of *Sripat Singh Dugar* v. *Maharaja Sir Prodyot Kumar Tagore* (1) was quoted. We do not propose to dispute for a moment the suggestion that this decision contains a clear exposition of the law that where a property has been sold in execution of a decree against the father, and where it is clear upon the whole of the proceedings in the Court making the decree that the decree was made against the whole joint family property, the sons can only succeed on showing that the debt upon which the decree was made was taken for illegal or immoral purposes. But in the case before us it will be observed that prior to the passing of the decree there was no debt due from the father of this family at all, and in the second place, when the debt did fall due, that is to say, when the party for whom the father stood surety failed to make good the sum misappropriated by him, the Courts were required to ascertain whether the debt was an illegal or immoral debt. It is not of course an immoral debt, but in the view taken by Mr. Justice Chatterjee in Appeal from Appellate Decree No. 3811 of 1910 of the Calcutta High Court the debt incurred in the circumstances in which the appellant has obtained his decree is an illegal debt, and this view is not inconsistent with that taken in the decision of Mr. Justice Mookerjee in *Ohakouri Mahton* v. *Ganga Froshad* (2). The point under discussion in the latter case was whether a debt incurred by a criminal action was an illegal debt, and it was decided that the act under which the liability was incurred in that case amounted to a civil tort and not to a criminal act, and that, therefore, the debt was not an illegal debt. There can be no doubt upon the text that the sons are not liable for a liability incurred by a father's crime. There can be no doubt also that a Hindu father is not allowed by the text to stand surety pledging himself to bear the consequences of another's crime. There are three kinds of sureties mentioned in the text: (1) surety for appearance, (2) surety for good behaviour, and (3) surety for money. The action of the father in standing surety for good behaviour and pledging the property of the family for good behaviour of the stranger would be in the eyes of the Hindu Law unlawful as affecting the son. This point was developed by Mr. Justice Chatterjee in the case to which I have referred, and it seems to me an easy step in deduction to say that if a father's debt, incurred by his own breach of the law, is an illegal debt, then the father's debt, incurred by a stranger's breach of the criminal law, is also an illegal debt.

It is, however, contended before us that the debt upon which the present decree was made was not necessarily a debt incurred by the criminal action of a stranger. The Courts below have concurred in finding as a fact that the surety bond given was a security against embezzlement. The translation of the phrase creating a lien on the property of the family shows that this is a correct construction. That phrase runs:—

"If the Tahsildar fails to make good the money which may be found due from him after the rendition of accounts, then the said Babu will be at liberty to realise the amount so misappropriated from the properties mortgaged by way of surety."

This seems to me to be a provision solely against the taking of money in circumstances which would amount to criminal misappropriation. In my view it was unlawful for a father to stand surety for such moneys

(1) 30 Ind Cas. 252; 25 C. L. J. 220; 32 M. L. J. 133; 15 A L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 21 M. L. T 222; 19 Bom. L. R. 290; 44 C. 524; 44 I. A. 1 (P. C.).

(2) 12 Ind. Cas. 609; 39 C. 862; 15 C. L. J. 228; 16 C. W. N. 519.

and the debt incurred by him in so standing surety was an illegal debt. I would, therefore, dismiss this appeal with costs.

CHAPMAN, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1235 OF 1917.

February 3, 1919.

Present:—Justice Sir Ernest Fletcher, KT.

AMAR KRISHNA SEN—PLAINTIFF —APPELLANT

versus

CHANDRA KUMAR SEN AND ANOTHER —DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 38—Tender, conditional, whether valid—Interest, whether ceases to run—Landlord and tenant—Interest, high rate of, stipulated in kabuliyat*—Tenant, whether liable to pay stipulated rate.*

Plaintiff brought a suit to recover rent of land in a town to which the provisions of the Transfer of Property Act, and not the Bengal Tenancy Act, applied. Defendant tendered the rent and demanded a receipt stating that the holding was a *kaimi raiyati* one. This was refused, and payment was declined. Plaintiff thereupon brought this suit in which he also claimed interest:

Held, that plaintiff was entitled to sue for rent and interest; that the defendant's offer was conditional and was, therefore, not a good tender, and the consequences imposed by section 38 of the Contract Act did not follow; that the defendant was liable for the payment of interest at the rate mentioned in the *kabuliyat*, as it was not shown that the agreement to pay was entered into under coercion or undue influence. [p. 794, col. 2; p. 795, col. 1.]

Appeal against the decree of the District Judge, Noakhali, dated the 31st March 1917, affirming that of the Munsif, 2nd Court at Sudharam, dated the 31st January 1916.

FACTS.—The appeal arose out of a suit for recovery of rent together with interest in respect of a piece of land within the town of Noakhali. Interest was claimed at Rs. 3-2-0 per cent. per mensem on the basis of a *kabuliyat*. The defendants admitted the liability for rents claimed, but their plea with regard to interest was that they had legally tendered the rents to the plaintiff as they fell due, but the plaintiff did not accept them without any cause, and further that the interest stipulated in the *kabuliyat* was penal. Both the Courts below gave effect to the defendants' plea of tender and gave the plaintiff only a partial decree, dismissing his claim for interest. The findings of the lower Appellate Court with regard to the tender were:—"The defendants wanted to have *dakhilas* mentioning the holding as *kaimi raiyati*, but the plaintiff's Tahsildar did not consent to take rent granting such *dakhilas* and hence disputes arose between them and the rents, though tendered, were not accepted. Although in the *kabuliyat* the holding is not described as *kaimi*, it is seen from the *dakhilas* filed that from 1304 to 1317 B. S., that is for a period of 14 years, the defendants did receive such *dakhilas* from the vendor of the plaintiff, who is a new purchaser."

Babu *Jitendra Kumar Sen Gupta*, for the Appellant.—The tender set up by the defendant is not a valid tender, as it was not unconditional within the meaning of section 38 of the Indian Contract Act, hence such tender did not stop interest. The condition imposed by the defendant was that the plaintiff must describe the holding as a permanent one, though the *kabuliyat* did not mention it as such. The defendants were not even entitled to demand a receipt while offering to make the payment of rent: see Leake on Contract, 6th Edition, page 632, in which it is stated that "an offer to pay the money upon condition of the creditor giving a receipt was not good tender."

[FLETCHER, J.—But is not the tenant entitled to a receipt under section 56 of the Bengal Tenancy Act?]

But this case is not governed by the Bengal Tenancy Act, because the land is within the town of Noakhali and it is not agricultural land.

My second point is that the plea of tender before action, so that it might stop interest, must be accompanied by payment of the money into Court after action. See *Dixon* v. *Clark* (1) and *Haji Abdul Rahman* v. *Haji Noor Mahomed* (2). In this particular case there was no payment of

(1) (1848) 5 C. B. 365; 75 R. R. 747; 5 D. & L. 155; 16 L. J. C. P. 237; 136 E. R. 919.

(2) 16 B. 141; 8 Ind. Dec. (N. S.) 570.

the money admitted to be due into Court after action, hence the plea of tender cannot be given effect to.

Babu *Bhagirathi Ch. Dass*, for the Respondents.—It will be dangerous to hold that a demand of receipt would vitiate the tender. Otherwise no tenant will be safe in this country. Besides it has been held in several cases in this country that a demand of receipt does not vitiate the tender. See *Jagat Tarini Dasi* v. *Nabagopal Chaki* (3) and *Rup Chand Ghose* v. *Narendra Krishna Ghose* (4).

[FLETCHER, J.—But all the cases you are citing were governed by the Bengal Tenancy Act. This case is not governed by the Bengal Tenancy Act.]

Even under the general law demand for receipt does not make the tender a conditional one. See *Jones* v. *Arthur* (5) and *Richardson* v. *Jackson* (6).

[FLETCHER, J.—All these cases go to show that a mere request for receipt does not make the tender conditional but when payment is refused unless receipt is granted, the tender clearly becomes conditional.]

In any case the case should go back to the lower Court for deciding the question whether the rent claimed by the plaintiff was penal. The point was not gone into by the lower Appellate Court

Babu *Jitendra Kumar Sen Gupta* briefly replied.

JUDGMENT.—This appeal is preferred by the plaintiff against a decision of the learned District Judge of Noakhali, dated 31st March 1917, affirming a decision of the Munsif of Sudharam. The plaintiff brought a suit for recovery of rent of certain land in a town to which the provisions of the Transfer of Property Act, and not those of the Bengal Tenancy Act, apply.

The only question raised in this appeal is this. The defendants stated that they had tendered the rent due to the plaintiff. The plaintiff stated that the tender was not valid, as it was not an unconditional one within the meaning of section 38 of the Indian Contract Act. What was found is this. When the defendants tendered the money, they demanded a receipt and to have it mentioned therein that the holding that they held under the plaintiff was a *kaimi raiyati* holding and that as the Tahsildar of the plaintiff refused to give them such a receipt, they declined to pay and, therefore, the present suit was brought.

The only question was, "were the defendants entitled to a receipt from the Tahsildar to describe the holding as a *kaimi raiyati* holding"? The law is not open to doubt in the matter. The law as stated in Leake on Contract, 6th Edition, at page 633 is as follows: "An offer to pay the money upon condition of the creditor giving a receipt is not a good tender but a mere request for a receipt is not a condition," and the learned author cites various authorities. That a mere request for a receipt does not impose a condition is well illustrated in the case of *Jones* v. *Arthur* (5). There a tender was made by a cheque contained in a letter requesting a receipt in return, and it was held that the defendant put the cheque entirely out of his power by sending it in a letter and he merely requested the plaintiff to send him a receipt, which was not a condition. That case is, however, quite different from the present one. In the present case what was found in fact was that the defendants stated that they would not pay unless they would get a receipt in a particular form. That obviously, in my opinion, makes the tender a conditional one. Therefore, the plaintiff was entitled to sue for rent and interest, and the consequences imposed on the failure to accept a valid tender by section 38 of the Indian Contract Act did not follow in the present case. There is nothing to show in the present case that the plaintiff was not entitled to interest on account of the holding being described as a *kaimi raiyati* holding. That disposes of the whole dispute and the defendants were wrong in refusing to pay except on the footing that they would get a receipt.

In that view of the case I must set aside the judgment and decree of the lower Appellate Court and direct the plaintiff to recover the amount of rent together with interest provided in the *kabuliyat* for the period sued for.

It has been suggested that the interest allowed in the *kabuliyat* was penal. I do

(3) 5 C. L. J. 270; 34 C. 305.
(4) 28 Ind. Cas. 683; 19 C. W. N. 112.
(5) (1840) 8 Dowl. P. C. 442; 4 Jur. 859; 59 R. R. 833.
(6) (1841) 8 M. & W. 298; 9 Dowl. P. C. 715; 10 L. J. Ex. 303; 151 E. R. 1051.

not think that it was penal. It was certainly contractual and if it was contractual and was entered into without coercion or undue influence, I do not see why the defendants should not pay the rate of interest which they had contracted to pay. The point was not, however, raised in the lower Courts and it cannot be allowed to be raised in the present state of the suit.

The appeal must, therefore, be allowed with costs both here and in the lower Appellate Court.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1634 OF 1917.

February 20, 1919.

Present :—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

ZAFAR ALI—PLAINTIFF—APPELLANT

versus

KISHEN CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Religious endowment—Trustee, power of, to create leases—Lease in perpetuity, whether valid—Limitation Act (IX of 1908), Sch I, Art. 134—"Transfer," whether includes lease in perpetuity—Suit to recover possession of property bequeathed in trust—Terminus a quo.

According to Muhammadan Law, the trustee of a religious endowment cannot grant a lease in perpetuity, nor can he create a lease of agricultural land for a period exceeding three years and of other property for a period exceeding one year. [p. 796, col. 1.]

Shoojat Ali v. *Zumeerooddeen*, 5 W. R. 158, followed.

The word "transfer" in Article 134 of Schedule I to the Limitation Act, is wide enough to include a lease in perpetuity. [p. 796, col. 1.]

Rameshwar Malia v. *Jiu Thakur*, 29 Ind Cas. 837; 43 C. 34; 19 C. W. N. 1082, *Baluswamy Aiyar* v. *Venkitaswamy Naicken*, 40 Ind. Cas. 531; 40 M. 745; 32 M. L. J. 24, followed.

The period of limitation for a suit to recover possession of immoveable property conveyed or bequeathed in trust and afterwards transferred by the trustee for valuable consideration is prescribed by Article 134 of Schedule I to the Limitation Act, the period being reckoned from the date of the alienation. [p. 796, cols. 1 & 2.]

Second appeal from the decree of the District Judge, Lahore, dated the 22nd February 1917, reversing that of the Subordinate Judge, 1st Class, Lahore, dated the 31st March 1916, decreeing the claim.

Lala *Moti Sagar*, R. S., and Babu *M. N. Mukerjee*, for the Appellant.

Bakhshi *Tek Chand*, Mirza *Asghar Beg* and Sheikh *Niaz Ali*, for the Respondents.

JUDGMENT.—The action, which has given rise to this second appeal, was brought by the Mutwalli of Wazir Khan's Mosque for the ejectment of one Ahmad Ali and his alienees from a site which is occupied by a shop belonging to the said Ahmed Ali. The learned District Judge finds that part of the site is the property of Ahmad Ali; and that the rest, though belonging to the religious endowment, was granted to his predecessor on a perpetual lease; and that the plaintiff's suit for ejectment is barred by time.

The first question which requires consideration is, whether the lessee got the land belonging to the mosque on a permanent tenancy. Now,. the following facts emerge from the pleadings of the parties and the evidence on the record:—

1. The origin of the tenancy is unknown. There is no deed recording the terms of the lease, nor is it known when the lease was created, beyond the fact the land was in possession of the tenant certainly in 1866, and the lease must, therefore, have been granted sometime before that year.

2. The tenancy was evidently for building purposes, because it is clear that a *pakka* shop was constructed upon the site and has been in existence all along.

3. The tenancy is a heritable one, having descended from one Ghulam Muhammad to his relative Muhammad Ali, and from the latter to his son Ahmad Ali. Further, it has been alienated twice, once by a mortgage effected in 1893, and again by a sale in favour of the defendant Mirza Qasim Beg.

4 The tenant has been paying a uniform rent at the rate of 12 annas per annum, and it is not even alleged that the rent has ever varied during the period of 50 years or so.

Upon these facts we have no hesitation in concurring with the District Judge that the tenancy is of a permanent character, and that the plaintiff's contention that the

defendants are tenants-at-will must be rejected.

The plaintiff, however, is on firm ground when he contends that the Mutwalli, being a trustee of the endowment, had no authority to grant a lease in perpetuity. It may be that in order to create a prosperous bazaar and to induce persons to build upon different plots of land, the then incumbent of the office considered it necessary, in the interests of the endowment, that leases in perpetuity be granted to the persons who were prepared to expend money on building shops; and that the lease in question was a part of that scheme. The transaction may have been beneficial to the mosque, but we are clear that it was beyond the power of the trustee. According to the Muhammadan Law, the trustee of a religious endowment cannot create a lease of agricultural land for a period exceeding three years and of other property for a period exceeding one year. A lease in perpetuity at a fixed rent is invalid, *vide, inter alia*, *Shoojat Ali* v. *Zumeerooddeen* (1).

Though the transaction was in excess of the authority conferred by law on the trustee, it is now too late to impugn it. Article 134 of the Indian Limitation Act, 1908, prescribes a period of 12 years for a suit to recover possession of immoveable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration; and we consider that the defendants can successfully invoke the aforesaid Article. It is to be observed that the word "transferred" has now replaced the word "purchased" used in the corresponding Article of the Act of 1877; and that "transfer" is wide enough to include a lease in perpetuity. The matter does not admit of any doubt, and if any authority were needed, we would cite *Rameshwar Malia* v. *Jiu Thakur* (2) and *Baluswamy Aiyar* v. *Venkitaswamy Naicken* (3), both of which are directly in point.

Mr. Moti Sagar is unable to invite our attention to any case which lays down a contrary rule. As the tenant agreed to pay a yearly rent, the transfer was for a valuable consideration; and it is not necessary that the consideration should be adequate, or that the tenant should pay a bonus or a lump sum in advance in order to establish that the transaction is for valuable consideration.

The learned Pleader, in order to get over the bar of limitation, argues that the period of limitation begins not from the date of the alienation, but from the date when the plaintiff succeeded to his office. This contention runs counter to the express words of the Statute. It is true that under the Limitation Act of 1877 it was held that, as Article 134 confined itself to the case of a purchase, the limitation applicable to a suit brought to recover the property transferred in any other manner was that prescribed by Article 144; and that there was some divergence of judicial authority on the question as to whether the *terminus a quo* for a suit of that kind was the date of the alienation or the date of the plaintiff's appointment to the office of trustee. But we are not aware of any case, and indeed none is cited by Mr. Moti Sagar, which laid down that though a particular case was governed by Article 134, yet the time from which the period began was not the date of the alienation.

As stated above, the action with which we are dealing comes within the scope of Article 134 of the Limitation Act, 1908, and it is clear that the date of the alienation must be taken to be the *terminus* from which the period of 12 years is to be reckoned. Accordingly we hold that though the transaction was *ultra vires* the trustee, it is protected from attack by the lapse of time. The judgment of the lower Appellate Court is, therefore, confirmed, and the appeal is dismissed with costs.

Appeal dismissed.

(1) 5 W. R. 158.
(2) 29 Ind. Cas. 337; 43 C. 34; 19 C. W. N. 1082.
(3) 40 Ind. Cas. 531; 40 M. 745; 32 M. L. J. 24.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 519 OF 1918.
May 23, 1919.
Present:—Mr. Justice Das and Mr. Justice Adami.
Shaikh QAMRUDDIN AND OTHERS—DEFENDANTS 1ST PARTY—APPELLANTS
versus
Shaikh FAKHRUDDIN—PLAINTIFF AND *Musammat* LIHAZAN AND ANOTHER—DEFENDANTS 2ND PARTY—RESPONDENTS.
Muhammadan Law—Minor—Mother, whether guar-

dian—Alienation by mother of minor's property, validity of.

A Muhammadan mother is not the guardian of her minor daughter, either *de jure* or *de facto*, and has no authority, either express or qualified, to convey property belonging to her minor daughter in favour of any person.

Appeal from a decision of the Officiating District Judge, Darbhanga.

Mr. *Fakhruddin*, for the Appellants.

Mr. *Hasan Jan*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal comes before us from the judgment of the Officiating District Judge of Darbhanga and arises out of a suit instituted by Shaikh Fakhruddin, who is one of the respondents before us, against the appellants for declaration of his title to and for recovery of certain properties which are specified in the plaint.

It appears that one Jadibuksh died leaving two sons, three daughters and a widow. Upon his death the widow and her infant daughter became entitled to a two-anna share each. The widow on her own behalf and as guardian of her minor daughter conveyed a four-anna interest in the property to the plaintiff, and it is on the basis of this conveyance that the plaintiff brought the action out of which this appeal has arisen.

Various questions were raised in the Courts below and were disposed of in favour of the purchaser; but before us the substantial question that has been argued on behalf of defendants Nos. 1 and 2, who are the sons of Jadibuksh and are in possession of the property, is that the widow was not competent to convey the share which belonged to her infant daughter. Upon this question the lower Appellate Court came to the conclusion that a sale by the mother is neither void nor voidable, but in a state of suspense till the end of the minority of the minor. No doubt, at the time when the learned Judge decided this case it was possible to take this view, but in our opinion the argument is inadmissible in view of the latest Privy Council decision. The Privy Council in *Imambandi* v. *Mutsaddi* (1) has reviewed all the authorities and has come to the conclusion that a Muhammadan mother is not the guardian of her minor daughter either *de jure or de facto* and has no authority, either express or qualified, to convey the property belonging to her minor daughter in favour of any person. In our opinion, that decision is destructive of the case put forward on behalf of the purchaser. The lower Appellate Court has come to the conclusion that there was no necessity for the sale of the minor's property. Therefore, the transaction is absolutely void and passed no title whatever to the purchaser. There being no title in the purchaser so far as the infant's share is concerned, he was not able in an action in ejectment to maintain a suit as against defendants Nos. 1 and 2. In our view, therefore, the decision of the lower Appellate Court on this point is erroneous. The decree of the lower Appellate Court, in so far as it awards to the plaintiff possession of the share of the infant daughter, should be discharged. We would, therefore, allow this appeal.

The result is that the plaintiff's suit, in so far as it relates to the 2-anna share which belonged to the infant daughter, will stand dismissed. The appellant is entitled to the costs of this appeal.

ADAMI, J.—I agree.

Appeal allowed.

(1) 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1918) M. W. N. 91; 45 I. A. 73 9 L. W. 518 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2591 OF 1916.

February 19, 1919.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

RAKHAL CHANDRA GHOSE AND OTHERS—PLAINTIFFS NOS. 1 TO 3—APPELLANTS

versus

MOHENDRA NARAIN SEN AND OTHERS—DEFENDANTS AND REMAINING PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Kabuliyat, *recital in, as to landlord's possession, value of*—*Encroachment by tenant, effect of*—*Landlord, whether entitled to benefit of encroachment*—*Limitation Act* (*IX of* 1908), *s.* 7, *applicability of*—*Persons jointly entitled to property, dispossession of*—*Possession, suit for*—*Limitation.*

A recital in a *kabuliyat* executed by a tenant that his landlord is in possession of a piece of land is not sufficient evidence of the latter's possession,

unless the executant of the *kabuliyat* is examined in Court and in his deposition makes the same statement as that to be found in the *kabuliyat*. [p. 798, col. 2.]

An encroachment made by a tenant upon the contiguous land of another enures for the benefit of the landlord from the moment the tenant takes possession, and not from the time when the tenant executes a *kabuliyat* in respect of that land in favour of his landlord. [p. 799, col. 1.]

Where several persons jointly entitled to a certain property are dispossessed, and a suit is brought for recovery of possession, section 7 of the Limitation Act can have no application to the case if each individual plaintiff is entitled to sue for his individual share. [p. 799, col. 1.]

Appeal against the decree of the District Judge, Birbhum, dated the 23rd of June 1916, modifying that of the Munsiff, 1st Court, at Bolpur, dated the 25th June 1915.

FACTS appear from the judgment.

Babu *Bankim Chandra Mukerjee* (with him Babu *Narendra Nath Chowdhury* for Babu *Bepin Behari Ghose*, Junior), for the Appellants.—This appeal is on behalf of plaintiffs Nos. 1 to 3, and it arises out of a suit for declaration of title and recovery of possession. The suit has been dismissed against these plaintiffs mainly on the ground of limitation.

My first point is that the recital in the *kabuliyats* executed by the tenants defendants in favour of the landlords defendants cannot be taken as evidence of adverse possession by the landlords defendants, who are owners of the contiguous Mouzah. In order to hold that the owners of the contiguous Mouzh were adversely in possession of the lands for the statutory period, there must be evidence of actual possession independently of the *kabuliyats* and as there is no such evidence, the Court of Appeal below has erred in holding that the plaintiffs' claim is barred by the twelve years' rule of limitation. The question of adverse possession has been wrongly decided by relying on the recitals in the *kabuliyats*.

Secondly, even if the possession of the landlord defendants be reckoned from the date of the execution of the *kabuliyats*, the suit will still be within time.

Thirdly, under section 7 of the Limitation Act time cannot run as against the present appellants, if it cannot run as against the plaintiffs Nos. 4 and 5 who are minors. The present appellants were entitled to sue for recovery of possession jointly with the plaintiffs Nos. 4 and 5, and if, in so far as the minors are concerned, the suit be within time, it is also within time in respect of the claims of the plaintiffs-appellants.

Babu *Surendra Nath Ghosal*, for the Respondents.—Section 7 of the Limitation Act can have no application in this case, because the present appellants have got a right to recover their shares even during the disability of the minor plaintiffs.

On the merits the Court of Appeal below has found as a fact that the plaintiffs' claim is barred by limitation, and this finding is justified by the evidence on the record. The learned Judge has, in addition to the recitals in the *kabuliyats*, relied on other evidence of possession adduced in the case.

Babu *Bankim Chandra Mukerjee* briefly replied.

JUDGMENT.—This appeal arises out of a suit No. 496 of 1915 in the Court of the Munsif of Bolpur. The suit was brought by the plaintiffs, who were five in number, for recovery of possession of certain lands on establishment of title. In respect of the shares of plaintiffs Nos. 4 and 5, who were entitled to an extension of time under sections 6 and 8 of the Limitation Act, the suit has been decreed. As regards the shares of plaintiffs Nos. 1 to 3, the suit has been dismissed both in the trial Court and in the Court of first appeal on the ground of limitation.

In the appeal it is first contended that the learned District Judge has erroneously used against the plaintiffs-appellants the recitals to be found in *kabuliyats*, and more particularly in one *kabuliyat* executed by the defendant Karinath Mal in favour of the landlord-defendants, who are the owners of a Mouzah contiguous to that of which the plaintiffs were the owners. If without examining the executants of the *kabuliyat* the recital had been used, there might have been some substance in this contention, but the executant was in fact examined and he makes in his deposition the same statement as that to be found in the *kabuliyat*.

It is next contended that the evidence of that defendant is not sufficient for the learned District Judge's finding that the land in question in this suit had been reclaimed by the tenant-defendant in Ashar 1309 and that the defendant had, therefore, been in possession adverse to the plaintiffs for more

than 12 years before suit. What is said by that defendant is that there was measurement in 1309 and that at the time of that measurement only a part of the land had been reclaimed. But in what month that measurement took place is not stated, and we cannot, therefore, accept that statement as negativing the inference made by the Judge that the land had been reclaimed in Ashar 1309. Moreover, there is other evidence on this point and we cannot say that on that evidence the Judge's finding is not justified.

It is next said that in so far as the landlord defendants are concerned, their possession should be counted from the date on which these tenant defendants executed *kabuliyats* in their favour, that is to say, some time in Kartick 1309. If that view were taken the suit would have been within time, but we are unable to accede to that view. The tenant-defendants are tenants of the landlord defendants in this contiguous Mouzah and their encroachments upon the plaintiffs' Mouzah were made for the benefit of the landlord defendants from the moment they took possession.

It is next contended that inasmuch as the plaintiffs Nos. 4 and 5 have been found entitled to the benefit of sections 6 and 8 of the Limitation Act, the other plaintiffs are also to be given the benefit of the same extension of time. This contention is based upon section 7 of the Limitation Act. But that section, we are of opinion, has no application in the present case, where each individual plaintiff was entitled to sue for his individual share.

All the contentions advanced by the plaintiffs-appellants thus failing, this appeal must be dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 563 OF 1919.

June 6, 1919.

Present:—Mr. Justice Dundas.

Musammat AFIMAN AND ANOTHER, THROUGH DALIP SINGH—DEFENDANTS—APPELLANTS

versus

HAMID-UD-DIN HUSAIN AND ANOTHER—PLAINTIFFS—SAID-UD DIN HUSSAIN—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, scope of—Waqf—*Alienation of* waqf *property—Suit to set aside alienation and for possession, whether maintainable.*

Section 92 of the Civil Procedure Code is not applicable to a case where the relief claimed is not one of the reliefs mentioned in the section. [p. 800, col. 2]

Any person interested in a *waqf* can sue to protect *waqf* property against strangers. [p. 800, col. 2.]

When, therefore, *waqf* property is mortgaged by the manager, any person interested in the *waqf* can sue to have the alienation set aside and the property restored to the trust. [p. 801, col. 1.]

Zafaryab Ali v. *Bakhtawar Singh*, 5 A. 491; A. W. N. (1883), 91; 3 Ind. Dec. (N. S.) 432, *Jawahra* v. *Akbar Husain*, 7 A. 178; A. W. N. (1884), 324; 4 Ind. Dec. (N. S.) 390, followed.

Second appeal from the decree of the District Judge, Karnal, dated the 20th December 1918, varying that of the Senior Subordinate Judge, Rohtak, dated the 28th May 1918, decreeing the claim.

Mr. *Bihari Lal* for Mr. *C. L. Gulati*, for the Appellants.

Sheikh *Niaz Ali*, for Sayad Ali and Hamid-ud-din Hussain, Respondents.

JUDGMENT.—The appellants are mortgagees of some $5\frac{1}{2}$ acres of land including 2 wells situated at Sonepat, District Karnal, holding a mortgage-deed of 10th June 1916 for Rs. 1,700 executed by one Said-ud-Din, describing himself as the manager of the land.

The present suit was brought by two persons Hamid-ud-Din and Sajjad Ali, who are collaterals of Said-ud-Din and also members of the Musalman Shia community of Sonepat; they asked first, for a declaration that this property is *waqf*, secondly, that the above mortgage be declared ineffective as against the *waqf* property, and thirdly, that the mortgagees be ejected and the land restored for the purposes set out in the dedication deeds of 1885.

Both the Courts below have concurred in finding that there has been a clear dedication of this land for religious pur-

poses constituting it a *waqf* and public trust. They have also concurred in finding that the manager for the time being is incompetent to alienate any portion of the property except possibly if absolutely necessary for the administration of the trust. Both the Courts found that the consideration of this mortgage consists largely of an accumulation of interest on some old debts of small amount contracted by former managers, that the management has not been prudent and that it cannot be said that the present mortgage is shewn to be for the necessity of the *waqf*, and in fact it is very doubtful whether the original expenditure may not have been on account of the private necessities of the manager. The first Court has concluded that the mortgagees can fairly claim to be paid Rs. 300 as compensation for the repairs and improvements effected by them and has decreed the ejectment of the mortgagees on payment to them of this sum. The lower Appellate Court thinks that only Rs. 200 can be allowed to the mortgagees on this account, as that is the amount entered in the mortgage-deed, but considers that the mortgagees are not liable to be ousted in the present suit. From this decision the mortgagees have appealed and the plaintiffs have filed cross objections asking that a condition that the property should be restored to them should be embodied in the decree which should be enforceable by the ejectment of the mortgagees. They also contend that this Rs. 200 should not be made a charge on the property.

It will be convenient first to take the appeal by the mortgagees. The first ground of appeal that the property in dispute is not a public trust is not maintainable. This is a finding of fact in which both Courts have concurred. The second ground that the lower Appellate Court was wrong in reducing the amount payable to the mortgagees on account of the repairs from Rs. 300 to Rs. 200, appears to me to be just. It seems to be clear that the mortgagees have effected necessary repairs, repairs in fact, which were insisted upon by the authorities and were not optional, and that the cost of these was at least Rs. 300. There seems to be no reason why the plaintiffs or those members of the Shia community who wish to recover this property should not reimburse the mortgagees for these moneys spent on the necessities of the property, which necessities are also the necessary, expenses of the *waqf*. There is quite enough authority that section 92, Civil Procedure Code, is not applicable to a case like the present, where the relief claimed is not one of the reliefs mentioned in the section but if further authority be required, *Kazi Hassan* v. *Sagun Balkrishna* (1) is quite sufficient. Any person interested in a *waqf* can sue to protect a *waqf* property against strangers. On the 4th ground of appeal, no doubt Sajjad Ali plaintiff signed one of the mortgages of 1889, but that was merely an assignment of the income of the property for a certain period and does not debar him from attacking subsequent alienations in which the nominal consideration is much heavier and the encumbrances more serious. No argument has been advanced in this Court as regards the applicability of section 41 of the Specific Relief Act. Both Courts have found that the alienations taken as a whole were not for necessity, and this is a question of fact.

And now to take the contentions in the cross-objections, I have already remarked above that I see no reason why Rs. 300 should not be made a charge payable before the mortgagees can be ejected. The lower Appellate Court was of opinion that perhaps a complicated procedure would be necessary before the mortgagees could be got rid of. I think that the procedure suggested by him of first removing the existing Mutwalli, then appointing another and then inducing the new Mutwalli to bring a suit for possession amounts to a denial of the clear relief to which the present plaintiffs are entitled. In *Zofaryab Ali* v. *Bakhtawar Singh* (2) it was held that a suit by certain Muhammadans for the ejectment of a purchaser of buildings attached to a mosque was maintainable. The same view was upheld in *Jawahra* v. *Akbar Husain* (3). In the Bombay case *Kasi Hassan* v. *Sagun Balkrishna* (1) the two Judges were not entirely of the same opinion. Mr. Justice Parsons considered the *waqf* property

(1) 24 B. 170; 1 Bom. L. R. 649; 12 Ind. Dec. (N. S.) 651.

(2) 5 A. 497; A. W. N. (1883) 91; 3 Ind. Dec. (N. S.) 432.

(3) 7 A. 178; A. W. N. (1884) 321; 4 Ind. Dec. (N. S.) 390.

could not be alienated and that any person interested in the endowment could sue to have the alienation set aside and the property restored to the trust. Mr. Justice Ranade considered that in the circumstances of the case the plaintiffs were incompetent to bring a suit for possession which could only be done by the *mutwalli* at the time. The circumstances were very peculiar, as the property was not wholly an endowment. Several persons, besides the plaintiffs and actually including some of the defendants, had a beneficiary interest in the property and he considered that on the suit as framed the plaintiffs could not obtain possession.

In the present case I think that the opinion expressed in the Allahabad cases and by Mr. Justice Parsons is to the point and I, therefore, dismiss the appeal of the mortgagees, accept the cross-objections and restore the decree of the first Court. The parties will pay their own costs in this Court and the lower Appellate Court.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 938 AND 1212 OF 1917 AND 422 OF 1918.

May 23, 1919.

Present :—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

BHIKHAD BHUNJAN NARAIN TEWARI —DEFENDANT NO. 2—APPELLANT

versus

UPENDRA NATH ROY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Possession, suit for—Evidence insufficient—Title—Presumption—Adverse possession.

Where in a suit for possession no evidence as to possession is given by either side, or the evidence adduced is so unsatisfactory or insufficient as to leave the Court unable to arrive at a clear conclusion as to which party is in possession, the presumption is that possession follows title. [p. 804, col. 1.]

Appeals from a decision of the Judicial Commissioner, Chota Nagpur.

Messrs. *Naresh Chandra Roy*, *Sushil Madhab Mullick* and *Sarat Chandra Roy*, for the Appellant.

Messrs. *Syed Hasan Imam* and *Naba Kumar Chowdhury*, for the Respondents.

JUDGMENT.—These three second appeals come before us from the decision of the learned Judicial Commissioner of Chota Nagpur.

With regard to Second Appeal No. 1212 Mr. Sushil Madhab Mullick, who appears on behalf of the appellant, admits that having regard to the finding of fact arrived at by the learned Judicial Commissioner, this appeal cannot be sustained. Accordingly Second Appeal No. 1212 of 1917 will stand dismissed with costs.

The two remaining appeals are Nos. 938 of 1917 and 422 of 1918.

The point arising for decision is common to both appeals; and consequently both these second appeals will be disposed of by one judgment.

Two villages by name Haisathu and Harchanda formed property which belonged to the members of a joint Hindu family; and the family was composed of three persons, Kirpal, Beni and Harihar.

In 1891 Haribar instituted a suit for partition and on the 27th February 1893 a preliminary decree for partition was passed.

On the 18th May 1893 the interest of the co sharers in both the villages was sold by auction in execution of a decree procured at the instance of three persons against all the co sharers, and what formerly constituted the joint family property was sold and purchased by one Jaipal at the execution sale.

It will be noticed that the sale in pursuance of the decree took place during the currency of the partition suit.

On the 13th September 1895 the final decree for partition was pronounced and the shares of the respective co-sharers were allotted to each.

At the execution sale, at which Jaipal was declared the purchaser, it was conceded that Jaipal bought as a *benamidar* on behalf of all the original co-sharers. It was at one time contended that Jaipal in fact became the purchaser on behalf of the widow of Kirpal; but the learned Judge has found as a fact that the purchase by Jaipal was really made on behalf of all the co-sharers. This issue was determined in Second Appeal No. 1212 of 1917, and with this matter we are not now concerned.

Between the 21st of April and the 22nd of May 1896 symbolical possession was given

to all the co-sharers of the respective *takhtas* allotted to them in pursuance of the partition.

On the 22nd February 1898 Jaipal obtained his sale certificate in respect of the aforesaid purchase by him at the execution sale and symbolical possession was given to him of both villages referred to above on the 17th April 1898. On the 15th of January 1900 the shares of Beni and Haribar in Mauza Haisathu were sold at an auction sale, and purchased by the plaintiffs' father, one Baikuntha Nath Rai, in pursuance of another mortgage decree. What was sold was five annas four pies of Mauza Haisathu; and on the 15th of May 1900 an additional five annas and four pies share of Haisathu was again sold in pursuance of a different decree, and 10 annas and 8 pies of Mauza Harchanda.

The sale to the plaintiffs' father was effected on the 15th January 1900 in respect of the first lot of property sold, and in respect of the second lot of property sold the same was purchased on the 5th May 1900 by the plaintiffs' father. The first sale was made absolute on the 1st February 1900, and the second sale was made absolute on the 21st July 1900, and symbolical possession was given to the plaintiffs' father as purchaser in respect of both denominations of property specified above on the 8th and 9th of November 1900 respectively.

The Record of Rights was published on the 23rd December 1900, and the defendant No. 2 was recorded as proprietor in respect of certain plots comprised within the said Manzas, forming part of the property purchased as aforesaid by the plaintiffs' father, as representative of Kirpal's branch of what was originally the joint family, and at the same time the Record of Rights contained an entry that certain plots within the said Manzas, being portions of the said properties purchased by Baikuntha Nath Rai, were also recorded in the name of the plaintiffs.

Kirpal's branch of the original joint family instituted a suit seeking to have the entry in the Record of Rights amended in so far as it recorded the plots in the name of the plaintiffs or of the plaintiffs' father. A counter-suit was instituted by the plaintiffs claiming like relief in so far as the plots that were recorded were recorded in the name of Kirpal and his branch of the family.

These are the facts out of which the present second appeals arise; and it may be stated that the point for consideration in both these second appeals, *viz.*, Nos. 938 of 1917 and Second Appeal No. 422 of 1918, are exactly similar, and that one judgment will be common to both.

The point for legal determination is a short and narrow one and may be briefly stated:—*viz.*, is the plaintiffs' Original Suit No. 368 of 1912, out of which Second Appeal No. 938 of 1917 has arisen, barred by limitation, and consequently are the plaintiffs not now entitled to recover possession of the property for which they sue. Defendant No. 2, who is the appellant, contends that the plaintiffs have failed to discharge the onus which the law casts upon a plaintiff in a suit suing for the recovery of possession of land, by proving possession and dispossession by himself or those through whom he claims within 12 years before action brought. The learned Judicial Commissioner addressed himself to a consideration of the evidence for the purpose of ascertaining if the plaintiffs had established possession of the lands in suit either by themselves or those through whom they claimed, within the 12 years before the institution of this suit. From the judgment the facts relative to a consideration of this point appear to be as follows.

After the partition was effected a question arose between Kirpal's branch of the family and the branches represented by Beni and Haribar as to whether Kirpal's branch had by adverse possession acquired title to the respective shares of Beni and Haribar. The learned Judge considered the evidence adduced on both sides, and in his opinion the vital question for consideration and determination was the question as to who had possession during the period from 1893 to November 1900. Kirpal's branch of the family were claiming a title by adverse possession, whereas Beni and Haribar claimed that the possession which they acquired in pursuance of the Batwara decree had never ceased; and that their possession was intact and unimpaired.

The learned Judge confesses that the evidence on both sides with regard to pos-

session, as adduced before him, was most unsatisfactory and that he was quite unable to make up his mind with whom possession in fact lay; and accordingly to arrive at a definite and final conclusion, the learned Judge applied the legal presumption that possession follows title to the facts proved in evidence before him, and held that the possession of the property in this suit lay with Beni and Harihar between the period from 1896 up to November 1900.

The learned Judge summarises his conclusion of fact in the following phrases: "My opinion then about the 1896 to 1900 period is that the direct evidence is insufficient to prove with whom possession lay." "When this position is reached a long series of rulings show that it should be presumed that possession goes with title." "The title of Beni and Haribar is, in my opinion, established by the partition proceedings. These as I have held were continued as though Jaipal's purchase in 1893 had not taken place." "I thus find that Beni and Harihar were *in actual possession from* 1896 *up to November* 1900, *when the Roys got symbolical possession.*"

Now if the learned Judge was right in point of law in applying the legal presumption that possession follows title, then the final conclusion of fact arrived at by the learned Judge cannot be impeached in second appeal.

Mr. Shushil Madhab Mullick appearing on behalf of the appellant contends that the learned Judge in the circumstances of this case, on the facts proved in evidence before him, was not warranted in applying in point of law the presumption that possession follows title. His contention before us has been that this presumption of law is only applicable in cases where the evidence is so strong and so consistent and so evenly balanced on both sides that the Court is unable to satisfy itself with which of the parties to the litigation before it possession lies; and that only in such cases is the Court entitled to apply the presumption of title in aid of possession. Mr. Mullick emphatically argues that the presumption cannot be applied in cases where no evidence of possession is given at all by either side; or where if the evidence that is given as to possession is so *unsatisfactory* and insufficient as to leave the Court unable to arrive at a clear conclusion as to with which party possession in fact lay.

We are of opinion that Mr. Mullick's contention is unfounded in point of law. There are many authorities of modern and recent date, which conclusively establish that even in cases where no evidence has been given at all as to possession that nevertheless the legal presumption may be resorted to to support the presumption that possession follows title, and likewise there are also reported cases which decide that where the evidence offered has been so unsatisfactory and weak on both sides as to leave the tribunal of fact unable to determine the issue of fact as to which of the parties to the litigation are entitled to possession, that in such cases the presumption that possession follows title may be resorted to to determine the issue as to possession in fact.

The main authority on which Mr. Sushil Madhab Mullick relies is a judgment of our learned brother Mr. Justice Mullick reported as *Fakira Lal Sahu* v. *Munshi Ram Charan Lal* (1). In that case on the fact before him, our learned brother did lay down that the legal presumption that possession follows title was applicable *only* in cases in which the evidence was so strong and consistent and evenly balanced on both sides that it was impossible to determine with whom possession lay. However, in a more modern ruling the same learned Judge re-considered the decision pronounced by him as a Single Judge in Second Appeal (unreported) No. 728 of 1917. Mr. Justice Mullick was sitting, in the unreported case cited, as a member of a Division Bench of this Court with my learned colleague Mr. Justice Jwala Prasad. Mr. Justice Mullick in that case stated:—

"We think it right, however, to state what, in our opinion, the law is with regard to the presumption which follows upon proof of title. The ordinary presumption of law is that possession goes with title. That presumption, of course, does not avail if there is clear evidence to the contrary. Where the evidence is equally strong on both sides, the presumption of law may, according to the circumstances of each case,

(1) 35 Ind. Cas. 564; 1 P. L. J. 146.

be regarded and turn the scale. But the presumption cannot overcome the facts proved, and, therefore, it is always open to the Court to give what weight it likes to the presumption. When there is no evidence of possession on either side, the presumption should prevail. *So also where the evidence is unsatisfactory* on both sides, provided always that the evidence does not negative the presumption."

With the expression of the law so stated we entirely agree.

Likewise it will be found stated in Mr. Justice Woodroffe's book on the Law of Evidence, page 692, of the last edition as follows: "It is, therefore, only when there is *no evidence of possession either way*, or when the evidence of possession is strong on both sides and apparently equally balanced, that the presumption that possession goes with title should prevail."

The importance of that commentary, coming from so distinguished an authority as Mr. Justice Woodroffe, is that it recognises that even in cases where *no evidence* is given on either side as to the fact of possession that the presumption should prevail.

Mr. Justice Mookerjee in a case reported as *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lal* (2) states at page 280 as follows: "When the District Judge deals with this part of the case, he may, if the state of the evidence justifies it, apply the principle laid down by their Lordships of the Judicial Committee in *Runjeet Ram Panday* v. *Goburdhun Ram Panday* (3), namely, where the evidence of possession is *equally unsatisfactory on both sides*, the presumption may be made that possession was with the true owner."

The importance of this judicial pronouncement is that it applies to the third class of cases, namely, where the evidence on both sides is so unsatisfactory or insufficient as to be inadequate to enable the Court to make up its mind as to with whom possession lies, that then the principle laid down by their Lordships of the Privy Council in the well-known case reported as *Runjeet Ram Panday* v. *Goburdhun Ram Panday* (3) should be applied. I also think the decision of their Lordships of the Privy Council reported as *Rani Hemanta Kumari Debi* v. *Maharaja Jogadindra Nath Roy Bahadur* (4) brings up to date what the law is as declared by their Lordships' Board, namely, that where the evidence as to possession is doubtful and conflicting, the initial fact of title comes to a party's aid with greater or less force according to the circumstances established in evidence.

Mr. Justice Mookerjee subscribes to this view in the case already cited reported as *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lal* (2). In that case, the learned Judge says at page 281: "It follows consequently that if a *plaintiff establishes by evidence, direct or presumptive, his possession, actual or constructive, of the disputed land* in Bharkalwar within 12 years of the suit, and if the defendants are called upon to prove their case of adverse possession for over 12 years, in respect of any portion of those lands, the *evidence as to their possession must be carefully scrutinized.*"

In our opinion in point of law the learned Judge was, on the facts of this case, justified in applying to the facts adduced before him in evidence in this suit the presumption already stated that possession follows title.

The learned Judge's finding of fact is that from 1896 down to 8th or 9th November 1900 respectively the predecessors-in-title of the plaintiff, Beni and Haribar, were in possession of the respective lands in suit; and that consequently the present suits having been instituted on the 7th and 9th of October 1912, the plaintiff has shown that he was in possession within 12 years before action brought, and that the defendant No. 2's present possession must be attributed to a dispossession or a discontinuance of the plaintiff's prior possession within the period provided by the Limitation Act.

It remains to consider which Article of the Limitation Act applies to this case. It has been forcibly contended before us that the Articles which apply are either Article 137 or Article 133. We are of opinion that neither of these Articles apply; and the Article which does apply is Article 142.

Article 138 applies only to the case of a judgment debtor or those claiming

(2) 12 C. W. N. 273; 3 M. L. T. 212; 7 C. L. J. 414.
(3) 20 W. R. 25 (P. C.).

(4) 10 C. W. N. 630; (P. C.); 3 A. L. J. 363; 8 Bom. L. R. 400; 1 M. L. T. 135; 16 M. L. J. 272.

through him who remain in possession after purchase made by an auction purchaser at an execution sale. In the present case defendant No. 2 bases his claim to title and possession as a trespasser relying upon adverse possession. Article 137 for obvious reasons has no application to the facts of this case, because as found by the learned Judge possession remained with the predecessors-in-title of the plaintiff up to the time that symbolical possession was given to the plaintiff.

Accordingly we are of opinion that the learned Judge was right in point of law in the conclusion at which he arrived, that the plaintiffs discharged the onus which the law imposed upon them in proving their possession and dispossession or discontinuance of possession within twelve years prior to the institution of these suits respectively.

We, therefore, decline in second appeal to interfere with the decision of the learned Judge, and dismiss these appeals with costs.

Appeals dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1225 OF 1918.
APPEAL AGAINST ORDER No. 295 OF 1918.
March 6, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

THE RAJAH OF BOBBILI—BIDDER—PETITIONER—APPELLANT

versus

AKKELLA SURYANARAYANA RAO GARU AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2 AND 3 AND LEGAL REPRESENTATIVE OF DEFENDANT No. 1.—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 47, 115, O. XXI, rr. 69, 71, 84—Contract Act (IX of 1872), s. 6—Execution of decree—Sale—Bid, nature and effect of—Death of highest bidder—Revocation of bid—Procedure, subsequent—Order for fresh auction—Declaring next lower bidder as purchaser, illegality of—Re-sale, order for, on default of payment of deposit—Jurisdiction, wrong exercise of—Appeal, maintainability of—Revision.

A bid at a sale in a Court-auction is merely an offer or, in the language of section 6 of the Contract Act, a proposal. It is the highest bidder that is regarded as having made the final proposal which may or may not be accepted by the auctioneer. Every bid that is made does not remain in abeyance pending acceptance by the auctioneer. Where a higher bid is made, all preceding lower bids are impliedly refused. [p. 808, col. 1; p. 809, col. 2.]

Jones v. *Nanney*, (1824) 147 E. R. 925; 13 Price 76 M'Cle 25, explained.

Where the highest bidder dies, the proper course for the Court is to direct a fresh auction, and not to treat the next highest bidder as the auction-purchaser. [p. 808, col. 2; p. 810, col. 2.]

Such an order is illegal and amounts to a wrong exercise of jurisdiction by the Court and is, therefore, open to interference by the High Court in revision under section 115, Civil Procedure Code. [p. 809, col. 1; p. 811, col. 1.]

The bidder who is affected by the illegal order is not 'a party' to the suit within the meaning of section 47, Civil Procedure Code, and cannot appeal against the order. [p. 808, col. 2; p. 809, col. 1; p. 811, col. 2.]

At an auction-sale, which was held for several days, one *R.* made the highest bid, after which the sale was adjourned. Before the date of the adjourned sale *R.* died, and the Court, instead of directing a fresh auction, held the petitioner, who was the next preceding bidder, to be the purchaser and directed him to make the deposit in two days. On his failing to do so, the Court directed a re-sale of the properties. Against this order the petitioner filed a revision petition in the High Court, and also presented an appeal:

Held, (1) that the order for re-sale was illegal and *ultra vires* and consequently void; [p. 808, col. 2; p. 811, col. 1.]

(2) that the petitioner was not a representative of either the judgment-debtor or the auction-purchaser within the meaning of section 47, Civil Procedure Code, and, therefore, no appeal lay at his instance against the order; [p. 808, col. 2; p. 809, col. 1, p. 811, col. 2.]

(3) that, as the order was one passed without jurisdiction, the High Court could interfere under section 115, Civil Procedure Code. [p. 809, col. 1, p. 811, col. 1.]

Per *Oldfield, J.*—Order XXI, rule 71, Civil Procedure Code, has reference to the defaulting purchaser, and is concerned only with the legal relation created by a purchase assumed to be regularly made, not with the consequence of its repudiation by the bidder. [p. 809, col. 1.]

Per *Seshagiri Aiyar, J.*—Every bid at an auction is not a contract or a subsisting offer which can be converted into a contract at the option of the purchaser at any moment of time. When a Court adjourns a sale fixed for a certain day to another date, with a view to get a higher offer for the property, it must be regarded not to have intended to accept the previous offer. This result would follow even if there are no higher offers. [p. 811, col. 1.]

Balakrishna Udayar v. *Vasudeva Aiyar*, 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628. 6 L. W. 501 (P.C.); 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261, distinguished.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Temporary Subordinate Judge, Vizagapatam, in Execution Petition No. 3 of 1918 in Original Suit No. 5 of 1913, and appeal against the said order of the said Court in the said Execution

Petition No. 3 of 1918, in Original Suit No. 5 of 1913.

FACTS appear from the judgment.

Mr. *K. Srinivasa Aiyangar*, for the Appellant.—In a judicial sale, once a higher bid is made, all the prior bids cease to have any value. Therefore the Court acted without jurisdiction: German's Civil Code, page 98.

[SESHAGIRI AIYAR, J.—Is not appeal your remedy? Now that you are knocked down as auction-purchaser rightly or wrongly, you have to come under section 47, Civil Procedure Code.

Payne v. *Cate* (1), *Jones* v. *Nanney* (2), *Kenaram* v. *Kailash Chandra* (3) and 4 American Cyclopedia of Law and Procedure 1044, footnote, *Donaldson* v. *Kerr* (4).

Mr. *P. Narayanamurthi*, for the Judgment-debtor-Respondent.—The bid not being withdrawn holds good.

[OLDFIELD, J.—But the bid is cancelled by the higher bid.]

That is the question to be determined. The adjournment was at the request of both bidders. Petitioner wanted time to think whether he could not bid higher.

[SESHAGIRI AIYAR, J.—Or perhaps whether his agent had not already bid too high.]

No. For there was the higher bid.

Appendix E, Form No. 29, Civil Procedure Code, third clause, introduces a proviso, 'provided he is legally qualified to bid.'

[SESHGIRI AIYAR, J.—The proviso refers to mad men and such like.]

Suppose the highest bidder in such a case is a mad man. His bid is as if it had not been made. Then the next lower bid must in law be taken as the highest bid.

Each bid is an offer, standing until withdrawn by the bidder himself. Form No. 56 of the Civil Rules of Practice. *Agra Bank* v. *Hamlin* (5) states that a bid is an offer which may be retracted.

[SESHAGIRI AIYAR, J.—That refers only to the highest bid.]

Mackenzie Lyall & Co. v. *Chamroo Singh & Co.* (6). So until the bid is retracted it is good and subsisting.

Kenaram v. *Kailash Chandra* (3). The determination of the highest bidder is only at the moment of the falling of the hammer. Till then all are bidders with varying offers.

[SESHAGIRI AIYAR, J.—The auctioneer cannot accept any of the offers.]

Only the highest available. If the higher bid does not mean the withdrawal of the lower, the lower bid is subsisting: section 6 of the Indian Contract Act.

[OLDFIELD, J.—The higher bid means that the previous ones are rejected.]

Then the highest bid must be confirmed, which cannot be done here.

Secondly, no revision lies. The order complained against is the order directing a re sale on default by petitioner to pay the deposit. It is not open to a person in whose favour a contract has been completed to sue for declaring it null and void until he sustains some loss or damage. In any case, there is no question of exercise of jurisdiction.

[SESHAGIRI AIYAR, J.—Suppose there is no auction at all and the Court takes a man to be the purchaser. Can't that be dealt with under section 115, Civil Procedure Code?]

That is an assumption of jurisdiction which it has not.

[SESHAGIRI AIYAR, J.—The present case is similar.]

See *Balakrishna Udayar* v. *Vasudeva Aiyar* (7), which defines the scope of section 115. Order XXI, rules 84 and 71, deal with re-sales.

There is an appeal against an order under rule 71: *Annavajhula Venkatachellamayya Garu* v. *Ramagirjee Neelakanta Girjee* (8).

[SESHAGIRI AIYAR, J.—The order in question foists upon the petitioner the character of an auction-purchaser, and, as a consequence, the representative of the parties to the suit. Will not section 47, Civil Procedure Code, apply?]

No. See *Annavajhula Venkotachellamayya Garu* v. *Ramagirjee Neelakanta Girjee* (8).

(1) (1789) 3 T. R. 148; 1 R. R. 679; 100 E. R. 502.
(2) (1824) 147 E. R. 925; 13 Price 76; M'Cle. 25.
(3) 19 Ind. Cas. 904; 18 C. L. J. 53.
(4) 6 Pa. St. 486.
(5) 14 M. 235; 5 Ind. Dec. (N. S.) 165.
(6) 16 C 702; 8 Ind. Dec. (N. S) 464.
(7) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715, (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).
(8) 43 Ind. Cas. 685; 41 M. 474 at p. 486; 23 M. L. T. 9; 34 M. L. J. 156; 7 L. W. 159; (1918) M. W. N. 121.

So far as the deficiency ordered to be paid is considered, it is to be regarded in the same light as damages for breach of contract. But when the order merely directs a re-sale no appeal also lies. *Amir Baksha Sahib* v. *Venkatachala Mudali* (9).

JUDGMENT.

OLDFIELD, J.—This petition and appeal relate to the circumstances in which a Court sale was concluded by the Temporary Subordinate Judge of Vizagapatam. The decree under execution was for over Rs. 2,50,000 and eight villages of a Zemindari belonging to the judgment-debtors, here respondents, were put up for sale in one lot on 27th September 1918. The sale was continued from that date until 22nd October 1918, when other bidders having dropped out, competition was confined to the Rajah of Bobbili, the petitioner and appellant here, and one Perla Ramamurthi Chetty. On that date the former by his Muktyar or agent bid Rs. 3,25,000. On 28th October 1918, however, the Chetty bid Rs. 3,26,000. The sale was then continued until 5th November 1918, although no further bids were received, apparently in compliance with the requests of the Rajah and the Chetty contained in two of the telegrams marked as Exhibit III Meanwhile news was received of the Chetty's death and on the date last mentioned an adjournment to the next day was granted to enable his widow to bid; and there were further adjournments until 18th November 1918, when the Subordinate Judge held quite correctly that the Chetty's bid was revoked by his death. He, however, decided to go on with the sale from the bid of the Rajah as the highest before him. No other bid being made, he at once knocked down the property in the Rajah's favour on his last bid of Rs. 3,25,000 granting him time until the next evening to pay the necessary deposit. As it was not paid by 20th November 1918, he held that a default was established and directed the re-sale of the property forthwith at the Rajah's risk. The re sale went on until 27th November 1918, when the present proceedings had been initiated and a stay order was passed by this Court. The appeal and the petition before us are against the order of 20th November 1918 directing a re-sale.

(9) 18 M. 439 at p. 443; 5 M. L. J. 206; 6 Ind. Dec. (N. S.) 655,

The foregoing appears from the original sale list more clearly than from the print, because the orders of the Subordinate Judge have been recorded with an informality, which the importance of the proceedings should have led him to avoid; and, it may be added, in slipshod language, unbecoming an officer of his standing. There are, moreover, portions of his orders, of which it is necessary to express disapproval on other grounds. On 22nd November 1918 he said, in adjourning the sale, "let the competitors think over and stop." On 31st October 1918 he expressed the opinion in his order on one telegram included in Exhibit III that the price was already too much. On 18th November 1918, he stated that he had already granted adjournment for the benefit, not only of the Chetty's widow and the Rajah, but also to enable other bidders such as the Maharajah of Jeypore to come forward and he referred to the possibility of the Court of Wards, which had taken over the Chetty's estate, wishing to purchase, although there was no application of any sort from the Maharajah and nothing formal from the Court of Wards before him. The only duty of the Subordinate Judge was to hold a fair sale, giving reasonable opportunity to purchasers to come forward; and these public references to his own opinion as to the price and as to possible competitors were out of place and should not have been made.

We are not, however, concerned directly with them or their effect, but with the Subordinate Judge's action in knocking down the property on the last bid of the Rajah when the Chetty's higher bid had been revoked, the former's contentions being that this procedure was irregular because either his own bid had been in fact retracted on 5th November 1918, or it had been discharged by (1) the suspension of the sale on its adjournment at the close of the day or (2) the higher bid of the Chetty. As regards first, the alleged retraction, the plea rests on the affidavit of the Rajah's Muktyar dated 25th November 1918. The facts are denied in the respondents' affidavit of 24th December 1918. In these circumstances it is impossible to reach any conclusion regarding them without taking oral evidence and calling on the Subordinate Judge for a report; and, as one of the

other contentions advanced affords ground for an immediate decision, I turn to it at once.

The contention that the Rajah's bid was discharged at the end of the day on which it was made by the adjournment of the sale is supported by the reasons given in the argument in *Jones* v. *Nanney* (2) and the qualified acceptance of them in two of the judgments in that case. But it was not the ground of decision; and I hesitate to adopt it here. For a bid is merely an offer or, in the language of the Indian Contract Act, a proposal, *vide Payne* v. *Cave* (1) and *Agra Bank* v. *Hamlin* (5) and although it may be that in particular cases the facts, such as a change in the circumstances during the suspension of the sale or the possibility that the bidder has exhausted his resources in the purchase of other lots, those being the contingencies referred to in *Jones* v. *Nanney* (2), may justify a presumption in favour of retractation, there is nothing of that sort alleged in the present case, and in the absence of any plea of a special custom relating to auctions in India we must, in my opinion, decide in accordance with section 6, Indian Contract Act. Under that provision the lapse of time before acceptance of a proposal, whether arising from the adjournment of auction proceedings or otherwise, is ground for presuming revocation, only when it is unreasonably long; and here the adjournments were authorised by the sale proclamation and Order XXI, rule 69, of the Code of Civil Procedure and are not said to have been excessive. If the Rajah's bid is to be held to have been discharged, it must be on the other ground above referred to, that it was impliedly refused, when the Subordinate Judge continued the sale and received the bid of the Chetty.

No doubt no authority has been adduced to show that acceptance of a higher bid involves rejection of the preceding lower one. But that is perhaps because it is so clear that it would be impossible to rest an auction-sale on any principle, if the contrary were the case. Condition No. 3 of the sale proclamation in the present case provides that the highest bidder must be the purchaser; and, when a higher bid has been received, as no possibility of a lower bid succeeding can remain, the latter must be taken to have been finally refused. It is argued for the respondents that an auction should be viewed as the successive submission of a number of offers to the auctioneer, of which he is bound to select the highest made by a competent bidder, and that the one to be selected is ascertainable by him only at the conclusion of the sale, when the hammer falls, all remaining effective until such ascertainment and it being open to him in case the apparently highest offer turns out to be that of a disqualified person, such as a lunatic or minor, to accept the next highest forthwith. But it would, I think, be extremely inconvenient in practice to regard the proceedings in this way and in the absence of authority I am not prepared to do so. In *Roberts* v. *Bozon* (10) such a construction was adopted only because it was specially authorised by the conditions of sale. The case of a bid being ultimately refused, as made by an incapacitated person, supports no argument, since in it the proper course, consistently with the foregoing, would not be to proceed from the next highest or any other bid, but to restart the sale from the beginning; and there would be no inconvenience in doing so and no prejudice to other bidders. My conclusion is that the Subordinate Judge fell into a fundamental error in not taking that course in the present case and in not treating the Rajah's bid as discharged.

This being the conclusion as to the legality of the Subordinate Judge's action, the question remains whether his order can be displaced either by an appeal or in revision. It is conceded that an appeal can lie against it, only if the question between the Rajah and the respondent, judgment-debtor, is one arising between the parties to the decree and necessary to its execution and it is not disputed that it fulfils the latter requirement. As regards the former the Rajah can be treated as the representative of a party, only if his character as a purchaser is admitted. But that character and the Subordinate Judge's attribution of it to him are exactly what he is seeking to disclaim by these proceedings. True, the respondent, judgment debtor, does not dispute and in fact is here to support that

(10) (1825) 3 L. J. (o. s.) Ch. 113.

attribution. But I can find no case under section 47 of the present Code of Civil Procedure or the section previously corresponding with it, in which a representative character was allowed to be pleaded in order to give the Court jurisdiction to negative its existence and it is impossible to understand how any logical course of pleading could permit it. No doubt again in Order XXI, rule 71, the reference is to the defaulting purchaser; although a re-sale consistent only with the cancellation of his purchase is in question. But this is inconclusive, since the rule is concerned only with the legal relation created by the purchase assumed to be regularly made, not with the consequence of its repudiation by the bidder. In these circumstances the application of section 47 has not, in my opinion, been justified and the appeal is, therefore, unsustainable.

As regards the revision petition this Court can, of course, only use its powers in case the Subordinate Judge committed not merely an error in law, but also a material irregularity in the exercise of his jurisdiction. The distinction between such an error and such an irregularity must inevitably be difficult. But the latter is, I think, in question here. For the Subordinate Judge's mistake arose, not incidentally or from any wrong application of or deduction from legal principles, but from a fundamental misconception of the nature of the transaction he was engaged in and his powers. It is urged also for the respondents that the Rajah can await the result of the re sale he objects to and sue, when the extent of his grievance has been ascertained; and no doubt this Court does not ordinarily use its revisional powers, when another remedy is available. But the rule is not absolute; and in the present case where the efficacy of that remedy is doubtful and a re-sale will only complicate the relations between those concerned, there is sufficient reason for immediate interference with the irregular course taken by the proceedings.

The result is that the civil revision petition is allowed, the Subordinate Judge's order of 20th November 1918 being set aside with a direction for the re-sale of the property. The judgment-debtors Nos. 3 to 5-appellants will pay the costs of the petitioner. The decree-holders Nos. 1 and 2-respondents will bear their own costs.

We consider it advisable that the proceedings should not be continued from this point before the Subordinate Judge referred to in this order. The Exhibit A is transferred to the District Court for disposal according to law.

Under rule 41 of the Rules framed under the Legal Practitioners Act we fix Rs. 500 as the appellant's Vakil's fee.

The appeal Civil Miscellaneous Appeal No. 295 of 1918 is dismissed. No order as to costs.

SESHAGIRI AIYAR, J.—I agree.

The facts set out by my learned brother show that there has been material irregularity and illegality of a pronounced type in the procedure of the Subordinate Judge. I wish to say a few words on the question of law argued in the case. Apart from authority the ordinary understanding of an auction-sale is this. In the presence of the auctioneer who may be regarded as the acceptor, successive proposals are made for the purchase of the property. *A* makes the first offer and when that is succeeded by the offer of *B* if *A* wants to purchase the property, he must have a higher offer. Otherwise he walks out of the bargain. There may be *C*, *D* and *E* and so on, who may bid higher than their immediate preceding bidders. It is the highest bidder that is regarded as having made the final proposal, which may or may not be accepted by the auctioneer. If it is not accepted there is no contract. The procedure at a Court sale exactly corresponds to what I have stated above. It is not different in any main particulars from any private proposal for the sale of property. According to the Subordinate Judge every offer that was made remained in abeyance pending acceptance by the auctioneer. If this is carried to its logical extent, the first or the lowest offerer may still be regarded as keeping alive his offer on the possibility of the auctioneer accepting his proposal. In the first place, this view of the Subordinate Judge is opposed, as pointed out by my learned brother, to the conditions of the sale. Because the third condition is: "The highest bidder shall be declared to be the purchaser of any lot, provided he is legally qualified and provided it shall be in the discretion of the

Court to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so." In the present case, in the auction list, even when the bid had not reached the present figure, the Subordinate Judge made a note that the price already offered was too high. Therefore, according to condition No. 3 when Ramamurthi Chetty offered Rs. 3,26,000, one would have expected the Subordinate Judge to have accepted the offer. But for some reason, notwithstanding his view that the price offered was unduly high, he adjourned the sale to a future date. Before the adjourned date, as pointed out by my learned brother, the highest bidder had died and the bid became a nullity. For this result the Subordinate Judge is mainly responsible. Instead of directing a fresh auction on the death of the highest bidder, because under section 6 of the Contract Act, clause 4, the death of the proposer revokes the proposal, he has declared the next highest bidder as the auction-purchaser. This conclusion of the Subordinate Judge seems to me to be utterly unwarranted by the conditions of the sale and by the recognised rules of auction-sales. I would have been content to overrule the Subordinate Judge on what seems to me elementary rules relating to Court sales. Naturally enough Mr. K. Srinivasa Aiyangar, who appeared for the next highest bidder who has been declared the purchaser, had great difficulties in finding authority for his contention. Fortunately, however, there are some decisions which he has been able to bring to our notice which support one's *a priori* notions of such matters. In *Payne* v. *Cave* (1) it was stated: "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified by the seller knocking down the hammer, which was not done here till the defendant has retracted."* * * * * * *
"Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to." The only addition which need be made to this statement of law is "or till a person makes a higher bid." In *Jones* v. *Nanney* (2), a case which is also reported in McClelland Reports 25, the facts are these: There were three plots for sale. The first plot was put up to auction. After there was a bid for £4,000 for it, the auctioneer thought that higher price should be secured for it, and informed the bidders that he would proceed to sell plots Nos. 2 and 3 and then come back to plot No. 1. He then disposed of the next two plots and found that there was no higher offer than £4,000 for plot No. 1. Thereupon he declared the person who offered £4,000 to be the purchaser. This latter person refused to accept the sale. The question was whether there was a concluded bargain. The learned Barons who took part in the case held that by not knocking down the plot to the person who offered £4,000 and by proceeding to sell the other two plots the auctioneer must be taken not to have accepted the offer, and that it was not competent for him subsequently to regard the offer as still open so as to enable him to accept it. This principle applies with great force to the present case. Here the Subordinate Judge accepted neither the offer of the appellant nor of Ramamurthi but adjourned the sale to some other date, because, in his opinion, there were two other persons who were likely to make a higher bid. When he took this step, he could not have insisted upon Ramamurthi Chetty, if he were alive, purchasing the property. Much less was it open to him to have asked the defendant to take the property. It was argued by Mr. Narayanamurthi that this English decision enunciates a principle too revolutionary for acceptance in this country. I do not think so. Under section 6 of the Contract Act, clause 2, "a proposal is revoked by lapse of a reasonable time without communication of the acceptance." It may be that the few minutes which elapsed between the offer and acceptance in the case of *Jones v. Nanney* (2) may not be regarded in this country as 'reasonable time". The question of reasonableness is a question which depends upon the business habits of particular communities. But even in this country where it is said that people conclude their contracts more leisurely than in England, when the Judge in the lower Court adjourned the sale to another date with a view to get a higher bid for the property, he certainly must be regarded not to have intended to accept the previous offer. I, therefore, think that the

principle of the case is applicable to India, subject to reservations on the question of reasonableness of the time. The result is that the appellant's offer, which was made on the 22nd of October 1918 not having been accepted within a reasonable time, was no longer in existence. This result would follow even if there were no higher offers than his. The acceptance of the conclusion of the Subordinate Judge must lead us to hold that every bid at an auction sale is a subsisting offer which can be converted into a contract at the option of the auctioneer at any moment of time. The theory that every bid is a contract has been repudiated long ago in England, see *Warlow* v. *Harrisson* (11), and is not law in this country. The reasoning in the above case applies against accepting the position that every bid is a subsisting offer. I have, therefore, come to the conclusion that the decision of the Subordinate Judge is wrong from every point of view.

The only difficulty I felt was about our powers of interference under section 115 of the Code of Civil Procedure. There can be no doubt that there has been very great irregularity and grave illegality in the procedure of the Subordinate Judge; and I do think that he has clutched at jurisdiction by these irregular and illegal methods. The auction had come to an end so far as the appellant was concerned when his offer was not accepted within a reasonable time and also when there was a higer offer. To foist upon him under these circumstances the position of a purchaser is equivalent to foisting upon any man in the street the status of an auction-purchaser when he made no bid at all at the auction. The language of the Judicial Committee in *Balakrishna Udayar* v. *Vasudeva Aiyar* (7) was relied upon by Mr. P. Narayanamurthi to show that these irregularities do not affect jurisdiction. I do not think the two cases are *in pari materia*. In my opinion, the procedure of the Subordinate Judge amounts to acting illegally and with material irregularity in the exercise of jurisdiction. I, therefore, hold that we have power to interfere with the order of the Subordinate Judge.

It was contended by Mr. Narayanamurthi that the order of the Subordinate Judge was an interlocutory one and that there was no case for revision until there has been a re-sale and a declaration of the deficiency recoverable from the appellant. I do not agree with this contention either. The Subordinate Judge has declared the appellant to be the purchaser and has given directions to sell the property treating him as the person responsible for any deficiency that may arise in the re sale. I do not see why a man who expects to be damnified and who certainly would be put to the necessity of taking part in the re sale to prevent the property being sold at a low price should not have the right to move the Court to interfere at this stage. I think the order of the Subordinate Judge was a final one, although further orders may follow in the wake of the one which he has passed.

Mr. K. Srinivasa Aiyangar has also filed a civil miscellaneous appeal. It is open to argument that the appellant is the representative of either the auction-purchaser or of the judgment debtor. The language of rules 71 and 84, Order XXI, of the Civil Procedure Code indicates that the appellant may be within section 47 of the Code. But the course of decisions in this Presidency as well as in the other High Courts have left this question of the representative character of the auction-purchaser in so confused a state that I do not think it safe to base my decision upon the assumption that the appellant is the representative of a party to the suit so as to invite the operation of section 47 of the Civil Procedure Code; if there is an appeal, there can be no doubt that the order should be set aside as wholly unwarranted and illegal. But I think it would be safer to hold that no appeal lies and that the case should be dealt with under section 115, Civil Procedure Code. The petition should be allowed and the order of the Subordinate Judge should be set aside I agree with the order as to transfer and as to costs made by my learned brother.

M. C. P.

Petition allowed;
Appeal dismissed.

(11) (1859) 1 El. & El. 309; 29 L. J. Q. B. 14; 6 Jur. (N. S.) 66; 8 W. R. 95; 117 R. R. 227; 120 E. R. 925.

BANK OF PESHAWAR LD. *v.* MADHO RAM.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2925 OF 1917.

May 2, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Dundas.

BANK OF PESHAWAR, LIMITED, MULTAN CITY, THROUGH *Diwan* NARINJAN PARSHAD, JOINT LIQUIDATOR —PLAINTIFF—APPELLANT

versus

MADHO RAM, MANAGER, PUNJAB, NATIONAL BANK, LIMITED, LAHORE— DEFENDANT—RESPONDENT.

Company Law—Liquidation of Company—Allotment of shares, application for—Invalid allotment—Revocation before ratification, effect of—Share-holder, liability of.

The liquidator of a Bank sued one *M.* for recovery of a certain sum of money on the basis of a promissory note alleged to have been executed by him and one *S.* jointly. It was alleged that *M.* and *S.* applied for the allotment of certain shares in the Bank, which shares were allotted by the Managing Director on the 29th June 1911 and notice of the allotment was given to *M.* and received by him on the 5th January 1912. On the 18th January *M.* repudiated the allotment and denied having made any application. It appeared that on 20th November 1908 two Directors of the Bank had made a delegation of the power of allotting shares to the General Manager, and that, subsequently, on the 27th November 1908 these two (one representing a third Director by proxy) together with a third, purported to confirm the decision of the previous week. It appeared further that neither of these two Directors had paid their allotment money by that date :

Held, (1) that under the circumstances no proper meeting of the Directors could be said to have been held and that there was no valid delegation of the power of allotting shares; [p. 813, col. 2.]

(2) that, consequently, there was no valid allotment of the shares to the defendant and, therefore, there was no consideration for the promissory note; [p. 814, col. 1.]

(3) that, in any case, it was open to the defendant to revoke his application for the allotment of any shares, provided the revocation was anterior to the date of any valid allotment or ratification by the Board of Directors; [p. 814, col. 1.]

(4) that no valid ratification of the invalid allotment before revocation could be said to have been proved; [p 814, col. 1.]

(5) that, under the circumstances, the defendant was not liable. [p. 815, col. 1]

First appeal from the decree of the Senior Subordinate Judge, Lahore, dated the 18th June 1917, dismissing the claim without costs.

Messrs. *H. Beechey* and *D Saunders*, for the Appellant.

Lala *Moti Sagar*, R. S., and Lala *Shamair Chand*, for the Respondent.

JUDGMENT.—The present suit was brought by the liquidator of the Bank of Peshawar against one Madho Ram, Manager of the Punjab National Bank, for recovery of Rs. 18,428-2-10 on the basis of a promissory note for Rs. 15,445 executed by Lala Madho Ram and Sidhu Ram jointly, at Multan, on the 18th December 1911. The plaint alleged that on that date the defendant Madho Ram and Sidhu Ram applied for the allotment of 3,089 shares in the Bank of Peshawar, Limited, on which Rs. 2 per share were payable on application and Rs. 3 per share on allotment, the total sum due on the allotment of these shares being, therefore, Rs. 15,445. The shares were duly allotted by the Managing Director of the Peshawar Bank, Lala Parmanand Khanna, on the 29th of December 1911 and notice of the allotment was given to Lala Madho Ram and received by him on the 5th of January 1912. On the 18th of January 1912 Lala Madho Ram wrote to the General Manager of the Bank of Peshawar repudiating this allotment and denying that he had made any application for shares or any payment for shares. Subsequently on the 29th of January 1912 it is alleged that a first call was made on these shares, payment of which was refused by the defendant. On the 16th of February two of the Directors of the Bank of Peshawar recorded a resolution that these shares should be forfeited. The Bank of Peshawar went into liquidation in the year 1913 and the present suit has been brought by the liquidator to recover Rs. 13,945 principal (Rs. 15,445 less Rs. 1,500) and Rs. 4,483-2-10 interest on the promissory note of the 18th December 1911; Rs. 1,500, the balance of the principal sum, is said to have been paid by Lala Sidhu Ram who has been discharged from further liability. The defendant amongst other pleas denied execution of the promissory note or signing the application for shares. The learned Subordinate Judge, who has decided this case, has found that the defendant duly executed the promissory note in suit and submitted the application for shares of the 18th December 1911. He has, however, found that the allotment of shares to the defendant by Lala Parmanand was invalid

inasmuch as there was no valid delegation by the Board of Directors of their power under the Articles of Association to allot the shares of the Company. He has also found that there was no acceptance by the defendant of the invalid allotment and that in fact he repudiated having made any application, and he has further found that there has been no ratification of the invalid allotment by a competent authority. A further defence has been set up that the Peshawar Bank had discharged the defendant by re-allotting these shares to Lala Sidhu Ram alone and accepting payment on his behalf from the Sindh Persian Gulf Trading Company with the result that this acceptance of performance of a promise by a third party had the effect under section 41 of the Contract Act of discharging the defendant from liability. This contention, however, was not accepted by the learned Subordinate Judge, who came to the conclusion that this transfer was fraudulent and was merely one of several similar transfers of shares to nominal purchasers made by the Directors of the Peshawar Bank in order to discharge themselves from liability to the creditors of the Bank which transfers, in addition, have been annulled by competent authority. The suit was dismissed on the ground that there had been no valid allotment, but considering that the defence raised had been dishonest, the Subordinate Judge left the parties to pay their own costs.

From this dismissal plaintiff Bank has appealed to this Court on six grounds, of which the 1st and 3rd are to the effect that the allotment to the defendant was valid. This argument is based on certain proceedings in what purports to be the Minute Book of the Board of Directors of the Peshawar Bank of November the 20th, 1908, and November the 27th, 1908. On November 20th it is said that two Directors, Tulsi Ram and Sita Ram, were present and though at that time the Articles of Association had not been printed, it must be presumed that these two were competent Directors and that they there and then made a valid delegation of the power of allotting shares to the General Manager, Lala Parmanand. Further, it is argued that this authority was sufficiently ratified in a further meeting held a week later, in which Thakar Singh was also present, representing himself and B. Mathra Das by proxy, together with Lala Tulsi Ram and Sita Ram, the three thus constituting a quorum of four, and at this meeting the previous minutes were read and confirmed. We do not consider that these proceedings effected a valid delegation of the powers of the Board of Directors in the allotment of shares. To begin with, there does not seem to be any record of any valid election of Lala Tulsi Ram and Sita Ram as Directors at all. A Company can only be formed by certain subscribers, and apparently the names of the subscribers were not ascertained at the time when the Articles of Association were sent to press. The names have been written in later. The qualification of a Director should be the holding in his own right of at least 100 shares. But neither Sita Ram nor Tulsi Ram had paid their allotment money on the 20th November 1908; Sita Ram did not actually pay his till nearly six months afterwards and Tulsi Ram only paid his in December 1908. Under the Act of 1882 governing these proceedings, until Directors were validly elected the subscribers of the memorandum of association were deemed to be Directors. The minimum legal number of these is seven and two would not constitute a quorum. The Articles of Association, Article No. 83, adopted on the 27th of November prescribe that a quorum of the Board shall be four and although in any case it is difficult to understand how the Directors could attend deliberations by proxy, it may be remarked that Article No. 52 of the Articles of Association prescribes that a proxy shall not be taken into account in estimating a quorum. The result is that it is not shown that there has been any valid delegation of the power of allotting shares which power is reserved to the Board of Directors by Article 12 of the Articles of Association. Late in argument it was suggested that Lala Parmanand became a Director on the 18th of December 1911, apparently for the sole object of receiving this application and the promissory note, but the fact appears to be open to question and the suggestion seems

to be an afterthought. We agree, therefore, with the first Court that there was no valid allotment of these shares to the defendant-respondent. Consequently there was no consideration for the promissory note. In any case it was open to the defendant to revoke his application for the allotment of any shares, provided the revocation was anterior to the date of any valid allotment or ratification by the Board of Directors. Now this revocation was communicated to the Bank on the 18th of January 1912. But, it is argued, the Directors had already confirmed the allotment of these shares to Lala Madho Ram and in support of this argument our attention has been drawn to a note on the proceedings of the 29th December 1911, to the effect that a loan of Rs. 15,000 be sanctioned to Messrs. Madho Ram and Sidhu Ram presumably to be applied to payment of the deposit on the purchase of these shares. It is difficult to avoid some scepticism as regards this entry, which appears to have been interpolated after the conclusions of the proceedings of that day and which could have been made at any time. Certainly it does not disclose the fact that any shares had been allotted to Lala Madho Ram and at the meeting of the 5th of January 1912 it would appear that there was some question as to the proceedings of the previous week which were not in fact confirmed. An effort has been made to get out of this difficulty by subdividing the resolutions of the previous meeting by sub-headings in red ink. A minute book conducted on these lines can hardly pretend to command a high degree of confidence. It may even be suspected that the Board of Directors of the Peshawar Bank existed merely for the purpose of ratifying the acts of the Manager, who had taken the precaution at the time that the Articles of Association were adopted to get himself appointed General Manager for the somewhat protracted term of twenty years (*vide* copy of Articles of Association). No valid ratification of any invalid allotment before revocation can be said to be proved.

Considerable stress has been laid in argument on the fact that the defendant never questioned the validity of the constitution of the Board or of the allotment of shares in his favour, but contented himself with an unqualified denial that he had ever applied for any shares or executed any promissory note. On this point we can only say that the question was, undoubtedly, argued at length in the first Court, that the defendant could hardly be expected to be acquainted with the intimate records of the Bank of Peshawar some three years before the date of this dispute, and that presumably he only discovered the defects of its proceedings when these were disclosed in evidence. Lastly, it must be added that the defendant still persists in the denial of execution of either the application for shares or the promissory note of December the 18th, 1911. Now undoubtedly the evidence of execution is very meagre and weak, especially as regards the promissory note. In fact the conclusion that these documents are genuine is entirely a matter of inference from the conduct of the defendant and possibly from that of Sidhu Ram. We notice that the promissory note was apparently produced by Sidhu Ram in March 1914 at a time when the Police had made their appearance at his house. His possession of the promissory note is probably explained by certain proceedings of 1913, when the former Directors of the Bank of Peshawar converted any liabilities of their own into liabilities of an apparently fictitious Company to which the name of the Sindh Persian Gulf Trading Company was assigned. Sidhu Ram was never produced as a witness of the execution of either of the documents now in question. Parmanand, the only other witness, declines to say more than that these documents were signed by the defendant in his presence as far as he can remember. There is no correspondence on the record indicating that any demand on the promissory note was made from the defendant Madho Ram or that he either admitted the existence of the promissory note or even had notice of its existence. He certainly repudiated his alleged application for shares by the 18th of January 1912. Although, therefore, there may be strong suspicion that these documents are genuine, it is difficult for us to regard the very qualified evidence of

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Parmanand alone and the action of Sidhu Ram as amounting to positive proof of the execution of these documents. At the same time we consider that the delay by Lala Madho Ram in repudiating his application, under the circumstances detailed by the Subordinate Judge, is a ground for the belief that he was engaged with Lala Parmanand in some negotiations as to the temporary disposal of these shares and that it took him some time to determine on his course of action. Under these circumstances we think that the Subordinate Judge's order in refusing him costs was justified.

On the grounds given above we must dismiss this appeal but on the view that we take of the defendant's conduct we also dismiss his cross-objections. We do not think that the appeal was justified. The liquidator must have become aware from the course of proceedings in the first Court of the flimsy character of the concern which called itself the Bank of Peshawar and must have been aware that whatever the conduct of the defendant Madho Ram, he did not in fact receive anything from these shares, which seem to have been worthless and which the Bank itself declared forfeited and endeavoured to allot elsewhere, and Madho Ram had not received any other consideration in return for the promissory note.

We must, therefore, allow the respondent his costs in this Court.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 650 OF 1917.

June 12, 1919.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

SARDANAND RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SOHAWAN KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption—Integrity of mortgage broken with consent of mortgagee—Redemption of remainder.

Where the integrity of a mortgage is broken up with the consent of the mortgagee and a moiety is redeemed, neither he nor those who claim through him can afterwards invoke in their aid the rule which prohibits the breaking up of a mortgage so as to entitle a mortgagor to redeem any portion thereof which he feels disposed to redeem. [p. 816, col. 1.]

Second appeal against the decree of the District Judge, Ghazipur, dated the 12th January 1917.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Komalakant Varma*, for the Appellants.

Messrs. *M. L. Agarwala* and *U. S. Bajpai*, for the Respondents.

JUDGMENT.

WALSH, J.—This is a perfectly plain case. Two persons, many years ago, mortgaged two distinct and separate properties in which they were separately interested for one joint sum; in other words, they joined in mortgaging their separate estates. Shortly afterwards, the mortgagee died and his heirs, who, I am satisfied and, if necessary, should be prepared to find, were members of a joint Hindu family, took in what has been called by the lower Appellate Court a partner co-sharer and somehow or another, which does not appear and the best persons to inform the Court about it were the present appellants, that partner became possessed of a moiety of the total mortgaged property by buying Sheoshankar Khan's share. With regard to the other moiety there would appear from the finding of the lower Appellate Court to have been a sort of partition, because one Sankata Prasad Rai is said to be in possession of one-anna two-*ganda* share, and one Mahesh Rai and the present appellants between them to be in possession of another one-anna two-*ganda* share, those two shares together making up the total of the second moiety which the other mortgagor mortgaged with Sheoshanker's two annas four *gandas*. It is significant, to say the least of it, that neither Sankata Prasad nor Mahesh Rai appealed even to the lower Appellate Court from the original decision in this case. The plaintiffs seek to redeem the other half which was not purchased by the partner on payment of half the mortgage money and both Courts have held them entitled to do so. The appellants, being some at any rate of the descendants or heirs of the original mortgagee, appeal against that decision, and invoke in their aid the rule which prohibits the breaking up of a mortgage so

as to entitle a mortgagor at his own sweet will and pleasure to redeem any portion thereof which he feels disposed to do. In my view the integrity of this mortgage has been completely broken up by the consent of the appellants or the persons through whom they claim, and that being so, it is hardly possible to conceive of a more hopeless appeal. Apart from that I should have been prepared to follow the principle laid down in *Narayan* v. *Ganpat* (1), where the exceptions to the general rule that a mortgagee has a right to insist that his security shall not be broken up are set out. One of them includes a case in which the original contract shows that the mortgagors joined together in mortgaging each his separate share. I think that applies to this particular mortgage and, if necessary, I should have been prepared so to decide. But the ground on which I think this appeal ought to be dismissed is that the present appellants have been party either themselves or through their predecessors to the breaking up of the integrity of this mortgage.

RYVES, J.—I agree.

BY THE COURT.—The appeal must be dismissed with costs, including in this Court fees on the higher scale.

Appeal dismissed.

(1) 21 B. 619; 11 Ind. Dec. (N. S.) 415.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 108 OF 1917.

June 16, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Adami.

UCHIT MANDAR AND OTHERS—APPELLANTS

versus

GOSAIN SINGH BAID AND OTHERS—RESPONDENTS.

Mortgage, usufructuary—Mortgagee, dispossession of, from portion of mortgaged property—Acquiescence—Transfer of Property Act (IV of 1882), s. 68.

A usufructuary mortgage stipulated that, in the event of dispossession of the mortgagee, he would be entitled to damages or to interest at a specified rate. In 1898 the mortgagee entered into possession, but in April 1902 he was dispossessed of half the property. Later on, the mortgagor sold the equity of redemption in the remaining half, and in April 1915 the purchaser forcibly dispossessed the mortgagee therefrom. In May 1915 the mortgagee brought the present suit to recover the principal sum advanced, together with interest at the stipulated rate on half that sum for the period between April 1902 and April 1915:

Held, that the plaintiff, having been dispossessed for 12 years and not having done anything during that time either to obtain compensation from the mortgagor, or to realise from the mortgagor or from the property his mortgage-debt, or to claim additional security, or to enforce payment of interest, must be deemed to have acquiesced in the changed state of affairs and was consequently estopped from claiming interest. [p. 818, col. 2.]

Appeal, under clause 10 of the Letters Patent, from a judgment of Mullick, J., dated the 18th May 1917, reported as 41 Ind. Cas. 55, affirming a decree of the Subordinate Judge, Patna.

Mr. *Shoroshi Charan Mitter*, for the Appellants.

Mr. *Rajendra Prasad*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal by the plaintiffs under clause 10 of the Letters Patent from a judgment of Mullick, J., dated the 18th May 1917, affirming a decree of the Subordinate Judge. In July 1898 the plaintiffs' predecessors-in-title took a usufructuary mortgage from the father of the defendants first party of the occupancy rights in a holding belonging to the mortgagor to secure an advance of a sum of Rs. 498. The mortgage stipulated for re payment in the following year, failing which the mortgagee was to remain in possession, until the principal sum and interest at 2 per cent. per mensem should be paid off. The mortgagee entered into possession, but he was dispossessed of half the property by the nephew of the mortgagor, who brought a suit claiming half the property as his own and obtained a decree declaring his title and awarding him possession. He is the defendant 3rd party in the present suit. The defendant 2nd party subsequently purchased the equity of redemption of the mortgagor in the remaining half which had remained in possession of the plaintiffs, and on the 4th April 1915 forcibly dispossessed the plaintiffs. In May 1915 the plaintiffs, instituted the present suit to recover the principal sum advanced, namely, Rs. 498, together with interest at 2 per cent. per mensem on half that sum between

April 1902, when they were dispossessed of half the property and April 1915, when they were dispossessed of the remainder. The interest thus calculated amounts to Rs. 785, but the plaintiffs remitted Rs. 408 of this amount as they say the property is of insufficient value to enable them to realise the whole claim. The claim for interest is, therefore, reduced to Rs. 377 making with the principal a sum of Rs. 875 as the amount claimed.

The mortgage contains the following stipulation:—

"If on account of default in payment of rent due to the proprietor or on account of my wrongful act (that is wrongful act of the mortgagor) or for any other reason, the said Mahajan (that is the mortgagee) be dispossessed of the land, then I shall pay damages on account of dispossession at the rate of 13 maunds of paddy per *bigha* or I shall pay interest at the rate above mentioned either amicably or by suit."

It is only necessary to state further with regard to the mortgage bond that whilst it is what is known as a usufructuary mortgage whereby the mortgagee is put in possession in order to cultivate the land and appropriate the entire proceeds thereof in lieu of interest, it is also a simple mortgage in that the property mortgaged is charged with the repayment of the principal sum advanced. When this suit was instituted, the principal sum of Rs. 498 was tendered in full satisfaction and paid into Court by the defendants. The only question for determination is as to the right to claim half the interest stipulated in the mortgage during the period when the plaintiffs were out of possession of half the property. The main defence was that the plaintiffs had by their conduct acquiesced in the diminution of the security to the extent of one half of the original holding and had so waived any rights they might have had under the bond.

The Munsif found in favour of the plaintiffs and decreed them interest as well as the principal sum claimed. On appeal the Subordinate Judge took a different view and found that the mortgagees, having taken no step for over 12 years to call on the mortgagor to recoup him for the loss of half the security, must be presumed to have acquiesced in the loss and to have remained satisfied with the diminished security. When the case came before this Court on appeal, it was contended that the question was one of fact which had been determined by the lower Court and that the facts were not open to review by a Court of second appeal. It is quite true that the question of acquiescence is in a sense a question of fact, but it is only so in so far as it is a question of the proper inference to be drawn from proved or admitted facts. That proposition was considered by their Lordships of the Privy Council in the case of *Beni Ram* v. *Kundan Lal* (1), where it was laid down that the question of acquiescence is not purely a question of fact but of legal inference from facts found. The learned Judge of this Court accepting that view came to the conclusion that, on the facts found by the Subordinate Judge, the finding that there had been acquiescence on the part of the plaintiffs which would estop them now from contending that they were entitled to interest had been sufficiently made out and he dismissed the appeal.

A number of cases have been referred to in argument before us dealing not only with the principle just mentioned but with the class of cases in which the Court will hold that the facts have been sufficiently proved to enable it to come to the conclusion that there has been acquiescence in the sense named. The case of *Beni Ram* v. *Kundan Lal* (1) (*ubi sup.*) was one where a tenant the term of whose lease had expired resisted eviction on the ground that he had, with the knowledge of the lessor, erected permanent buildings on the land leased during the term. He contended that there was an equitable estoppel against the lessor precluding him from denying that the tenancy had been changed into a permanent occupancy. The lease was granted for the purpose of erecting a saltpetre factory. The factory, it appears, had ceased to be worked after a time and shops and other buildings were erected on the land by the tenant. The

(1) 21 [illegible] (P. C.); 1 Beng. L. R. 430; 3 C. W. N. 69[illegible]; 26 [illegible] 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) [illegible].

landlord, although he was aware of what was going on, did nothing. Now, it is well established in England that if a tenant builds on land held by him under a lease he does not, apart from special circumstances, acquire any right to prevent the lessor from taking possession of the land and the buildings on the expiry of the term. That doctrine was laid down many years ago in the well-known case of *Ramsden* v. *Lyson* (2). The only difference in India is that the tenant may remove during the continuance of the lease anything which he has attached to the land provided he leaves the property in the state in which he received it. It is quite clear, therefore, that in the case quoted there was no estoppel whatever against the lessor and although the High Court decided that there was, misapplying the principle laid down in an earlier case, their Lordships of the Privy Council pointed out that there were no facts proved in that case from which an estoppel by acquiescence could be inferred.

The next case referred to was that of *Partab Bahadur Singh* v. *Gajadhar Bakhsh Singh* (3). In that case there was a stipulation for payment of interest until delivery of possession. There was no express stipulation for interest in case of dispossession. The mortgagee was dispossessed of about half the villages mortgaged and he took no action to recover the mortgage money for about 30 years but remained satisfied with the diminished security. When he brought a suit claiming interest in respect to that half of the property from which he had been dispossessed, their Lordships of the Privy Council came to the conclusion that as he had taken no steps for so long either to get additional security or to get the rent of the villages which were left with him enhanced, it must be taken that he had acquiesced in his dipossession and had consented to go on with the diminished security as if he had everything that he was entitled to. It is quite true that in that case there was no stipulation for interest in the case of dispcssession. But the decision does not seem to have depended upon that fact, and in spite of the absence of such a stipulation it seems pretty clear that had their Lordships come to the conclusion that there had been no acquiescence, they would have awarded interest or something in lieu of interest in the nature of damages to the plaintiff in that suit.

I do not think that this case is absolutely concluded by the decisions which I have referred to. It must, in my opinion, be a question of fact in each of these cases whether there was such conduct on the part of the plaintiff that he must be taken to have acquiesced in the changed state of affairs so as to bring into operation the equitable doctrine of estoppel. The learned Subordinate Judge as well as the Judge of this Court came to the conclusion that the facts in this case were sufficient to prove acquiescence and I have arrived at the same conclusion. The reasons which induce me to support the view taken by the lower Court on this question are these. The plaintiffs, having been dispossessed for 12 years before they brought any suit, took no action whatever during that time either to obtain compensation from the mortgagor or to realise from the mortgagor or from the property his mortgage-debt. They did absolutely nothing which would induce the mortgagor to come to any other conclusion than that they were quite satisfied to go on accepting the diminished security in lieu of the payment of interest. But that alone would not, in my opinion, be sufficient to justify the Court in coming to the conclusion that they meant to forego their rights. There is another element in this case which must not be lost sight of, and that is this. This was a mortgage for a period of about a year or a little over. At the end of that time the mortgagor had the right to redeem the property by paying the amount of the advance, a sum of something under Rs. 500. If he did not choose to do so, then the mortgagees were entitled to remain in possession satisfying themselves out of the proceeds for the interest which the mortgagor had undertaken to pay and accepting those proceeds in lieu of interest. Whether they would amount to more or whether they would amount to less than 2 per cent. per mensem on the capital sum advanced was a matter of no materiality. The mortgagees took the risk of that.

(2) (1866)1 H. L. 129; 12 Jur. (N. S.) 606; 14 W. R. 926.

(3) 24 A. 521 (P. C.); 29 I. A. 148; 7 C. W. N. 97; 4 Bom. L. R. 845; 8 Sar. P. C. J. 310.

They might either get more by cultivating the land and appropriating the proceeds or they might get less. When they were dispossessed in the year 1902, several courses were open to them. Either they could go on accepting in lieu of interest the proceeds in the diminished security or they could demand half the rate of interest or they could apply for further security for the interest. They could also, of course, bring a suit against the mortgagor to realise the amount of the loan and if they succeeded, and it is difficult to see how they could have failed, they would be entitled to recover the principal sum and when they had done so, the right to interest would naturally come to an end. But by not taking that course or applying for further security or demanding interest I think that it is clear that they must have induced in the mind of the mortgagor a not unreasonable impression that they were content to go on accepting the diminished security. Had the mortgagor thought that the plaintiffs were not content to accept the diminished security but would, when the mortgage was finally put an end to which might be many years hence, endeavour to recover from him interest in respect to half the property of which he was dispossessed in addition to the proceeds which they would in the meantime be getting from that property, it would have been open to the mortgagor at once to pay off the mortgage and so get rid of the whole matter, as in fact he did as soon as the mortgagees brought an action to realise their loan and recover interest. It seems to me that in these circumstances the mortgagees, by their conduct in failing to claim additional security or to enforce payment of interest in lieu of the proceeds of the land from which they were dispossessed or to take any other steps for 12 years, must be taken to have induced the belief in the mind of the mortgagor that they were content to accept the diminished security and, therefore, that by allowing them to remain in possession, instead of by paying the mortgage-debt and redeeming the property, he was incurring no risk of having to pay interest when the property should ultimately be redeemed. Therefore, it seems to me that by their conduct the mortgagees did in fact put the mortgagor in a worse position and they ought not now after this lapse of time to be entitled to claim that interest about which they have been silent for so many years. In my opinion this appeal must be dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1050 OF 1915.

May 16, 1919.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Raoof.

AFZAL KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

***Musammat* MAHTAB BIBI—PLAINTIFF—RESPONDENT.**

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Dower, suit to recover—Decree apportioning liabilities of various properties—Appellate Court, power of, to pass proper decree.

Where in a suit for recovery of a specific sum of money as dower, the Court had no materials before it to apportion the liabilities of various properties but, nevertheless, directed that the sum be recovered from these properties in a certain proportion:

Held, that the decree should not have contained this direction, and that the High Court had power to pass a proper decree by expunging from the decree of the lower Court the direction with regard to the manner of the realisation of the decretal amount. [p. 822, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Lahore, dated the 1st February 1915, decreeing the claim.

Mr. *Ghulam Rasul* and Lala *Moti Sagar*, R. S., for the Appellants.

The Hon'ble Mr. *Fazl-i-Husain* and Sheikh *Niaz Muhammad*, for the Respondent.

JUDGMENT.—This first appeal arises out of a suit for recovery of dower by *Musammat* Mahtab Bibi, a widow of one Sardar Mir Alam Khan, under the following circumstances:—Sardar Mir Alam Khan married the plaintiff sometime about 1876. From her he had three sons, Nur Alam Khan, defendant No. 1 in the case, Mir Hassan Khan, defendant No. 2, and Muhammad Aslam Khan, the defendant No. 3.

There are three daughters also, but their names [illegible] be mentioned here as they are [illegible] to this suit. His second wife [illegible] Fatima Bibi, who is the [illegible] No. 7. From her also he had

three sons, Mir Afzal Khan, Said Alam Khan and Nazir Alam Khan, who are impleaded as defendants Nos. 4, 5 and 6 in the plaint.

Mir Alam Khan died in the year 1911 possessed of moveable and immoveable property. The six sons above mentioned came into possession thereof. The plaintiff demanded from them Rs. 10,000, the amount of her dower due from the deceased Mir Alam Khan, on the ground of their being in possession of the assets of her deceased husband. They having failed to satisfy her claim, the present suit was instituted by her. The plaint was presented unstamped with Court-fee with a prayer for permission to sue as a pauper on the allegation that she was not possessed of sufficient property to be able to pay the required Court-fee. Her application to sue as a pauper was opposed by the defendants on the ground that she had inherited a share in her husband's estate and was, therefore, in a position to obtain funds for paying the Court-fee. In fact Faqir Muhammad, agent of the defendants, actually offered to advance a loan of Rs. 500 on the security of her share in the property of the deceased. Inspite of the opposition, permission was granted to her by the first Court on the finding that a Will was being set up according to which the entire property was said to have been gifted away in favour of the six sons. The defendants came up in revision to the Chief Court and in paragraph 3 of their petition of revision, they again stated that the plaintiff was jointly with her sons in possession of immoveable property in which she held a share by right of inheritance, that she had a saleable interest in their property and that their agent had offered to take over her share for an amount exceeding the amount of Court-fee payable on the plaint. The Hon'ble Mr. Justice Chevis rejected the petition for revision, repelling this plea on the ground that it was admitted on their behalf that all the estate had been disposed of by a Will.

I may mention here that inspite of this plea the defendant Mir Afzal Khan had the courage to raise in his *jawabdawa* the inconsistent plea that Mir Alam Khan had divorced the plaintiff long before his death and that she had ceased to be his wife. Before the suit actually came to trial Nazir Alam Khan, the 6th defendant, had died on the 27th March 1912 and Muhammad Afzal Khan has died since during the pendency of the appeal.

The principal defendants in the case were *Musammat* Fatima Bibi and her sons, who actually resisted the claim of the plaintiff. The other defendants being her sons admitted the claim. The real defence is to be found set up in the *jawabdawa* put in on behalf of the brothers Mir Afzal Khan and Said Alam Khan. They pleaded that the amount of dower alleged by the plaintiff was excessive and unreal and that, as a matter of fact, she being a low Kashmiri girl her dower was fixed at Rs. 30 only. They also resisted the claim on the plea that she had been divorced long ago and that her claim was long barred by time.

Issues were framed by the Court below on the 27th of March 1912, and the issues Nos. 3 and 4 related to these two pleas. The remaining issues need not be mentioned as no argument was raised before the Court as to matters covered by these issues. It lay upon the plaintiff to prove her claim for a dower of Rs. 10,000. The burden of proof as to this issue was placed upon her by the order of the Court. She in proof of her claim produced both oral and documentary evidence. The latter consisted of the record of a deposition of her husband in a suit for dower instituted so far back as 1899. In that suit the amount of dower claimed was Rs. 30,000 and Mir Alam Khan was called as a witness in proof of the amount. Nur Alam Khan, the defendant No. 1, has stated in his evidence that before going to Court his father had taken the precaution of arming himself with the possession of the deed of dower for Rs. 10,000 which he himself had executed in favour of the plaintiff. He took the dower-deed with him and produced it before Court, when he stated that the dower which he had himself fixed upon his wife was Rs. 10,000. Bawa Baij Nath was the reader of the District Judge of Lahore at the time. He has been examined in this case to prove this statement of Nur Alam Khan, which was taken down by him in the case of *Muhammad Jan* v. *Musammat Bibi*, Appeal No. 15 of 1899. Mahtab ud-

din acted as an agent in the above-mentioned case, *Muhammad Jan* v. *Musammat Bibi*. He has also been produced as a witness in this case. He was present at the time when Mir Alam Khan stated before the Court that the dower of Mahtab Bibi was Rs. 10,000. He saw him producing before the Court a paper about the dower in support of his statement. The written deposition on the record together with the statements of these two witnesses leaves no possible doubt as to the genuineness of the plaintiff's claim for Rs. 10,000, as her dower. This, in our opinion, was sufficient to establish her claim, but in addition to this she has called several witnesses who have given direct evidence on the question of the amount of dower. Muhammad Amir, Imam-ud-din, Fazal Din, Ahmad Bakhsh, Rahim Ullah, and Nur Ahmad were all present at the ceremony of the *nikah* and before their eyes and within their hearing the *nikah* took place. Rs. 10,000 as dower was fixed and a *mehrnama* was prepared. The lower Court has believed this evidence and found that the plaintiff has succeeded in establishing the amount of dower claimed by her. We ourselves have carefully examined the plaintiff's evidence on this point in the light of the criticism of Rai Moti Sagar, the learned Counsel for the appellants, and have unhesitatingly arrived at the same conclusion. The evidence of rebuttal given on behalf of the defendants is utterly worthless. In fact Rai Moti Sagar frankly admitted it and did not like even to refer to it in his argument. In their forlorn hope of succeeding to gain their point they even brought into Court forged documents to which in this Court Rai Moti Sagar did not think proper to refer. We, therefore, do not wish to take any notice of them. On this point, therefore, there can be no doubt the judgment of the Court below is unassailable. As regards the question of the alleged divorce and limitation, it may be mentioned at the outset that although the decision of the Court below was against the defendants on these two points also, originally no plea was raised on those two points in the memorandum of appeal as originally framed. Later on in amplification of grounds Nos. 1 and 5 an additional ground was added by Mr. Ghulam Rasul, the Counsel who filed the appeal. No ground, however, was even then taken against the finding of the lower Court on the question of divorce. As we have already mentioned in the early part of our judgment, the plea of divorce was merely an afterthought. A plea quite contradictory to this plea was raised in the proceedings relating to the enquiry into the question of the plaintiff's pauperism. However be that as it may, let us see whether the defendants have succeeded in making good this plea, the burden of establishing which lay heavily upon them.

As found by the learned Judge of the Court below, in the hope of throwing dust into everyone's eye, they brought into Court a forged register kept by a deed-writer in which an entry as to the execution of a *talaknama* is to be found, wherein an extract of the contents of the document is given. It is to the effect that "*Musammat* Mahtab Bibi is disobedient and she does not behave properly. According to Muhammadan Law I of my own accord have pronounced the word 'divorce' thrice and have made her unlawful for my person." The name of Mir Alam Khan is entered as the executant of the document. An extract from the register containing the entry is on the record and its translation is to be found printed at page 27 of the printed record. The register itself was before the Court below, which came to the conclusion that there were grounds to look upon the entries with suspicion. The pages containing the entries appeared to the Court to have been intentionally "dirtied by an unusual amount of fingering." Taking this circumstance into consideration along with a number of other circumstances, the Court treated the entry as spurious and wholly unreliable. We entirely agree in the reasons given by the Court below. We are not, however, in a position to express any opinion as to the register of the deed-writer, because the defendants have not thought fit to have it brought up before this Court. Having regard to the strong finding of the Court against the register, it was the duty of the defendants to have placed it before this Court if they wished to get rid of the finding on the point. Evidently having failed to mislead the Court below, they thought it wise not to

make an attempt here. The oral evidence under this head also is as worthless and unreliable as under the first head and we fully agree with the Court below that it cannot be believed. An attempt was made on behalf of the defendants in the Court below to rely upon certain circumstantial evidence to show that the plaintiff must necessarily have been divorced by her husband. A Will is produced in which provision is made for the sons and no mention is made of the plaintiff, but as the learned Judge has remarked, the defendant No. 7 also is not mentioned, nor are any of the daughters. The properties are divided among the sons of Mahtab Bibi and Fatima Bibi and evidently the sons have been trusted to look after their mothers. There is, therefore, nothing in this circumstance which may point towards divorce. As we have already stated, no plea has been taken impugning this finding of the Court below, but we have allowed Rai Moti Sagar to address us on this point also. The case for the defence was a bad one and it was not possible for the learned Counsel to say much in support of it.

The last plea urged by him is the one raised in paragraph 7 of his plaint. It is to the effect that the value of the property at Peshawar is less than one-sixth of the value of property at Lahore and hence the decree against both properties in equal proportion is contrary to law and equity. This plea evidently impugns the concluding direction given in the decree of the Court below in these words: "It is also directed that not more than half the sum shall be raised from the Peshawar property." There is force in this plea. The Court below had no materials before it to apportion the respective liabilities of the Peshawar and Lahore properties. This is a question which can be tried only when it actually arises.

Under rule 33, Order XLI, we have power to pass a proper decree which ought to have been passed by the Court below. We, therefore, direct that the words quoted above be expunged from the decree. In other respects it will stand. The appeal, therefore, fails and is hereby dismissed with costs.

Appeal dismissed;
Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 438 OF 1917.

August 28, 1918.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Krishnan.

SIVARAMALINGA DIKSHITAR—PLAINTIFF—APPELLANT

versus

SABHARATNA DIKSHITAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42, proviso—Declaration, suit for—Consequential relief, prayer for, when necessary—Temple trustee, conditional suspension of—Trustees holding properties in rotation—Suit to declare suspension invalid, for injunction and for emoluments—Plaintiff not entitled to possession at date of suit—Joint possession of temple properties, absence of prayer for, effect of—Dismissal of suit—Procedure.

A suit for a declaratory decree ought not to be dismissed on the ground that it is barred by the proviso to section 42 of the Specific Relief Act, unless it is quite clear that the plaintiff ought to seek further relief which he has failed to claim. [p. 824, col. 1.]

Aisa Siddika v. *Bidhu Sekhar*, 18 Ind. Cas. 633; 17 C. L. J. 30, followed.

The further relief which the section speaks of is such relief as flows directly from the declaration sought for and such as the plaintiff would be able to claim in an ordinary suit by virtue of the title sought to be declared. [p. 824, col. 1.]

Abdulkadar v. *Mahomed*, 15 M. 15; 5 Ind. Dec. (N. S.) 360, followed.

The plaintiff, one of twenty trustees of a temple, was suspended conditionally from the trusteeship until he paid a certain fine and delivered a plot of land to the remaining trustees. Plaintiff sued for a declaration that the order of suspension was invalid, for an injunction restraining future interference with his performance of the duties of the office and for damages for loss of emoluments caused by the defendant's obstruction. According to the usage of the temple, the trustees held possession of its properties by rotation and plaintiff was not entitled to possession at the date of suit. The District Judge directed the plaint to be amended by adding a prayer for joint possession of the properties with the other trustees and ordered additional Court-fees to be paid on their value. As plaintiff failed to comply with the order, the suit was dismissed:

Held, (1) that the only consequential relief incidental to and flowing out of the declaration had been asked for by the plaintiff, *viz*, injunction and damages, and that no further relief was necessary; [p. 824, col. 2.]

(2) that as the plaintiff was not entitled to possession of the properties at the date of suit, and the setting aside of the suspension order would in no way affect the possession of the temple and its properties, the plaintiff was not bound to ask for either joint or symbolical possession. [p. 825, col. 1.]

Vengan Poosari v. *Patchamuthu*, 14 M. L. J. 260
Abdulkadar v. *Mahomed*, 15 M. 15; 5 Ind. Dec.

SIVARAMALINGA v. SABHARATNA.

(N. S.) 360 and *Rathnasabapathi Pillai* v. *Ramasami Aiyar*, 5 Ind. Cas. 630; 33 M. 452; 7 M. L. T. 311; 20 M. L. J. 301; (1910) M. W. N. 112, distinguished.

Appu Pillay v. *Perumal Pillay*, 16 Ind. Cas. 630; 23 M. L. J. 118; 12 M. L. T. 168, explained.

Rama Das v. *Hanumantha Row*, 12 Ind. Cas. 449; 36 M. 364; 21 M. L. J. 952; 10 M. L. T. 356; (1911) 2 M. W. N. 387, considered.

Second appeal against the decree of the District Court, South Arcot, in Appeal Suit No. 184 of 1915, preferred against the decree of the Court of the Temporary Subordinate Judge, Cuddalore, in Original Suit No. 53 of 1914.

FACTS appear from the judgment.

Mr. *T. R. Venkatarama Sastri* for the Hon'ble Mr. *T. Rangachariar* (with him Mr. *S. Muthiah Pillay*), for the Appellant.—The suit is not barred under the proviso to section 42 of the Specific Relief Act. The plaintiff has asked for all further reliefs that it is necessary for him to ask. The prayer for injunction and damages are the only reliefs that flow directly on the declaration asked for. The properties of the temple are held in rotation by the trustees. Plaintiff was not entitled to possession at date of suit and, therefore, could not sue for possession. He need not sue for joint possession. The cancellation of the suspension order will not affect the possession of the temple properties. The declaratory decree will entitle the plaintiff to ask for possession of the temple when his turn comes. The plaintiff has valued the injunction substantially.

A person suing for a declaration that he is the trustee of a temple need only ask for an injunction against the defendant and need not ask for possession. *Kunj Bihari* v. *Keshavlal Hiralal* (1).

Messrs. *K. Bashyam Aiyangar* and *N. Kunjithapatham Aiyar*, for the Respondents.—It was incumbent on plaintiff to ask for joint possession of the temple properties, as by the suspension order he was excluded from possession. It is a consequential relief flowing directly from the declaration. *Vengan Poosari* v. *Patchamuthu* (2), *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (3), *Rama Das* v. *Hanumantha Row* (4) and *Abdulkadar* v. *Mahomed* (5).

The fact that the Court is not able to place the plaintiff immediately in possession is immaterial in considering the applicability of the proviso to section 42 of the Specific Relief Act. The only question is whether the plaintiff is entitled to possession. *Appu Pillay* v. *Perumal Pillay* (6).

JUDGMENT.—The lower Courts have dismissed the plaintiff's suit without any trial, holding that it was not maintainable under the Specific Relief Act without a prayer for the possession of the temple and its properties jointly with the defendants. Though a preliminary issue was framed on the point, no evidence was given or taken and the question was disposed of solely on the pleadings; we have, therefore, to decide the question on the same materials.

In his plaint the plaintiff states that he is one of the Dikshidars, who are holders of the combined offices of Archaka and Dharmakarta in the plaint temple, and that as such he is entitled, according to the usage of the temple, to the right of performing *puja* for 5 days once in every 9 months and along with 19 others to the custody of the idols, jewels and other valuables of the temple for 6 months by rotation (apparently once in 6 or 7 years). He states that in 1909 on account of a dispute as to the ownership of a certain plot of land, the body of Dikshidars passed a resolution directing him to deliver it up to the temple and inflicted a fine of Rs. 300 on him and suspended him from his office till he obeyed their orders. He complains that, as a result of this resolution, he has been obstructed in the exercise of the rights and duties of his office and prevented from enjoying the emoluments and privileges attached to it. He claims that the resolution is illegal and inoperative and prays for a declaration to that effect and also for an injunction restraining the defendants from interfering with him in the exercise of his office. He further claims damages for the loss of emoluments caused by the wrongful obstruction of the defendants and for the loss of his reputation, in all Rs. 1,600. The

(1) 28 B. 567; 6 Bom. L. R. 475.
(2) 14 M. L. J. 290.
(3) 5 Ind. Cas. 630; 33 M. 452; 7 M. L. T. 311; 20 M. L. J. 301; (1910) M. W. N. 112.

(4) 12 Ind. Cas. 449; 36 M. 364; 21 M. L. J. 952; 10 M. L. T. 356; (1911) 2 M. W. N. 387.
(5) 15 [illegible] 360.
(6) 16 Ind. Cas. 630; 23 M. L. J. 118; 12 M. L. T. 168.

only objection the defendants took to the frame of the plaint in their written statement was that plaintiff should have asked for the possession of his office as well. The plaint was thereupon amended to add a prayer for the joint possession of the office. The above is a brief summary of the material allegations and prayers in the plaint with reference to the point we have to consider.

On this point the lower Courts have held that, as plaintiff was excluded by the defendants from the office of Dharmakarta, he ought to sue not only for a declaration that the defendants' act was wrongful but also for the possession of the temple and its properties as consequential relief flowing from the declaration; and relying mainly on the observations of Subramania Aiyar, J., in *Vengan Poosari* v. *Patchamuthu* (2) and on the rulings in *Abdulkadar* v. *Mahomed* (5) and *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (3) and distinguishing the case in *Rama Das* v. *Hanumantha Row* (4), they have held the suit to be not maintainable under section 42 of the Specific Relief Act without such a prayer. On the facts of this case we are unable to support that view.

We agree with Mookerjee, J., in thinking that a Court should not throw out a suit on the ground that it is barred by the proviso to section 42, unless it is quite clear that the plaintiff ought to seek further relief which he has failed to claim, see *Aisa Siddika* v. *Bidhu Sekhar* (7). The further relief the section speaks of is such relief as flows directly from the declaration sought for and such as a plaintiff will be able to claim in an ordinary suit by virtue of the title sought to be declared.

This is the view taken in *Abdulkadar* v. *Mahomed* (5) and we accept it. Such further relief will necessarily depend on the facts of each case.

Is it clear then that, in the present case, on the declaration asked for being granted the plaintiff will become thereby entitled to the joint possession of the temple and its properties and that he should be compelled to ask that relief and pay Court fees on their value which is said to be about Rs. 35 lakhs? We do not think so. Plaintiff's right to the trusteeship is not denied and he is not seeking to establish it in the present case. He sues to declare the invalidity of a conditional order of suspension against him, under which he had been excluded from the performance of the duties of his office and from the enjoyment of its perquisites till he paid a fine of Rs. 300 and delivered over a plot of land to the temple. The direct result of the declaration will be that plaintiff will be entitled to recover the office and the emoluments that he has lost in consequence of the wrong order and to prevent interference with him in the future in the discharge of his duties. He has prayed for all these consequential reliefs. It is not at all clear that the setting aside of the order of suspension will in any way affect the possession of the temple and its properties. There is no allegation in the plaint or in the written statement about the lands belonging to the temple; they are said to be in the possession of persons who look after the lighting of the temple, in turn. The temple building and the jewels and valuables were, on the date of suit, according to the usage of the temple in the custody of a body of 20 persons of whom plaintiff was not one. The declaration, therefore, will not give plaintiff any right to the present possession of the temple or its properties. As to plaintiff's right to possession when his turn comes, the declaration by itself will be sufficient relief as the persons in possession must be taken to be holding the properties on behalf of all the rightful trustees. In considering this question the District Judge says that this view ignores plaintiff's right to the subsidiary offerings when he is not doing his *morai* or turn of worship and does not take account of his right to vote on the question, whether the bids for the leases of the offerings should be accepted or not. These are clearly irrelevant considerations on the question of possession of the temple and its properties. The injunction and damages plaintiff asks for are the proper reliefs to secure such rights. We must, therefore, hold that, in the circumstances of this case, plaintiff is not bound to ask for joint possession; indeed he is not entitled to it and the dismissal of his suit for not asking for such relief is erroneous.

The cases chiefly relied on by the lower Court and by the learned Vakil for the respondents are all clearly distinguishable,

(7) 18 Ind. Cas. 638; 17 C. L. J. 30 at p. 33.

None of them dealt with a case of suspension of a Dharmakarta or with circumstances, such as we have here, of the possession of the temple and its properties being held not by all the trustees but by a few of them at a time in rotation, plaintiff not being entitled to it at the time of the suit. In the case of *Vengan Poosari* v. *Patchamuthu* (2) it appears that the plaintiff was entitled to the joint possession of the temple but the defendant prevented him from having access to it by keeping it under lock and key. In *Abdulkadar* v. *Mahomed* (5) defendant was in possession of the properties which possession, if plaintiff's case was established, would be that of a trespasser. The case most relied on by the respondents is the one in *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (3), but that was a case of a trustee who had been dismissed from his office and had actually been ousted from possession of the temple properties by the defendants; that ruling also is thus distinguishable from the present case. The case which seems to us to be nearest to the present case is the one in *Rama Das* v. *Hanumantha Row* (4). The District Judge distinguished it on the ground that the tenants in possession there were willing to recognise whomsoever was holding the office of Dharmakarta, whereas he says we have here the determined opposition of the whole body of Dikshadars. That opposition, however, was only to the order of suspension being cancelled as invalid and not to the giving of the custody of the properties to the plaintiff in his proper turn, if the Court set it aside as illegal or the plaintiff complied with the condition. The distinction drawn is, therefore, not valid, as here also the persons in actual possession were holding on behalf of all the rightful trustees. In this case as in that, a substantial value has been put on the injunction. If, as the defendants contend, the prayer for the recovery of the office has not been properly valued it will be for the trial Court to consider it but it does not affect the question before us. That case, therefore, supports the view that the present suit is maintainable without a prayer for possession.

The learned Vakil for the respondents also cited to us the case of *Appu Pillay* v. *Perumal Pillay* (6) and contended that it was an authority for holding that the fact that the Court was not in a position to place the plaintiff in possession of the property at the date of the hearing, on account of an arrangement as to management under which the defendant was to remain in possession, was not material in considering the applicability of the proviso to section 42. We do not think that any such general proposition has been laid down by that case. As a matter of fact the question there was whether a declaration alone could be asked for in second appeal because the right to possession had ceased by then, whereas both in the suit and in the appeal possession had been asked for. It was held that it could not be, but there is no discussion of the reasons. The prayer in second appeal must ordinarily have reference to the prayer in the suit and the circumstances that existed then. It is probably for this reason the bare declaration was disallowed in second appeal. The case certainly cannot be treated as an authority for the respondents' contention before us. If, on the declaration being given, a plaintiff is not entitled to possession he is not bound to ask for symbolical possession under section 42.

The appellant's Vakil relied on the ruling in *Kunj Bihari* v. *Keshavlal Hiralal* (1), in which it was held that a person suing to get himself declared the proper trustee of a religious institution need not ask for the possession of the trust properties but it was sufficient for him to ask for an injunction against the defendant. This view has been dissented from in *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (3), but we observe that the late Chief Justice has, in his judgment in *Rama Das* v. *Hanumantha Row* (4), accepted the view that the ownership of the trust property is in the idol as a juridical person and not in the trustee and it may, therefore, be a question whether, when the person in possession of the property holds it on behalf of the idol and the plaintiff does not dispute his right to do so a prayer for joint possession should be insisted upon. But in this case we need not express any opinion on that question.

The lower Court's decree must be set aside and the suit remanded to the first Court for disposal according to law. Defend-

ants will pay plaintiff's costs here and in the lower Appellate Court; costs in the first Court to abide and follow the result.

M. C. P.

Appeal allowed;
Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2572 OF 1917.

April 28, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Duval.

Maharajah BIRENDRA KISHORE MANIKYA BAHADUR—PLAINTIFF—APPELLANT

versus

PADMA LOCHAN BANIKYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O II, r. 3 (1)—Causes of action, joinder of—Different causes of action against same defendants, whether may be joined in one suit—Contribution, suit for.

There is nothing in law to prevent two causes of action against the same defendants being joined in one suit. [p. 827, col. 1.]

The superior landlord of the plaintiff and the defendants, who were co-sharers in certain tenures, brought two suits for rent and obtained two decrees jointly against them. The decrees were executed and the tenures were put up to sale. Thereupon the plaintiff paid the entire decretal amount and sued the defendants for contribution, claiming against each of them a specific sum according to his share:

Held, that, although the two decrees were for two different sums and the plaintiff satisfied them separately on two different occasions, the causes of action, which were different, could be joined in one suit for contribution. [p. 826, col. 2.]

Appeal against the decree of the District Judge, Noakhali, dated the 7th September 1917, affirming that of the Munsif, 2nd Court at Feni, dated the 22nd December 1916.

FACTS appear from the judgment.

Babu *Gobinda Chandra Dey Roy* (with him Babu *Gopal Chandra Chakraburty*), for the Appellant.—The plaintiff is the appellant here. The appeal arises out of a suit for contribution against defendants, for their share of rent paid by the plaintiff in execution of two rent decrees obtained jointly against the plaintiff and the defendants by the superior landlord. The first Court dismissed the suit on the ground of misjoinder of causes of action. The lower Appellate Court confirmed the judgment of the Munsif on appeal. The defence was that they were not liable as they had paid up their share. The defendants, however, could not prove their plea of payment. My submission is that the suit is not bad for misjoinder of causes of action. The money was not paid on different occasions as the Courts have held, but was paid in a lump on 24th June 1912. Further, the Courts below have overlooked the provisions of Order II, rule 3 of the Civil Procedure Code.

Babu *Bhagirath Chandra Das*, for the Respondents.—The suit has not been dismissed on the ground of misjoinder. The plaint ought to have specifically set out the separate amount due from each of the parties. The shares given by the plaintiff have not been proved.

Babu *Gobinda Chandra Dey Roy* replied in brief.

JUDGMENT.—This appeal arises out of a suit for contribution.

The plaintiff and the defendants are co-sharers in certain tenures. The superior landlord brought two suits for rent and obtained decrees jointly against the plaintiff and the defendants. The decrees were executed and the tenures were put up to sale. Thereupon the plaintiff paid the entire decretal amount and sued the defendants for contribution claiming against each a specific sum of money according to his share. The suit has been thrown out by the Courts below, mainly on the ground that as there were two decrees for two different amounts and as the plaintiff satisfied these separately on two different occasions, there were different causes which could not be joined in the same suit.

Order II, rule 3 (1), Civil Procedure Code, lays down that "save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendants or the same defendants jointly may unite such causes of action in the same suit" and Order II, rule 6, provides that "where it appears to the Court that any causes of action joined in one suit cannot

be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient." There is, therefore, nothing in the law to prevent two causes of action being joined in one suit.

It is pointed out on behalf of the respondents that the plaintiff has failed to prove the shares of the defendants in the tenure, and that was one of the grounds upon which the decrees of the Courts below proceeded. It appears that the plaintiff set out the amount he claimed against each of his co-sharers in the two tenures, but the share of each defendant was not mentioned in the plaint. But most of the defendants do not appear to have taken exception on the ground of shares, their defences on the merits being that they had paid up their shares of the rent to the superior landlord and that, therefore, they were not liable; and although some of the defendants made a vague assertion that their share of the *jama* stated in the plaint was not correct, they did not state what their share was. The real defence, as already stated, was that the defendants' share of the rent had been paid by them. The Courts below appear to have dismissed the suit really on the ground of misjoinder of causes of action. The learned Munsif said: "As the suit fails on a preliminary point and as the plaintiff is not very much to blame for this, I direct that the parties should bear their own costs." The learned District Judge also agreed with the learned Munsif.

In these circumstances, we think that the decrees of the Courts below should be set aside and the case sent back to the Court of first instance in order that it may be tried according to law. The Court will allow the plaintiff to amend the plaint (by specifying the shares of the defendants) on such terms as to costs as it may think proper.

Costs to abide the result.

Appeal allowed;
Case remanded.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 70 OF 1918.

January 20, 1919.

Present :—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

CHINNA VENKATASAMI NAICKEN—PETITIONER—APPELLANT

versus

VENKATASAMI NAICKEN AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II—Arbitration—Reference to arbitrators, including presiding Judge, legality of—Applicability of Sch. II—Award by majority—Decree following on award, whether binding.

A reference of the subject-matter of a pending suit to arbitrators, one of whom is the presiding Judge, is not governed by Schedule II, Civil Procedure Code, and a decree following on an award passed by the majority is valid and binding on the parties. [p. 828, cols. 1 & 2.]

Per *Seshagiri Aiyar, J.*—It is undesirable that a Judge, before whom a case is pending, should associate himself with other persons as arbitrators in the case. [p. 828, col. 1.]

Where parties have chosen to entrust their case to a Judge and two others, they must be deemed to have agreed to accept the decision of that body as final and as not being open to the attacks to which otherwise a judgment is liable. [p. 828, col. 2.]

Per *Wallis, C. J.*—A reference of a pending suit to the presiding Judge must be held to be altogether *extra cursum curiæ* and not the less so when two others are joined with him, and the decree passed in accordance with their decision must be regarded as a consent decree and as not subject to the provisions of the Second Schedule to the Civil Procedure Code. [p. 829, col. 2.]

Appeal, under clause 15 of the Letters Patent, against the decision of the High Court (Justice Sir William Ayling) in Civil Revision Petition No. 474 of 1917, preferred against the decree of the Court of the Subordinate Judge, Coimbatore, in Original Suit No. 50 of 1916.

FACTS appear from the judgment.

Mr. *T. R. Ramachandra Aiyar* (with him Mr. *L. S. Veeraraghava Aiyar*), for the Appellant.—The reference was made under Schedule II, Civil Procedure Code, and is, therefore, governed by it. The Judge should not be one of the arbitrators. The whole proceedings are void.

Under section 89, Civil Procedure Code, the reference must be deemed to have been made under the Second Schedule. There is no [illegible] it.

[illegible] *Aiyar*, for Mr. [illegible] for the Respond-

ents.—The Second Schedule, Civil Procedure Code, does not apply to this reference. The language of the reference is immaterial. What the parties had in view was to adjust their disputes finally by the decision of the three persons to whom the reference was made. Such a reference is not within the purview of Schedule II. Where the reference is to the presiding officer, the proceedings must be taken to be *extra cursum curiæ*. Where the presiding Judge is one of the referees, the rules applicable to awards by private persons do not strictly apply. The parties must be deemed to have agreed to accept the decision of the referees unreservedly. It is final and the matter cannot be re-opened.

JUDGMENT.

SESHAGIRI AIYAR, J.—The suit was for money due upon a mortgage bond. After the examination of some witnesses the parties agreed to refer the questions of facts and of law arising in the case to the decision of three persons, namely, the Subordinate Judge and two friends of the parties. An award was made by the majority. Thereupon an application was presented by the defendant to set aside the award on various grounds. The Subordinate Judge overruled the objections and passed a decree. On this a civil revision petition was filed in the High Court, mainly on the ground that the reference to the Subordinate Judge as one of the arbitrators was illegal and that the whole award was vitiated thereby. Mr. Justice Ayling rejected this contention and dismissed the petition. This Letters Patent Appeal is against the learned Judge's judgment.

In my opinion, the conclusion of the learned Judge is right. I may at the outset say that it is undesirable that a Judge before whom a case is pending should associate himself with other persons as arbitrators in the cause. The Subordinate Judge thought that the Second Schedule to the Civil Procedure Code applied to the reference. If he was right in this view, when the award is submitted to the Court, it would be open to the parties to impeach the character and conduct of the Subordinate Judge as an arbitrator. It is not desirable that a Judge should lay himself open to such a possible impeachment. But I do not think that the Second Schedule has any application to the case. Mr. Ramachandra Aiyar for the petitioner referred to the order of the reference, and contended that, as the reference was in terms made under the Second Schedule, the entire proceedings were void. The form of the reference is not conclusive of the matter. It is the intention of the parties that has to be looked to. There can be no doubt that the parties desired that the controversy between them should be put an end to by the decision of the three gentlemen to whom they referred the matter. In my opinion, the whole frame of the Second Schedule shows that references like the present one are not within its purview. Applications may be made for extension of time, for remitting the award, for correcting the award, and for impeaching the partiality of the arbitrators. If a Judge is one of the arbitrators, he cannot in another capacity extend the time, correct his own judgment, and scrutinise his own character. Section 17 of the Civil Courts Act, though not in terms applicable to the present case, indicates that what has been done by a Judge in one character or capacity should not be revised by the same officer in another capacity. It may be, as pointed out by Lord Halsbury in *Burges* v. *Morton* (1), where a reference is made to a presiding officer the proceedings may be taken to be *extra cursum curiæ*. But it does not follow that the rules which govern awards by private persons would be strictly applicable to decisions in which the Judge of the Court takes part as a referee. The Lord Chancellor said: "My Lords, it has been held in this House that where with the acquiescence of both parties a Judge departs from the ordinary course of procedure and...decides upon a question of fact, it is incompetent for the parties afterwards to assume that they have an alternative mode of proceeding and to treat the matter as if it had been heard in due course." With slight modifications the same language may be applied to what has been done in the present case. Where parties have chosen to entrust their case to a Judge and two others, they must be deemed to have agreed to accept the decision of that body as final and as not being open to the attacks to which otherwise a judgment is liable. An argument was addressed to us

(1) (1896) A. C. 136; 65 L. J. Q. B. 321; 73 L. T. 713.

based upon section 89 of the Civil Procedure Code. Clause 1 lays down that all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule. The proviso exempts reference under the Indian Arbitration Act and proceedings under "any other law for the the time being in force." No doubt if there is no law which would give validity to the decision of the Judge and of his two colleagues, the proceedings must be taken to have been under the Second Schedule to the Code of Civil Procedure. In this case I am of opinion that by virtue of Order XXIII of the Civil Procedure Code the present reference can be regarded as being outside the Second Schedule. The parties have chosen a particular tribunal consisting of a Judge and of two other persons to deal with their contentions. They must be deemed to have agreed to accept their conclusions unreservedly. In other words it must be regarded that they agreed to *adjust* the suit by the result of the decision of the three persons. This adjustment must be taken to have been reported to the Court before which the suit was pending and the Court, by virtue of its inherent powers to finally dispose of any matter which is pending before, it must be deemed to have passed a decree in terms of the decision reported to it by the three persons. This was practically the view taken in *Nanjappa* v. *Nanja Rao* (2) and *Pragdas* v. *Girdhardas* (3). Giving such a finality to decisions is not unknown to the Civil Procedure Code. For example, Order XXXVI provides for cases in which a party may state a special case before a Judge who hears the suit. In such cases it has been held that there will be no appeal. *Vide Nidamarthi Mukkanti* v. *Thammana Ramayya* (4). If the conclusions come to by a Judge before whom a special case is stated can be regarded as final, there is nothing incongruous in giving the same finality to the conclusion come to by a Judge who is assisted by two other persons. In my opinion, therefore, although the procedure adopted by the Subordinate Judge in dealing with the matter as if it was a reference under the Second Schedule and as if the provisions of the Code applied was wrong, inasmuch as a decree was passed in terms of the award the defendant as a party to the reference is not entitled to contest its finality and to request that the case should be heard again. On this ground I am of opinion that the decree of the Subordinate Judge was rightly passed, and that the petition to this Court was rightly dismissed. The Letters Patent Appeal must be dismissed with costs.

WALLIS, C. J.—I agree with the conclusion. I think that a reference of a suit to the presiding Judge must be held to be altogether *extra cursum curiæ* and not the less so when two others are joined with him, and that the decree passed in accordance with their decision must be regarded as a consent decree, and as not subject to the provisions of the Second Schedule.

M. C. P.

Appeal dismissed.

(2) 16 Ind. Cas. 473; 23 M. L. J. 290; (1912) M. W. N. 1091; 12 M. L. T. 133.
(3) 26 B. 76; 3 Bom. L. R. 431.
(4) 26 M. 76.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 175 OF 1918.

May 6, 1919.

Present:—Mr. Justice Walsh and Mr. Justice Stuart.

ARBINDAKEB RAI—DEFENDANT—APPELLANT

versus

JAGESHAR RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Acknowledgment, what is—Sale to mortgagee—Mortgage acknowledged in sale-deed—Recital, whether acknowledgment—Trial of suit—Procedure—Evidence led on all issues—Judgment on preliminary point, expediency of.

The word "acknowledgment" in section 19 of the Limitation Act means a lawful acknowledgment given by a person able to bind himself by the acknowledgment as and when it is given. [p. 831, col. 1.]

The defendant No. 1 by separate deeds mortgaged his property as follows:—

On 15th February 1882 to *B* (the plaintiff);

On 14th July 1892 to *C* (father of defendant No. 2);

On 7th June 1894 to *D* (father of defendants Nos. 3 and 4);

On 31st July 1897 to *B* (the plaintiff).

ARBINDAKEB RAI *v.* JAGESHAR RAI.

On the 24th June 1910 he sold the hypothecated property to *B* in lieu of his mortgage of 31st July 1897 and in the sale-deed acknowledged this mortgage. Prior to the execution of the sale-deed, *C.* in 1908 and *D.* in 1909 had obtained decrees on their mortgages and brought the property to sale, which was purchased by themselves. They received possession on the 6th February and 9th June 1914 respectively, thereby dispossessing *B.*, who thereupon brought the present suit on his mortgage of 31st July 1897 to recover his mortgage-money by sale of the property. It was objected that the suit was barred by limitation but the plaintiff relied on the acknowledgment contained in his sale-deed:

Held, that the acknowledgment relied on for extending the period of limitation came within the language of section 19 of the Limitation Act and the suit was not barred by limitation [p. 830, col. 2.]

The practice of trying a case till it is ready for judgment and then disposing of it on a preliminary point, condemned as tending to cause needless delay and unnecessary expense. [p. 831, col. 1.]

Appeal from an order of the Officiating Additional Judge, Gorakhpur, dated the 15th November 1918.

FACTS.—Kariya Singh, defendant No. 1, executed a simple mortgage in favour of plaintiffs' ancestor on 15th February 1892. He subsequently executed a simple mortgage in favour of father of defendant No. 2 on 14th July 1892, and on 7th June 1894 he executed a third mortgage in favour of father of defendants Nos. 3 and 4. On 31st July 1897 he executed a fourth mortgage in favour of the plaintiffs in lieu of the former mortgage of 15th February 1892 and also Rs. 100 were paid to him in cash by the plaintiffs.

On 24th June 1910 he executed a sale-deed of the hypothecated property in favour of the plaintiffs-appellants in lieu of the mortgage of 31st July 1897 thereby acknowledging the mortgage and put them in possession thereof. In 1908 father of defendant No. 3 obtained a decree for sale of the property on the basis of his mortgage, impleading the present plaintiffs as parties to the suit but alleging also that their prior mortgage had become time-barred.

In 1909 defendant No. 2 brought a suit and obtained a decree on his mortgage of 1892. The plaintiffs were made parties to the suit as puisne incumbrancers. He obtained a decree for sale of the property subject to the first mortgage of the plaintiffs.

In each case the property was sold and purchased by the decree-holders themselves, who obtained possession on 6th February and 9th June 1914 respectively thereby dispossessing the plaintiffs.

Plaintiffs instituted the present suit for recovery of money by sale of the hypothecated property on the basis of the mortgage of 31st July 1897 and the question was whether the acknowledgment contained in the sale-deed of 24th June 1910, which related to the part of the property hypothecated in favour of the parties, saved limitation for a suit based on the fourth mortgage of 31st July 1897 against the mortgagor as well as against 2nd and 3rd mortgagees.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Iswar Saran*, for the Respondents.

JUDGMENT.

WALSH, J.—We think this appeal must be dismissed. We do not think that it is necessary to discuss all the authorities which have been mentioned in the judgment of the Court below and in the argument before us. We do not mean by this that the argument has exceeded in the least the limits of what was reasonable having regard to the difficulty of the point raised, but we think the difficulty of the point raised has been largely accentuated by a tendency on the part of some Judges to travel a little beyond the actual province within which they are called upon to determine the question. The real question we have to determine in this suit is whether the acknowledgment relied upon by the plaintiff as extending the period of limitation was given within the meaning of section 19 of the Limitation Act, that is to say, was it given by some person through whom the defendant derives title or liability? We have come to the conclusion that it is impossible to say that it is not, and that it is impossible to take it out of the plain language of the section. It is really immaterial to consider the various equitable considerations which bear upon the interpretation. We really have no alternative but to reiterate the language of the section. The Calcutta High Court, although it is perfectly true that their decision under section 20 was sufficient to justify the allowing of the appeal, nevertheless took the same view that we now take of the language of section 19.

Mr. Peary Lal has pressed upon us a distinction between that case and the present in this respect, that in that case

the acknowledgment was antecedent to the transaction by which the defendant derived title from the mortgagor. We think this makes no difference in the interpretation of the Statute. The real question is, not when was the acknowledgment given nor when did the transaction of transfer take place, but was the acknowledgment really a genuine acknowledgment as and when it was given? A suppositious case is put forward: A mortgagor, after getting rid of all his interest, has given a friendly or collusive acknowledgment to the mortgagee so as to extend the mortgagee's remedies against the third party when the mortgagor had no further interest in the subject-matter. In my judgment the answer is this, that the word 'acknowledgment' in the section must mean a lawful acknowledgment given by a person able to bind himself by the acknowledgment as and when it is given. In these circumstances the case must go back for trial upon the merits. The appeal is dismissed with costs, including in this Court fees on the higher scale.

I should like to add that it is, in my opinion, very unfortunate. I have said over and over again in order to draw the attention of the trial Courts to it—that after all the evidence is taken on the issues and the case argued and ready for judgment, the learned Judge when he sits down to write the judgment should decide the case upon a preliminary point. If he turns out wrong, it involves three years' delay and a great deal of unnecessary expenditure. It may be that the determination of the other issues renders the decision of this point totally superfluous. It is better and far cheaper in the interests of the parties themselves that when an appeal is brought against the decision of a preliminary point, the Appellate Court should have all the findings before it and be in a position to give a final decision on the case.

STUART, J.—I concur in the order proposed.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2621 OF 1915.

May 23, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Dundas.

THE MUNICIPAL COMMITTEE OF LUDHIANA—DEFENDANT—APPELLANT,

versus

AHAD SHAH—PLAINTIFF—RESPONDENT.

Punjab Municipal Act (III of 1911), s. 172, scope of—Notice by Municipal Committee requiring demolition of bridge constructed with permission, validity of—Injunction.

Section 172 of the Punjab Municipal Act does not contemplate that a permission once given by the Municipal Committee should be withdrawn after a term of years. [p. 832, col. 2.]

Plaintiff obtained permission from the Municipality of Ludhiana to build a bridge across a drain in front of his house, on executing an agreement to the effect that he would, at the end of ten years, either apply for fresh permission to maintain the bridge or permit its demolition. The ten years having elapsed and the plaintiff not having applied for fresh permission, the Municipality issued a notice under section 172 of the Punjab Municipal Act calling upon the plaintiff to demolish his bridge or obtain fresh permission to maintain it. Thereupon the plaintiff instituted a suit for the issue of a perpetual injunction against the Municipality restraining it from demolishing the bridge:

Held, (1) that the notice issued by the Municipality was *ultra vires*; [p. 832, col. 2.]

(2) that the circumstances did not fall within the purview of section 172 of the Punjab Municipal Act, and as the Municipality was exceeding its statutory powers, it could be restrained by an injunction. [p. 832, col. 2.]

Second appeal from the decree of the District Judge, Ludhiana, dated the 28th May 1915, affirming that of the Subordinate Judge, 1st Class, Ludhiana, dated the 15th March 1915, decreeing the claim.

The Hon'ble Mr. *Fazl-i-Husain*, for the Appellant.

Mr. *Ghulam Rasul*, for the Respondent.

JUDGMENT.—The present case is a dispute between the Municipality of Ludhiana and the plaintiff Khwaja Abad Shah. In the year 1903 Khwaja Abad Shah applied for permission to build a bridge across the drain in front of his house and obtained the permission upon his executing an agreement in favour of the Municipality of Ludhiana to the effect that he would at the end of ten years either apply for a fresh permission to maintain the bridge

or permit its demolition. The ten years having elapsed and Khwaja Ahad Shah not having applied for any further permission, the Municipality issued a notice under section 172 of the Punjab Municipal Act requiring Khwaja Ahad Shah either to demolish his bridge or to make a fresh application for permission to maintain it. Thereupon Khwaja Ahad Shah instituted a suit against the Committee arguing the necessity of the bridge, denying his liability to execute any further agreement or to apply for any fresh permission, alleging that the condition attached to the grant of permission in 1903 was void and praying for an injunction restraining the Municipal Committee from demolishing the bridge or resorting to any other summary remedy available under the Act.

The vital question for determination is whether the Municipal Committee was entitled to resort to the summary remedy prescribed by section 172 of the Punjab Municipal Act and could ask the plaintiff to remove the bridge after the expiry of ten years. The Courts below have answered this question in the negative, and for the reasons to be recorded hereafter we have no hesitation in concurring in that conclusion. The lower Courts have also expressed the opinion that the agreement entered into between the parties in 1903 is void and cannot be enforced. We consider that the action of the Municipal Committee, which prompted the suit, was the notice issued by it under section 172, and that the discussion by the lower Courts as to the validity of the agreement has gone beyond what was necessary in order to grant the plaintiff an effective relief in the circumstances of the case. What has happened so far is that the Committee has issued a notice under section 172 requiring the plaintiff to demolish his bridge or to procure sanction for its maintenance. The *first* question that arises is whether the Committee is entitled under the terms of the Statute to issue this notice. The *second* and further question which the plaintiff has raised is whether the agreement executed by the plaintiff in 1903 can be entirely avoided by him, either as being expressly barred by the provisions of the Municipal Act or as being void or voidable under the Contract Act. Now, as to the first question we consider that there can be no doubt that the notice issued by the Municipal Committee under section 172 of the Act is *ultra vires*. The circumstances disclosed are clearly not such as fall within the purview of the section. The material portion of the section runs as follows:—

"Whoever, without the written permission of the Committee, builds any immoveable encroachment over any drain or water-course, shall be punishable with fine. The Committee may, by notice, require the owner or occupier of any building to remove such immoveable encroachment, and no compensation shall be payable in respect of such removal."

But the plaintiff's bridge was built with the written permission of the Committee and the Act does not apparently contemplate that such permission should be withdrawn after a term of years. At all events, the Committee does not appear to be competent to issue a summary notice to the plaintiff under section 172, as the plaintiff has not committed any act contemplated by that section. It follows that as the Committee was exceeding its statutory powers, it can be restrained by an injunction and the plaintiff's claim to this extent must be allowed. But we do not consider that we are bound to go further than this. The question whether the Municipality has got any rights under the agreement executed by the plaintiff and can enforce its contract irrespective of the provisions of the Municipal Act can only be decided in a suit properly framed for that purpose and we must refrain from expressing any opinion at this stage. The cause of action accruing to the plaintiff was the notice under section 172, and the action of the Municipality in this connection has been restrained. Should the Committee think fit to endeavour to enforce the plaintiff's agreement by a regular suit, the further question will necessarily come up for decision.

We accordingly modify the decree of the lower Appellate Court and grant the plaintiff a permanent injunction restraining the defendant from demolishing the bridge by invoking the powers conferred by the Municipal Act. As the appellant has failed on the main question, it must pay the costs incurred by the respondent.

Decree modified.

PHEKU JHA *v.* EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION No. 117 OF 1919.

May 9, 1919.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

PHEKU JHA—COMPLAINANT—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 408, 413, 439—Joint trial—Appealable and non-appealable sentences—Non-appealable sentences, whether can be appealed against—Revision—High Court, power of interference of.

Per *Atkinson, J.*—Where two or more persons are jointly tried together for the same offence and one is convicted and awarded an appealable sentence, and the others are convicted and awarded non-appealable sentences, and the convict entitled by virtue of his sentence to appeal does appeal, the law does not warrant under such appeal the right to re-open the trial as an appeal in favour of those who have been convicted and awarded non-appealable sentences; in other words, those latter have no right of appeal and, so far as they are concerned, the correct procedure is to refer the matter to the High Court for its consideration in the exercise of its revisional jurisdiction. [p. 835, cols. 1 & 2.]

Per *Jwala Prasad, J.*—In such cases the accused who are awarded non-appealable sentences have the right of appeal along with the accused who have received an appealable sentence. [p. 838, col. 1.]

By the Court.—The High Court has ample power under section 439 of the Criminal Procedu e Code to deal with a case reported to it for orders, or which otherwise comes to its knowledge. [p. 839, col. 1.]

Rule calling upon the Additional Sessions Judge, Muzaffarpur, to show cause why his order, dated the 21st March 1919, be not set aside.

FACTS of the case are as follows :—

Fifteen persons were convicted by the Sub Divisional Officer of Sitamarhi on 7th February 1919 under sections 149 and 379, Indian Penal Code. It was alleged that they had looted the crops of the complainant. One of the accused was found by the trying Court to be the ringleader in the offence and was sentenced to six months' rigorous imprisonment and a fine of Rs. 50; four of the accused were sentenced to pay a fine of Rs. 15 each and the remaining accused were sentenced to pay a fine of Rs. 30 each. The ringleader accused appealed to the Sessions Judge, and the remainder moved the Sessions Judge to refer their case under section 438 to the High Court for setting aside their convictions and sentences. The Sessions Judge allowed the appeal on the ground that the complainant had not proved that he had grown the crop looted-and, relying upon the ruling of *Lal Singh* v. *Emperor* (1), treated the applications of the other fourteen accused as an appeal and acquitted them also. The complainant moved the High Court and obtained a Rule on the ground that the order of the Sessions Judge in respect of the non-appealing accused was without jurisdiction.

Mr. *Abdul Majid*, for the Petitioner, argued that under section 413 the Sessions Judge was incompetent to hear the appeals on behalf of the fourteen accused, because the marginal note to section 413 is headed "no appeal in petty cases." The object of the Legislature is that the judgment in petty cases shall be final. In order to decide whether a particular accused has a right of appeal, we are not entitled to consider what sentence the co-accused, if any, has received. The right of appeal claimed by the accused is determined by the sentence which he has received. This is the natural construction of the section in order to carry out the true intention of the Legis-lature. Section 413 distinctly limits the provisions of section 408; if there had been no section 413, section 408 would give the right of appeal in every case. The ruling relied upon by the Sessions Judge in *Lal Singh* v. *Emperor* (1) has been overruled in *Husain Khan* v. *Emperor* (2), and the learned Judge, Piggott, J., himself resiles from the position which he took up in *Lal Singh* v. *Emperor* (1). See *Bhola* v. *Emperor* (3).

The fact that there is a proposed amend-ment in the Criminal Procedure Code of section 413 supporting the interpretation put upon the section in *Lal Singh* v. *Emperor* (1) also shows what the true in-tention of the Legislature is.

The learned Counsel then argued upon the facts, which is not material to this report.

(1) 36 Ind. Cas. 481; 38 A. 395; 14 A. L. J. 518; 17 Cr. L. J. 513.

(2) 39 Ind. Cas. 690; 39 A. 293; 15 A. L. J. 136; 18 Cr. L. J. 546.

(3) 40 Ind. Cas. 332; 39 A. 549; 15 A. L. J. 574; 18 Cr. L. J. 684.

Mr. *Gour Chandra Pal*, for the Opposite Party, contended that on the analogy of section 408, where an appeal by the accused, who is sentenced by the Assistant Sessions Judge for less than four years, lies to the High Court if his co-accused receives a sentence for more than four years, the Sessions Judge had jurisdiction to hear an appeal of these fourteen men. Cites *Har Dayal* v. *Emperor* (4) and reads section 408, proviso (*b*).

There is a conflict of authority on this point and in that view also a favourable construction is to be put on the right of the accused. Section 413 evidently refers to those cases only where the maximum sentence is one month or Rs. 50 fine. It cannot be denied that where one accused has received a sentence of one month and his co accused has received a sentence of more than one month, the first co accused, although he has received a non-appealable sentence, received it in a case where the maximum sentence is appealable. When for purposes of trial there is only one case, for the purposes of evidence there is only one case and the judgment is written on the same page, how can we distinguish and say that the co-accused has received sentence in a case where the trial Court has passed the sentence not exceeding one month, etc? The moment the Deputy Magistrate passes the sentence beyond one month on any of the accused, the case is not a "petty case" and it cannot be divided and dissected for the purpose of depriving the accused of the right of appeal.

The learned Vakil then argued on facts and contended that this was not a case in which the High Court should interfere, because on the merits the complainant had no case at all. The High Court in exercising its revisional powers is not bound to interfere where there is no miscarriage of justice, although there may be an error in law.

JUDGMENT.

ATKINSON, J.—This application comes before us in revision from an order of the learned Additional Sessions Judge of Muzufferpore dated the 21st March 1919.

It would appear that fifteen persons were charged before the learned Sessions Judge with an offence under section 379, Indian Penal Code, read with section 149, Indian Penal Code.

The case was tried by Mr. Owen, the Sub-Divisional Officer of Sitamarhi, and he convicted all the accused and sentenced the accused Khobari, the ringleader, to a period of six months' rigorous imprisonment; and of the remaining fourteen accused persons he convicted and sentenced four to pay a fine of Rs. 15 and ten to a fine of Rs. 30 respectively.

An appeal was presented to the learned Additional Sessions Judge on behalf of Khobari Koeri who had been convicted and awarded a period of six months' rigorous imprisonment, which is an appealable sentence. It was contended on behalf of the petitioner before the learned Sessions Judge that the remaining fourteen accused who were not appellants before the Sessions Judge had no remedy in respect of their conviction and sentences save by way of reference to the High Court The learned Sessions Judge, however, held that, inasmuch as Khobari was convicted and awarded an appealable sentence that, therefore, the whole case was open in respect of all the accused persons, and that he was at liberty to consider the propriety of the conviction and sentences of the other fourteen co-accused persons other than Khobari who were convicted and awarded non-appealable sentences.

The ruling of the learned Sessions Judge was challenged, and we allowed notice to issue for the purpose of considering the propriety of the aforesaid ruling of the learned Judge.

In substance the learned Judge's ruling amounts to this, that whenever two or more accused persons are jointly tried together and *one* is convicted and awarded an *appealable sentence*, and the others are convicted and awarded *non appealable sentences*, and the accused entitled by virtue of his sentence to appeal does appeal; that then and in such event the whole case is open in its entirety even in favour of the accused persons who have been only awarded non-appealable sentences.

This conclusion involves a consideration of two important sections of the Code of Criminal Procedure. Section 408 in general terms confers a right of appeal in all criminal

(4) 30 Ind. Cas. 158; 37 A. 471; 13 A. L. J. 719; 15 Cr. L. J. 606.

proceedings culminating in conviction and sentence and it runs as follows:—

"Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate, or other Magistrate of the first class, or any person sentenced under section 349 by a Magistrate of the first class, may appeal to the Court of Session."

It is not material for the purposes of this case to consider the provisos to section 408. Section 408 is only material in so far as it confers an absolute and unqualified right of appeal in all cases tried by the respective officers specified in the section itself. The important section, however, to consider is section 413 and to ascertain what bearing it has in modification of the general provisions of section 408. Section 413 provides as follow:—

"*Notwithstanding anything hereinbefore contained*, there shall be *no appeal* by a convicted person *in cases* in which a Court of Session or the District Magistrate or other Magistrate of the first class *passes a sentence of imprisonment not exceeding one month only*, or of fine not exceeding Rs. 50 only, or of whipping only."

Section 413, therefore, *prima facie* modifies and abridges the general and unqualified right of appeal conferred by section 408; and consequently section 403 must be read and construed subject to the limitations and qualifications expressed in section 413. Thus if a person be convicted of an offence and he be sentenced to a period of imprisonment of less than one month, or to pay a fine of a sum not exceeding Rs. 50, whether tried alone or jointly with others for the same offence and even though his co accused may be convicted and receive a sentence of an appealable character, yet he has no right of appeal. To hold otherwise would render section 413 meaningless. The opening words of section 413 are the governing words which control the operative construction to be given to section 413 itself. The opening words of that section are vitally important because they restrict, cut down and abridge in express and general terms whatever more extended right may ostensibly have been conferred by section 403, "*Notwithstanding anything hereinbefore contained.*"

Speaking for myself, I am satisfied that if two or more persons are tried jointly, and some are convicted and awarded non-appealable sentences and others are convicted and awarded appealable sentences, and such persons as have been convicted and awarded appealable sentences appeal, the law does not warrant under such appeal the right to re open the trial as an appeal in favour of those persons who have been convicted and awarded non-appealable sentences.

In my opinion, there is no doubt as to what the law is as it now stands. Some debate or argument has been founded upon some subtle meaning to be attributed to the word "cases" as employed in the wording of section 413. In my opinion the word "cases" leads to no difficulty or embarrassment at all in construing section 413. I think that the word "cases" in section 413 applies to all cases, whether they be summons cases, warrant cases, or trial cases. The word "cases" is used in its widest and most extensive sense to cover the trial of all cases in respect of which an accused person may be convicted. In British India the law appears to be substantially uniform at the present time as to the construction to be applied to section 413 read as a general modification of the wide and extensive provisions of section 403 of the Code of Criminal Procedure.

It is true that in a Full Bench ruling reported as *Bi Thaw* v. *Emperor* (5), the Chief Court of Burma took a different view to that which I have expressed, but the reasoning of that decision does not appear to me to be sound nor does it command itself to me. Therefore, I feel unable to follow it, more especially when I have decisions of various High Courts in India which appear to me to be more in accordance with the true interpretation and construction of the Code of Criminal Procedure itself.

A note of dissent was recorded by Mr. Justice Piggot of the Allahabad High Court in the ruling reported as *Lal Singh* v. *Emperor* (1). Mr. Justice Piggott in that case was most emphatic in his expression of opinion sitting as a Single Judge of the Allahabad High Court, that where one accused person was convicted and awarded an appealable sentence and he appealed, that by reason of such appeal the right and benefit of an appeal was also given in favour of the ac-

(5) 9 Cr. L. J. 103; 4 L. B. R. 302.

accused who were convicted and awarded non-appealable sentences. Sir George Knox of the Allahabad High Court, however, while acting as Chief Justice of that Court, declined to accede to the decision of Mr. Justice Piggott in the case previously cited, and accordingly Sir George Knox in a ruling reported as *Husain Khan* v. *Emperor* (2) held that an accused person who has received a non-appealable sentence did not derive any right of appeal because of the fact that his co-accused tried jointly with him had received a sentence which was appealable. Sir George Knox decided the case as a single Judge in the year 1916. In the same volume of the Allahabad Reports will be found another case decided by Mr. Justice Piggott reported as *Bhola* v. *Emperor* (3), in which Mr. Justice Piggott unequivocally resiles from the position which he took up in the previously cited case, *Lal Singh* v. *Emperor* (1), and there Mr. Justice Piggott said: "I take this opportunity of stating that, although I have myself expressed and acted upon the view that the provisions of section 413 aforesaid do not operate so as to take away the right of appeal, which would otherwise be conferred in any case tried by a Magistrate of the first class to the Court of Session by section 408. I find that this view has not been generally accepted in this Court and has been expressly dissented from by the present acting Chief Justice. I do not propose, therefore, further to insist on my own individual view in this matter."

Therefore, I take it that in the Allahabad High Court, at least, the matter has now been decided beyond the region of cavil or dispute. A ruling is also to be found in *Reg.* v. *Kalubhai Meghabhai* (6). That was a decision given in the year 1870; and the learned Judges constituting the Court were Westropp, C. J., and Lloyd, J. The same point there, as here, was taken and the learned Judges without hesitation set aside the order of the Sessions Judge, who had held on similar facts that a right of appeal existed on behalf of persons who were convicted and had received a non-appealable sentence, with others who had received appealable sentences, and had appealed.

Consequently, in my opinion, the order of the learned Sessions Judge was wrong in law and without jurisdiction, in so far as he dealt with the cases of the 14 accused persons who were convicted and awarded non-appealable sentence. The learned Sessions Judge should have, in the ordinary exercise of his jurisdiction so far as such accused persons were concerned, referred the matter to the High Court for its consideration in the exercise of the revisional powers vested in it. Therefore, so far as the order of acquittal of the fourteen accused persons who received non-appealable sentences is concerned as declared by the learned Sessions Judge the same must be set aside.

We indicated when we granted the Rule sought in this case that we would examine the record for ourselves for the purpose of seeing whether the case was one in which the conviction as against the aforesaid fourteen accused persons should be set aside. We have considered the judgment of the learned Sessions Judge very carefully and the judgment of the trial Magistrate, and we have examined the evidence on the record itself, and having perused the evidence and giving due weight to the considerations which have been placed before us on behalf of the petitioner, we have no hesitation in saying that we both agree in holding that the accused were properly acquitted in the sense that on the merits no conviction ought to be maintained against them. Accordingly we now, in exercise of our powers in revision, set aside the order of conviction pronounced by the learned trial Magistrate by his order dated the 7th February 1919 and direct that if the fines awarded against the aforesaid accused respectively have been paid, that the same be forthwith refunded.

JWALA PRASAD, J.—The complainant Pheku Jha moves this Court for setting aside the order of acquittal of the opposite party, fourteen in number, passed by the Additional Sessions Judge of Muzafferpur by his judgment dated the 21st March 1919. These fourteen persons along with one Khobari Koeri were convicted by the Sub-Divisional Magistrate of Sitamarhi by his judgment, dated the 7th February 1919, under sections

(6) 7 B. H. C. R. 35[Cr.

149 and 379, Indian Penal Code. Khobari was held by the Magistrate to be the ringleader in committing the theft of the crops in question and was sentenced to six months' rigorous imprisonment and a fine of Rs. 50. Out of the remaining 14, four were sentenced to a fine of Rs. 15 each and the rest to a fine of Rs. 30 each.

Khobari appealed to the Sessions Judge and the remaining fourteen applied to the Sessions Judge for recommendation under section 438 to the High Court for setting aside their convictions and sentences. The learned Sessions Judge held that the complainant failed to prove that the paddy said to have been removed was sown by him and hence the charge of theft was not at all established. He acquitted Khobari, and treating the application of the remaining fourteen accused as an appeal he acquitted them as well.

Mr. Majid on behalf of the complainant contends that the order of the Sessions Judge acquitting these fourteen persons is without jurisdiction, inasmuch as the sentence passed against each of them was below Rs. 50 and hence non-appealable. The contention is based upon section 413 of the Code of Criminal Procedure, which purports to enact that there shall be "no appeal in petty cases," *vide* the marginal note in the present Code as well as in the old Codes of 1882 and 1872. The right of appeal to the Sessions Judge is conferred by section 408 upon "any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate, or other Magistrate of the first class, or any persons sentenced under section 349 by a Magistrate of the first class" Section 413 purports to curtail this right "by a convicted person in cases in which a Court of Session or the District Magistrate or other Magistrate of the first class passes a sentence of imprisonment not exceeding one month only, or of fine of Rs. 50 only, or of whipping only."

The Sub Divisional Magistrate who tried the case passed a sentence of six months against one of the accused persons and a fine of less than Rs. 50 against each of the remaining persons, so that it cannot be said that in the case tried by the Magistrate he passed a sentence not exceeding the limit prescribed by the section for an appeal. Learned Counsel, however, contends that the words in section 413 of the Code of Criminal Procedure quoted above should be construed as curtailing the power of appeal "by a convicted person" in cases in which the Courts specified in the section pass a sentence *upon him* such as is mentioned therein, though in the same case he may have passed a sentence beyond the said limit upon the other convicted persons. This is only possible by adding the words "upon him" after the word "passes" and before the words "a sentence" in the section. We have no authority in interpreting a section to add words to the section which the Legislature did not think fit to do, specially when the addition of the words would curtail an undoubted and substantial right by the Statute in clear and unambiguous terms such as the right of appeal given by section 408 of the Code. If the Legislature meant to curtail the said right of appeal, it would not have been difficult for it to do so by adding the said words in the section or in any other way.

There is another reason why we are not justified in adding any expression to the section which is not there, for the addition of such an expression would cause an obvious anomaly, inasmuch as the narrow interpretation of the section suggested by the learned Counsel would deprive an accused person, as in the present case, who was supposed to have taken a secondary part in the offence, of the right of appeal on facts, whereas the ringleader who took a serious part in the committing of the theft would be allowed to do so and to prove his innocence by appealing on facts. We have to interpret the Statute as it is and we cannot possibly add to it nor narrow its scope, meaning and application.

It has then been suggested that the opening words in section 413 of the Code of Criminal Procedure, "Notwithstanding anything hereinbefore contained," curtail the right of appeal conferred by the preceding section 408. This is so, but the question is to what extent and in what manner section 408 is controlled by section 413. To my mind the latter section curtails the former only in cases in which there is no sentence upon any convicted person above the

limit prescribed by section 413, so that if any of the convicted persons in the same case has received a punishment above that limit, the right of appeal given in section 408 upon a convicted person receiving a sentence below the limit is not at all curtailed, but that he along with the one who received a higher punishment has the right uncontrolled and uncurtailed. The interpretation is also borne out by referring to proviso (*b*) to section 408 of the Code. That proviso says that when in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years or any sentence of transportation, the appeal shall lie to the High Court. The words in this proviso are similar to those in section 413. Under the said proviso (*b*) it has been held that where some of several accused persons are sentenced to imprisonment exceeding four years, those sentenced to less terms have the right of appeal to the High Court, *Palani Koravan* v. *Emperor* (7), *Hardit Singh* v. *Emperor* (8), *Richha* v. *Emperor* (9) and *Har Dayal* v. *Emperor* (4). This is the test how section 413 should be construed and it is, as I have said above, the maximum sentence passed upon any one of the convicted persons that determines the right of appeal in that case by the said person as well as those who received petty sentences as mentioned in that section. There has been a conflict of opinion regarding the interpretation of the section. A Full Bench of the Burma Court in the case of *Ba Thaw* v. *Emperor* (5) held that where on a trial of several persons one is awarded an appealable sentence, the others who have got non-appealable sentences may appeal. The Oudh case of *Sheopal* v. *Emperor* (10) was to the same effect. So also the case of *Lal Singh* v. *Emperor* (1) and *Emperor* v. *Jaisukh* (11). Piggott, J., who decided the case of *Lal Singh* v. *Emperor* (1), however, modified his view considerably in the case of *Husain Khan* v. *Emperor* (2), where a contrary view was expressed. The Madras Court has also taken a contrary view. The fact that there has been a conflict of opinion in the interpretation of the section by several eminent Judges goes to show that the section is capable of both the interpretations, and it is consonant with rules of construction of a Statute that the interpretation favourable to the right expressly conferred upon a subject should be accepted and acted upon as being the true intention and meaning of the Legislature. In this view also the right of an accused person should not be curtailed unless it is purported to be done by clear expressions in the Statute. The practice in this matter appears to be not uniform. Some of the Sessions Judges in such cases recommend to the High Court under section 438, while the others deal with them along with the appeal of persons given sentences beyond the limit prescribed by section 413, and dispose them of themselves. In the case of *Kanchan Mallik* v. *Emperor* (12) it would appear from the facts stated therein that a convicted person who had received a fine of Rs. 25 each under two charges appealed to the Sessions Judge along with those who had received sentences of three months' rigorous imprisonment and fines. I am, therefore, not prepared to hold with my learned brother that the Sessions Judge had no jurisdiction to treat the application of the 14 accused persons, the opposite party, as an appeal while dealing with the appeal of Khobari who had, undoubtedly, received an appealable sentence of six months.

Assuming for the sake of argument that the Sessions Judge should not have acquitted these persons but should have recommended their case to the High Court for acquittal, I think that the conviction of these accused by the Sub-Divisional Magistrate cannot be sustained The case is one in which the High Court is justified in going through the evidence and to see if the conviction was proper. Upon the evidence it is impossible to hold that the complainant has proved that the crop in question said to have been removed by the

(7) 17 M. L. J. 248; 5 Cr. L. J. 496.

(8) 10 Ind. Cas. 278; 161 P. L. R. 1911; 12 Cr. L. J. 236; 53 P. W. R. 1911 Cr.

(9) 28 Ind. Cas. 737; 13 A. L. J. 272; 16 Cr. L. J. 353.

(10) 19 Ind. Cas. 170; 15 O. C. 386; 14 Cr. L. J. 170.

(11) 33 Ind. Cas. 653; 16 P. R. 1916 Cr; 21 P. W. R. 1916 Cr.; 17 Cr. L. J. 173.

(12) 26 Ind. Cas 134; 42 C. 374; 18 C. W. N. 1215; 15 Cr. L. J. 696.

accused was sown by him. As a matter of fact, the trial Magistrate has disbelieved the prosecution witnesses and has held that they have not shown themselves incapable of telling falsehood in order to help out the case. He has not found that the complainant was in possession, or had sown the crop in question. Upon the finding of the trial Magistrate himself the conviction cannot be sustained and must be set aside. The High Court has got ample power under section 439, which empowers the Court to deal with a case which has been reported for orders or "which otherwise comes to its knowledge," and the powers given to the Court in revision are those conferred on a Court of Appeal amongst others by section 423 of the Code. It does not matter that the case has come to us upon an application made by the complainant. The record is here and this Court has got seizin of the entire case and is competent to revise the order passed by the Courts below. In a long series of cases it has been held that the High Court has power in a proper case to set aside the conviction and sentence of an accused person who did not appeal while considering the case of those who did: *Queen* v. *Jaffir Ali* (13) and *Broja Rukhal Mozumdar* v. *Empress* (14). Though this is not the case here, yet the principle of that ruling is that it does not matter in whatever way the record comes to the High Court, it has power of revision under section 439.

I, therefore, agree with the order proposed by my learned brother that the application of the complainant should be rejected and that the acquittal of the accused should not at all be disturbed.

Application rejected.

(13) 19 W. R. Cr. 57 at p. 65.
(14) 5 C. W. N. 330.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 793 OF 1918.
November 1, 1918.

Present :—Mr. Justice Fletcher and Mr. Justice Walmsley.

NEZAMADDI AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 439—Enquiry under s. 110—Joint trial—Association of accused, proof of—Failure to examine evidence, effect of—Court, duty of—Revision.

The law requires that when proceedings are taken against more persons than one for a joint trial under section 110, Criminal Procedure Code, proof should be given that they were associated together in the matter under enquiry. [p. 839, col. 2; p. 840, col. 1.]

The petitioners were ordered to furnish security under section 110, Criminal Procedure Code, on evidence which was not merely meagre and vague but was accepted by the trying Magistrate without any critical examination. In appeal, the trial Court's order was upheld but in the Appellate Court's judgment no reference was made to evidence on important points:

Held, that the order passed by the lower Courts could not be sustained, inasmuch as the procedure adopted by them was not at all satisfactory. [p. 840, col. 2.]

Rule against an order of the Sub-Divisional Magistrate, Comillah, dated the 28th June 1918.

Babu *Manmatha Nath Mukkerjee*, for the Petitioners.

Babu *Satindra Nath Mukherjee*, for the Crown.

JUDGMENT.

WALMSLEY, J.—The thirteen petitioners were called upon to show cause why they should not be required to give security under the provisions of section 110, Code of Criminal Procedure. They showed cause; evidence was gone into and they were ordered to give security. They preferred an appeal to the District Magistrate. That appeal was dismissed by the learned Additional District Magistrate. On application to this Court, they obtained the present Rule calling upon the District Magistrate to show cause why on the grounds set out and on an examination of the evidence, the order complained of should not be set aside. After going through the evidence, it appears to me that the order passed by the lower Courts cannot be supported.

First, with regard to the matter of association. The law requires that when

proceedings are taken against more than one person for a joint trial under section 110, Code of Criminal Procedure, proof should be given that they were associated together in the matter under enquiry. The trying Magistrate dealt with this question and he said that proof of association was given by the facts that the accused were seen together at meetings, that these meetings were followed by offences against property and that on numerous occasions after theft had been committed, some or other of the petitioners demanded payment and obtained payment in redemption of the property stolen. The Appellate Court did not deal with this matter at all. Now, if the evidence in support of these statements were good and substantial, there would be good reasons for treating the men as associated. But all the petitioners come from the same village of Bareswar. They all followed the same calling and many of them are related to one another. There is nothing unnatural in their meeting together in the village. The allegations that the meetings were followed by offences is extremely vague. The thefts to which allusion was made occurred 2 or 3 years or several months ago. No attempt was made to give the exact dates, and it is just the same regarding the allegations of extortion. My objection to the judgment of the first Court is that these statements were accepted without any critical examination, while in the Appellate Court's judgment no reference whatever is made to this matter.

Then, as to the evidence given against the petitioners, the principal fact in the case appears to me to be this: As I have already said, all the petitioners came from the village of Bareswar. There are 101 witnesses examined, altogether 50 on the prosecution side and 51 on the defence side. Sixty-seven of these witnesses come from the same village of Bareswar; thirty-five appear on one side and 32 on the other. I cannot understand how it is possible for such a large body of witnesses, who must represent a very large proportion of the adult male population of the village, to be divided into two parties in this matter unless the whole village is divided by party feeling, and there is abundant evidence to show that there is strong party feeling. There was a murder sometime ago in which the victim was a member of one of the present parties and the accused a member of the other. It also appears that after that murder case and the trial which followed, a new mosque was established and one part of the village now assembles in the new mosque and the other in the old mosque and that the witnesses for the prosecution on the one side and the defence witnesses on the other are divided on the same lines. That is a very important fact to which the Courts below ought to have given their very careful consideration; but they have omitted it altogether.

Another point which I wish to mention is that considerable stress is laid on the evidence given by one Tarak Chunder Chowdhury on the ground that he is a Hindu and a landowner. But it appears in the first place that he had never been to the village, and what is more important is that when he says that his tenants in the village borrowed money from him to redeem the stolen property from the petitioners, it is quite clear that the statement as to the object of the borrowing is inadmissible in evidence. He may prove the borrowing of the money but he cannot say what the object was. In my opinion, the evidence is extremely weak and it has not been subjected to the critical examination which it deserves. I think the order complained of should be set aside and the accused discharged from their bail.

FLETCHER, J.—I agree.

Rule made absolute.

PATNA HIGH COURT.

CRIMINAL REVISION No. 14 OF 1919.

May 29, 1919.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

GURU PRASAD SAHU—PETITIONER

versus

AJODHYA NATH PARHI AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 200, 345—Failure to examine complainant—Illegality—Non-compoundable offence—Compromise, whether can be sanctioned.

A complaint was made to a Magistrate against several persons of the offence of theft. The Magistrate, without examining the complainant upon oath, held a local investigation and found that an offence in the nature of theft had been committed. During the course of the investigation the parties agreed to

a compromise which was sanctioned by the Magistrate. The accused failing to abide by the terms of the compromise, the complainant applied to have the order sanctioning the compromise set aside and for permission to proceed with his original petition of complaint :

Held, that the proceedings of the Magistrate were altogether irregular and improper, inasmuch as the offence complained of was not compoundable, and he, therefore, had no jurisdiction to entertain or sanction the compromise entered into between the parties, or even to permit the same to be filed. [p. 842, col. 1.]

Rule against the order of the District Magistrate, Balasore, dated the 25th March 1919, dismissing the petition of the complainant to revive the complaint.

FACTS.—On the night of 28th December 1918, the accused party forcibly entered the Cutchery house of the complainant's master, Babu Barda Prasad Parhi. Information was sent that night to Police. On 20th January 1919, the Police submitted a report that the complainant's case was false. On 24th January 1919, the complainant Guru Prasad Sahu filed a petition before the Sub-Divisional Officer, Balasore, impugning the Police report and praying for judicial inquiry. The Magistrate without examining him on oath noted an order in the order-sheet: "The complainant to prove his case on 10th February 1919." On 3rd February 1919 the complainant filed another petition, praying for a prompt inquiry by a Deputy Magistrate as the accused were trying to remove the traces of the alleged crime. The learned Sub-Divisional Officer without examining the complainant passed an order that Mr. A. Samad, Deputy Magistrate, may enquire and report and submitted the file to the District Magistrate, upon whose orders the learned Sub-Divisional Officer went to the scene of occurrence and found boxes and almirahs broken open, windows removed from the walls, etc., and made a note of these and other facts in the order-sheet. On 11th February 1919, the father of the principal accused Ajodhya Nath Parhi and others on the one side and the complainant's master on the other filed a petition of compromise, by which the accused party promised to return the stolen articles and the complainant was to remove the building materials by a particular date. Thereupon the learned Sub-Divisional Officer, while holding that the complainant's case was certainly not false, dismissed the complaint as one of civil dispute. The accused having failed to carry out the terms of the compromise, the complainant filed a petition to revive the case but it was rejected by the Sub-Divisional Officer and the District Magistrate in appeal; thereupon the complainant moved the High Court and obtained the present Rule.

Mr. *S. A. A. Asghar* (with him Babu *Gajendra Prasad Das*), for the Petitioner, submitted (*a*) that the Magistrate acted illegally in not examining the complainant on oath after taking cognizance of the case and the subsequent proceedings, including the local inquiry and the order of dismissal, were void: *Jhuna Lal Sahu* v. *Emperor* (1); (*b*) that the Magistrate's action in holding a local inquiry without examining the complainant was illegal; (*c*) that the Magistrate had no jurisdiction to dismiss a complaint of a non-compoundable offence on the basis of a compromise without following the procedure provided for in the Criminal Procedure Code.

Mr. *Gour Chandra Pal*, for the Opposite Party, submitted that even in cases of non-compoundable offences disclosed on a petition of complaint, the Magistrate upon local investigation could permit the compromise thereof if he was of opinion that in fact only a compoundable offence had been committed, and the order of dismissal showed that the Magistrate thought the dispute to be of a civil nature and hence dismissed the complaint. The complainant's remedy lies in a Civil Court only.

JUDGMENT.—The only question arising for determination in this application for revision is whether the order confirming the compromise arrived at between the parties dated the 11th February 1919 is valid or invalid; and if invalid, whether the same should be set aside.

The petition of complaint filed by the complainant avers facts which tend to show that a theft from the Kutcheri house in village Jamjhari had been committed by the opposite party of certain articles and property belonging to the complainant therein; and that the ingredients necessary

(1) 41 Ind. Cas. 1002; 2 P. L. J. 657; 2 P. L. W. 152; 18 Cr. L. J. 890.

to constitute an offense under section 380 of the Indian Penal Code existed.

The Magistrate failed and omitted to take the necessary steps to examine the complainant as he should have done immediately on the filing of his petition of complaint, having regard to the frame of his petition relative to the matters stated therein. The learned Magistrate, instead of proceeding to examine the complainant as he ought to have done, proceeded to hold a local investigation; and when he went to the scene of occurrence, he found a condition of things existing which showed that the case put forward by the complainant was not entirely false, and he assigned reasons which we think cogent to show that a crime in the nature of a theft had been committed.

During the course of this investigation the opposite party came forward and suggested that a compromise might be effected on a certain basis. The parties on both sides agreed that a compromise should be arrived at between them, as it was more or less a matter of family dispute. But the opposite party represented before us by Mr. Gour Chandra Pal failed to carry out the terms of the compromise. Hence the petitioner seeks now to have the order of the 11th February set aside; and craves permission to proceed with his petition of complaint unfettered by the terms of the order of the 11th February 1919.

The offence charged in the petition of the complainant would appear to constitute an offence under section 380 of the Indian Penal Code and consequently be a non-compoundable criminal charge, and, therefore, the learned Magistrate ought not to have sanctioned or entertained the compromise entered into between the parties or permitted the same to be filed. As far as I can see, every step taken by the learned Magistrate in the course of the proceedings has been irregular from their inception to their end.

We are quite satisfied that in point of law the order of the 11th February was quite irregular and improper and must be set aside, and we order that the complainant shall be entitled to proceed on his petiton of complaint in due course of law as if the order of the 11th February 1919 had never been made.

We have no evidence before us as to the merits of the petitioner's claim; and we refrain in an application of this character from expressing any opinion as to the merits or demerits of the case of either of the parties to the contemplated pending criminal proceedings.

Accordingly we allow this application.

Application allowed.

PUNJAB CHIEF COURT.

CRIMINAL CASE No. 443 OF 1918.

October 30, 1918.

Present :—Mr. Justice Scott-Smith and Mr. Justice Martineau.

GOBINDU—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Custom—Marriage—Rathi Rajputs *of Kangra District*—Janjharara *marriage, whether valid.*

Among *Rathi Rajputs* of the Kangra District a *janjharara* marriage is valid. [p. 843, col. 2.]

Appeal from the order of the Magistrate, 1st Class, with enhanced powers under section 30 of the Criminal Procedure Code, in the Kangra District, dated the 12th March 1918 convicting the appellant.

Lala *Mul Chand*, R. S., Public Prosecutor, for the Respondent.

JUDGMENT.—This is an appeal from the order of Lala Diwan Chand, Magistrate of the 1st class in the Kangra District, convicting Gobindu of an offence under section 498, Indian Penal Code, and sentencing him to undergo six months' rigorous imprisonment and to pay a fine of Rs. 50. The appeal was duly filed in the Court of the Sessions Judge, Hoshiarpar, and on his recommendation it was transferred for hearing before this Court, because an important question arises, namely, whether remarriage of a widow by the *janjharara* ceremony is valid by custom in the tribe to which the parties belong. In *Gigal* v. *Phio* (1) this Court refused upon revision to interfere with the finding of the District Magistrate of Kangra to the effect

(1) 25 P. R. 1886 Cr.

that the *janjharara* ceremony of marriage did not by custom constitute a valid marriage within the meaning of section 494 of the Indian Penal Code. The learned Judges, who were parties to that decision, said that the District Magistrate had given good reasons for his finding and that they were not prepared to interfere with his order, and consequently refused the petition for revision. They did not go into the matter in detail and we, therefore, consider that we are not bound by that decision in deciding the present appeal.

The case for the prosecution is that Lehnu complainant married *Musammat* Gulabi, a widow, by the *janjharara* ceremony on the 14th of February 1917 and that some four months later Gobindu appellant enticed her away within the meaning of section 498, Indian Penal Code. The parties are Rajputs belonging to the class known as Rathis. The questions for decision are:

(1) Is the *janjharara* form of marriage valid among Rathis ?

(2) Was *Musammat* Gulabi married to Lehnu by *janjharara* ceremony ?

(3) Was she abducted by Gobindu ?

(4) Did Gobindu know that she was the wife of Lehnu ?

In regard to the first point, Mr. Lyall in his Settlement Report of the Kangra District at page 102 gives two classes of landholder:—

(1) those whose women affect seclusion and do not work in the fields, and who cannot contract what are known as *janjharara* or widow marriages, and

(2) those who marry widows, and allow their women to work more or less in the fields.

It appears from this that the higher classes do not allow *janjharara* marriages, but the lower classes do allow them. The Gazetteer of the Kangra District published in 1904, pages 74 and 75, divides the Rajputs into five classes. The two lowest of these are the Rathis, of whom it is said that they appear to be degenerate Rajputs and that if they are to be definitely classified, they should be classed as Sudras. In *Musammat Deokie* v. *Ram Dhan* (2) it was found that, whilst a *janjharara* marriage was not recognised as valid amongst the highest class of pure Rajputs, it was recognised as valid amongst the lower or impure sub-divisions, such as the Sartoras, the subdivision to which the parties to that suit belonged. The *riwaj-i am* of the neighbouring Tahsil of Dehra, which was recently prepared, states that *janjharara* marriages are recognised as valid among the Rathis. It is, therefore, in our opinion *prima facie* probable that such a marriage is valid amongst Rathis in the Kangra District and that if Lehnu married *Musammat* Gulabi by *janjharara* ceremony, the marriage would be valid. Now the Magistrate in this case held a special enquiry as to whether such marriages were valid or not, and in his opinion, the enquiry shows that such marriages are valid. Unfortunately neither the appellant nor his Counsel has appeared to argue the appeal before us, but we have carefully examined the evidence on the record and we agree with the Magistrate that a *janjharara* marriage amongst the Rathis is valid.

As to the second question, there is very strong evidence on the record to show that Lehnu married *Musammat* Gulabi by *janjharara* and that all the necessary ceremonies were carried out at the time. The woman's own statement that no marriage was performed is absolutely valueless in view of her statement at mutation, her report at the *thana* and her execution of the document of the 16th of February 1917. Her explanation as to why she went and resided in Lehnu's house has been shown by the Magistrate to be absolutely false and it is unnecessary to discuss the matter further.

The next question is whether Gobindu abducted her and on this we have the direct evidence of Kirla, prosecution witness. His name was mentioned in the original report at the *thana* made by Lehnu immediately after the abduction. The Magistrate has believed his evidence and we see no reason to disbelieve it. In addition to this, there is the evidence detailed in the Magistrate's judgment as to *Musammat* Gulabi living in the appellant's house.

The remaining point is whether the appellant knew of the marriage. In regard to this, it has to be considered that he has

(2) 98 P. R. 1890.

known the woman for some years and lived near her, and we think that the Magistrate was justified in presuming knowledge on his part. Kirla's evidence shows that the appellant was the actual abductor and we have no doubt that he abducted her from Lehnu's house and that he very well knew that she was Lehnu's wife. We, therefore, dismiss the appeal and confirm the finding and sentence. The appellant, who is at present on bail, should return to jail and complete his sentence.

Appeal dismissed.

PATNA HIGH COURT.
CRIMINAL REVISION No. 122 OF 1919.
May 21, 1919.
Present:—Mr. Justice Das.
TENI PRASAD SINGH AND OTHERS—PETITIONERS
versus
SARJOO SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 133—Obstruction, order directing removal of—Findings necessary to confer jurisdiction—Bona fides *of claim.*

In proceedings under section 133, Criminal Procedure Code, it is necessary to establish, *first*, that the act complained of is a nuisance or an obstruction; and, *secondly*, that it was committed in a public place which may lawfully be used by the public. [p. 844, col. 2; p. 845, col. 1.]

The question of the *bona fides* of a claim is a question of fact which has to be inquired into like any other question of fact. [p. 845, col. 1.]

Criminal revision against the order of the Deputy Magistrate, Patna, dated the 12th April 1919, directing the petitioners to remove an obstruction.

FACTS of the case are that in survey plot No. 222 the petitioners put up a Nad. On the complaint of the opposite party that by the erection of this building an unlawful obstruction had been caused to the public pathway and that the opposite party was, therefore, prevented from having free access to his house, the Deputy Magistrate drew up proceedings under section 133. The petitioners objected that the Criminal Court had no jurisdiction in the matter inasmuch as the survey plot No. 122 was not a public pathway at all.

Mr. *Gour Chandra Pal*, for the Petitioners, argued that (1) there being no clear and distinct finding that this was not a *bona fide* dispute or that the claim was a mere pretence on behalf of the accused, the order was without jurisdiction: *Manipur Dey* v. *Bidhu Bhusan* (1) and *Bhagat Pershad* v. *Ramrup Karmokar* (2). Secondly, the only evidence in the case is that the villagers used this path. But this does not prove that it is a public pathway. All that this shows is that the people of this village used this path, whereas it ought to have been established that the "members of the general unascertained mass of the public" not exclusively of that village were in the habit of using that path: Reads *Queen-Empress* v. *Jasoda Nand* (3) and *Jhunnu Singh* v. *Emperor* (4).

Mr. *Hasan Imam* (with him Mr. *S. K. Banerji*), for the Opposite Party, argued that in survey regarding survey plot No. 222 the entry is "*Rasta ghairmazrua aam*," *i.e.*, "pathway uncultivated and public:" Reads *Bharosa Pathak* v. *Emperor* (5). The rulings cited by the other side do not decide what my learned friend contends. The Magistrate has considered the question whether or not it is a *bona fide* dispute and whether or not it is not a public pathway. Those findings cannot be challenged in appeal. Reads section 268, Indian Penal Code.

JUDGMENT.—The petitioners complain against an order passed by a Magistrate of Patna requiring them to remove an obstruction on a public road, which is survey plot No. 222. The petitioners deny that survey plot No. 222 is a public road and claim it as their Sahana. In proceedings under section 133, Criminal Procedure Code, it is necessary to establish, *first*, that the act complained of is a nuisance or an obstruction, and *secondly*, that it was committed in a public place which may lawfully be

(1) 26 Ind. Cas. 146; 18 C. W. N. 1086; 42 C. 159; 15 Cr. L. J. 698.
(2) 27 Ind. Cas. 224; 21 C. L. J. 116; 16 Cr. L. J. 160.
(3) 20 A. 501 at p. 505; A. W. N. (1898) 141; 9 Ind. Dec. (N. S.) 632.
(4) 4 Cr. L. J. 65; A. W. N. (1903) 190.
(5) 13 Ind. Cas. 999; 34 A. 345; 9 A. L. J. 355; 11 Cr. L. J. 183.

used by the public. It is admitted that a building has been put up on survey plot No. 222. So far as the second question is concerned, the learnad Magistrate has considered the evidence bearing on the point and has come to the conclusion that plot No. 222 is a public pathway which is or may be lawfully used by the public.

It is urged, however, that the claim of the petitioners is a *bona fide* claim and that such a claim ousts the jurisdiction of Criminal Courts. But the question of *bona fides* of a claim is a question of fact which has to be enquired into like any other question of fact, see *Nundo Gopal Chatterjee* v. *Kusum Kumar Banerjee* (6). The learned Magistrate has enquired into the question of *bona fides* and has recorded a finding adverse to the petitioners. In my opinion, there is no substance in the application, which must be refused.

Application refused.

(6) 1 C. L. J. 434; 2 Cr. L. J. 349.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 71 OF 1919.

February 19, 1919.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

MRITUNJOY GOU AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 487—Penal Code (Act XLV of 1860), s. 188—Disobedience to order promulgated by public servant—Magistrate, whether can try offence for disobedience of his own order.

No Magistrate can take cognizance of an offence under section 188 of the Penal Code except in the manner prescribed by section 195, Criminal Procedure Code, even where the offence arises out of a disobedience of the Magistrate's own order. [p. 845, col. 2.]

A Magistrate whose order has been disobeyed cannot, under section 487, Criminal Procedure Code, try the person guilty of the disobedience. [p. 845, col. 2.]

Rule against an order of the Sub-Divisional Magistrate, Kalna, dated the 4th January 1919.

Babus *Dasarathi Sanyal* and *Debendra Narayan Bhattacharjee*, for the Petitioners.

Babus *Manmatha Nath Mookerjee* and *Mukunda Behari Mullick*, for the Opposite Party.

JUDGMENT.—It appears that in connection with a civil suit pending in the Court of the Subordinate Judge at Burdwan the plaintiff Srishtidar Mullick was appointed a Receiver. One of the properties in respect of which the Receiver was appointed was a ferry at Sutraghat. The Receiver met with opposition in getting possession and ultimately on the 11th November 1918, Mr. K. B. Mullick, Sub-Divisional Officer of Kalna, passed an order under section 144 of the Criminal Procedure Code directing the petitioners "to abstain from going either to ply any ferry boat or to erect any *bund* on the *khari* at or near Sutraghat and also from obstructing, Srishtidar to ply a ferry boat or to erect a *bund* over them."

This order seems to have been duly served on the petitioners, who were the second party in that proceeding. Subsequently there was a report by the Police that the petitioners had disobeyed the order under section 144, and on receipt of this report the Magistrate on the 4th January 1919 directed the issue of process against the petitioners to answer to a charge under section 188 of the Indian Penal Code.

This Rule was issued calling upon the District Magistrate and Srishtidar, the Receiver, to show cause why the order directing the issue of processes should not be set aside on grounds Nos. 1, 4 and 5 mentioned in the petition.

It is clear that no Magistrate was competent to take cognizance of the case except in accordance with the provisions of section 195, Criminal Procedure Code, and that Mr. Mullick, whose own order was disobeyed, was not competent to try the case (section 487, Criminal Procedure Code). The point is not disputed and the Rule is made absolute on this ground alone.

It will, however, be still open to the Magistrate to consider whether it is a fit case for grant of sanction under section 195.

It has been brought to our notice that the Police, purporting to act under the authority of the order passed by the Magistrate under section 144, broke down a causeway which had been erected by the petitioners themselves

before that order was passed. It will be for the Magistrate to consider whether this action of the Police was or was not justified, and whether under the circumstances it is desirable to take any further action against the petitioners.

Rule made absolute.

PATNA HIGH COURT.
CRIMINAL REVISION No. 109 OF 1919.
May 14, 1919.
Present:—Mr. Justice Das.
BABU KHAN AND OTHERS—PETITIONERS
versus
Babu RAJ KISHORE PERSHAD NARAYAN SINGH AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 147, proviso—Jurisdiction, basis of—Exercise of right within three months, proof of.

An order under section 147 is without jurisdiction if it is made in the absence of any finding that the right in dispute was exercised within 3 months anterior to the enquiry. [p. 846, col. 2.]

In order to vest a Court with jurisdiction to deal with a matter under section 147 of the Criminal Procedure Code it must appear that where the right to do such thing is exerciseable at all times of the year, the right has been exercised within three months next before the institution of the enquiry, or where the right is exerciseable only in particular seasons or on particular occasions, the right has been exercised during the last of such seasons. [p. 846, col. 2.]

Guru Prasad Dhar v. *Lachman Ram Ghose*, 19 Ind. Cas. 959; 14 Cr. L. J. 303, relied upon.

Pasupati Nath Bose v. *Nundo Lal Bose*, 5 C. W. N. 67, distinguished.

Criminal revision against the order of the Sub Divisional Officer, Behar.

Messrs. *Akbari*, *Khurshed Husnain* and *Nawal Kishore Prasad*, for the Petitioners.

Messrs. *Ganesh Dutt Singh* and *Jalgobind Sinha*, for the Opposite Party.

JUDGMENT.—I am of opinion that the order passed by the learned Sub-Divisional Officer of Behar under section 147 of the Criminal Procedure Code must be set aside, on the ground that he has not shown that the right claimed by the second party has been exercised during the last season. The dispute between the parties refers to the right claimed by the second party to put a dam across the mouth of a Pyne. The first party says that the second party has no such right. The Court has come to the conclusion that the second party has such right and "that they have all along been exercising that right." It is argued before me by Mr. Akbari on behalf of the first party petitioners that in order to vest a Court with jurisdiction to deal with a matter under section 147 it must appear that where the right to do such thing is exerciseable at all times of the year, the right has been exercised within three months next before the institution of the enquiry, or where the right is exerciseable only in particular seasons or on particular occasions, the right has been exercised during the last of such seasons. In this case the second party claims the right to erect the dam only at particular seasons, in fact only once a year. Therefore, Mr. Akbari argues that the Court has no power to permit the second party to construct the *bandh* unless it is of opinion that the right has been exercised during the last season.

The Court, however, comes to the finding that they have all along been exercising that right. In my view this is not the same thing as saying that the right has been exercised during the last of such seasons, because it may be that the second party has been constructing a dam year after year for the last fifty years but they did not construct a dam during the last season. The Court on those facts would be entitled to come to the conclusion that they have all along been exercising that right and yet could not come to the conclusion that the right has been exercised during the last of such seasons. This argument is considerably strengthened by form No. 24 given in Schedule V. I may also refer to a case reported as *Gur. Prasad Dhar* v. *Lachman Ram Ghose* (1). In that case it was laid down by Sir Richard Harington and Mr. Justice Coxe that an order under section 147 of the Criminal Procedure Code is without jurisdiction if it is made in the absence of any finding that the right was exercised within three months anterior to the enquiry. The learned Judges in that case say: "If the Magistrate reads the proviso to section 147, he will see the procedure to be followed before he can make an order under section 147 and if he

(1) 19 Ind. Cas. 959; 14 Cr. L. J. 303.

looks at the form No. 24, Schedule V, he will notice that the Legislature has provided a form in which the order should go." Mr. Ganesh Dut Singh, however, relies upon a case reported as *Pasupati Nath Bose* v. *Nando Lal Bose* (2). In that case what was claimed was an uninterrupted use of the water of the *nullah* and the Court recorded a finding that the first party, the Ticcadar and Zemindar, had proved an uninterrupted use of the water of this *nullah* for twenty years which they had enjoyed as an easement and as of right. Clearly in the facts of that case that finding was quite sufficient to invest the learned Magistrate with jurisdiction to deal with the matter under section 147 because the right claimed was an uninterrupted right, but here the right claimed is to erect a *bandh* only once a year at a particular season. Therefore, in my view the decision in *Pasupati Nath Bose* v. *Nundo Lal Bose* (2) is not to the point.

I hold that in the absence of a finding that the right has been exercised during the last season, the order under section 147 of the Code of Criminal Procedure passed by the learned Sub-Divisional Officer is without jurisdiction and consequently that order must be set aside.

Order set aside.

(2) 5 C. W. N. 67.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 225 OF 1918.

CRIMINAL REVISION PETITION No. 175 OF 1918.

November 8, 1918.

Present:—Mr. Justice Sadasiva Aiyar.

NALLAYA NAICK AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 447—Criminal trespass—Warrant for delivery of land by Civil Court—Refusal of Amin to inspect documents showing rights in derogation of delivery warrant—Offence.

An Amin of a Civil Court cannot be charged with criminal trespass for delivering property to a person covered by a delivery warrant of Court, although a portion of the property is claimed by a different person whose documents of title the Amin refuses to inspect

or act upon. It is not for the Amin to determine whether his superior officer might not have committed a mistake in issuing the warrant.

A person assisting an Amin in doing his duty cannot be held guilty of criminal trespass.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Sivakasi Division, in Criminal Appeal No. 70 of 1917, preferred against the judgment of the Stationary 2nd Class Magistrate, Srivilliputtur, in Calendar Case No. 351 of 1917.

Dr. *S. Swaminadhan* and Mr. *A. N. Krishna Aiyangar*, for the Accused.

The Public Prosecutor, for the Crown.

ORDER.—The convictions and sentences cannot be upheld. The Amin (6th accused) has to obey the clear directions found in his delivery warrant and not to be looking into Exhibit C offered for his inspection and then to solve a difficult question of law, whether his superior officer might not have committed a mistake in issuing a delivery warrant in wider terms than was legally justifiable.

The other accused assisted the Amin in doing his duty and could not be convicted of criminal trespass or charged with illegal and dishonest intentions.

The convictions are set aside and the fines, if paid, will be refunded.

M. C. P.

Convictions set aside.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 20 OF 1919.

May 16, 1919.

Present :—Mr. Justice Das.

YUSUF AND OTHERS—PETITIONERS

versus

BUNI LAL MANDAL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Inquiry—cross-examination of complainant, whether ground for transfer—Criminal trial—Court, duty of.

YUSUF *v.* BUNI LAL MANDAL.

It is very important for Magistrates to remember that lawyers in charge of cases of accused persons have a large discretion in the way they should conduct the defence of accused persons. The position of accused persons is at all times of grave anxiety and Courts trying criminal cases should be specially on their guard not to do anything which may have the effect of increasing their anxiety.

Where a trying Magistrate stopped the cross-examination of the complainant in a case because in his view the complainant had been fully cross-examined for one hour:

Held, that the Magistrate was guilty of an act of indiscretion which could reasonably lead the accused to believe that they would not get a fair trial at his hands and that the case should be transferred to the Court of some other Magistrate.

Application for transfer of a criminal case from the file of the Sub-Divisional Officer, Araria.

FACTS briefly stated are that on 8th March 1919, the date fixed for the cross-examination of prosecution witnesses, the Court was held at Forbesgunj in camp. The Pleader who was retained for the defence did not come to the camp and a request by the accused for an adjournment was refused. The Magistrate, being of opinion that the defence Mukhtear had deliberately started a cross-examination of obstruction because the adjournment was refused, stopped the cross-examination of the complainant on the ground that he had been cross-examined for one full hour. The remaining prosecution witnesses were tendered for cross-examination and discharged because the accused's Mukhtear refused to cross-examine them before the cross-examination of the complainant had been completed to his satisfaction. The accused then put in a petition to the Court praying "that the complainant had not been cross-examined on the point of occurrence and the witnesses have been discharged by your honour. This has been prejudicial to the interest of your petitioners. Besides your petitioners' Mukhtear asked your honour's permission to cross-examine the complainant on the point of occurrence; but the witnesses were discharged by your honour. It is prayed that the orders may be passed for cross examining them." Upon this the Court passed the following order:—

"The complainant was fully cross examined for one full hour. He cannot be further cross-examined. The other witnesses were tendered for cross-examination but they were not cross-examined. I cannot do anything in the matter now."

Mr. *Athar Hussain*, for the Petitioners.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—I think that it is expedient that there should be a transfer of this case. In making this order I ought to say that, in my opinion, the learned Sub-Divisional Officer was not really guilty of any bias towards the accused persons, but he was, undoubtedly, guilty of an act of indiscretion which may reasonably lead the accused persons, and in this case has led them, to believe that they would not get a fair trial at the hands of the learned Sub-Divisional Officer. I do not think he should have stopped the cross examination of the complainant who was certainly the most important witness on behalf of the prosecution. I have read the cross-examination of the complainant and I am unable to say that there was anything irrelevant in that cross-examination, or that it was a cross-examination of obstruction as the learned Sub-Divisional Officer says. It is very important for the Magistrates to remember that lawyers in charge of cases of accused persons have a large discretion in the way they should conduct the defence of accused persons. As I said in a case which I decided the other day, the position of accused persons is at all times one of grave anxiety and Courts trying these cases should be specially on their guard not to do anything which may have the effect of increasing their anxiety.

I, therefore, transfer this case to the learned District Magistrate of Purneah who, if he chooses, may try the case himself or make it over to some Deputy Magistrate competent to try the case. Whoever tries the case will give an opportunity to the accused persons to cross-examine the complainant and the case will proceed from that stage.

Case transferred.

INDRA NARAIN *v.* DIJABAR SAMANTA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2556 OF 1917.

April 23, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Duval.

INDRA NARAIN SHAO—PLAINTIFF—APPELLANT

versus

DIJABAR SAMANTA—DEFENDANT, RAM CHAND AND ANOTHER *Pro forma* DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 132—Loan of paddy, repayment of, suit for—Charge on immoveable property—Limitation.

A. borrowed some paddy from *B.* and agreed to repay the price thereof with interest at a certain rate within a specified period; as security for the price he mortgaged certain lands to *B.* which, it was stipulated, *B* could attach and sell in the event of *A.* failing to re-pay. On *A.*'s failure *B.* brought the present suit, but it was dismissed on the ground that it was barred by limitation having been instituted more than six years after the due date of payment, and that Article 132 of Schedule I to the Limitation Act did not apply as no money was charged on the land:

Held, that there was a clear charge upon the land and that Article 132 was applicable to the case. [p. 850, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Midnapore, dated the 12th September 1917, reversing that of the Munsif, 1st Court at that place, dated the 23rd August 1916.

FACTS appear from the judgment.

Babu *Debendra Narain Bagchi* for Babu *Amarendra Nath Bose*, for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for satisfaction of money due on a mortgage-bond executed by defendant No. 1. Defendant No. 1 took a loan of 6 *arahs* of paddy from the plaintiff's grandfather in 1309 and agreed to repay the same in 1312 with interest at the rate of $1\frac{1}{2}$ pice per rupee mentioned in the bond. There was a clause in the bond which provided that in case of default by defendant, plaintiff would be entitled to recover the price of the paddy lent with interest thereon together with all the incidental expenses of attachment and sale by Court. The first Court decreed the suit. The lower Appellate Court, although finding in favour of plaintiff, dismissed the suit on the ground of limitation. My sole point is that the Court of Appeal below erred in holding that in a case like this Article 132 of the Limitation Act would not apply. I submit Article 132 applies to the case. See *Sripati Lal Dutt* v. *Sarat Chandra Mondal* (1) and *Nilmony Singha* v. *Haradhan Dass* (2).

Babu *Satcowripati Ray*, for the Respondents.—In every case when paddy is taken, the suit must be for recovery of money. The question is whether the mortgage was of paddy or any other property. Immoveable property cannot be charged for repayment. The case of *Rash Bihari Das* v. *Kunjabihari Patra* (3) acted upon by the lower Appellate Court is doubtful law. In all cases like the present the price of paddy lent must be stated for purposes of registration. But that cannot be taken to be a charge for the money. My submission is that the property mortgaged was for paddy and that, therefore, the paddy ought to be returned. In this view Article 132 is not applicable. The matter ought to be decided by a Full Bench in view of the decision in *Rash Bihari Das* v. *Kunjabihari Patra* (3).

Babu *Debendra Narain Bagchi* replied in brief.

JUDGMENT.—This appeal arises out of a suit upon a mortgage-bond. Various defences were raised in the case.

The Courts below have found in favour of the plaintiff upon all points, except that the lower Appellate Court has held that the suit is not governed by Article 132 Schedule II of the Limitation Act and that as it was instituted more than 6 years after the due date of payment, it was barred by limitation.

The mortgagor borrowed a certain quantity of paddy from the plaintiff and agreed to repay the paddy with interest at a certain rate mentioned in the bond. It is mentioned in the bond that the paddy was sold for Rs. 192. Then the stipulation in the bond is as follows: "If I do not repay the paddy within the period aforesaid, then on the expiry of the aforesaid period you will be entitled to recover the price of paddy with interest thereon at the rate of $1\frac{1}{2}$ pice per rupee per month, together with costs of Court by attachment and sale of the aforesaid lands (together with the crops thereon) which are given in mortgage for the repayment thereof."

(1) 46 Ind. Cas. 78; 22 C. W. N. 790.
(2) 13 C. W. N. CLXXXIV (184).
(3) 37 Ind. Cas. 805; 24 C. L. J. 348.

It appears, therefore, that money (the price of paddy with interest) was charged upon the immoveable property. The learned Subordinate Judge held that Article 132 was not applicable, relying upon a decision of this Court in the case of *Rash Bihari Das* v. *Kunjabihari Patra* (3) in which it was held that a suit upon a mortgage-bond to secure the repayment of the loan of certain paddy was not a suit to enforce payment of money charged upon immoveable property. But all the terms of that mortgage-bond do not appear from the report of the case and the judgment seems to have proceeded on the ground that no money was charged upon the property.

The question whether money is charged upon immoveable property must depend upon the terms of the bond in each case.

In the present case, as already stated, the mortgagee was expressly given the right to recover the price of the paddy with interest thereon at $1\frac{1}{2}$ pice per rupee per month (together with costs of Court), by attachment and sale of lands which were given in mortgage for the repayment thereof. There was, therefore, a clear charge upon the land for the price of the paddy.

We may refer to the case of *Sripati Lall Dutt* v. *Sarat Chandra Mondal* (1), where Fletcher and Shamsul Huda, JJ., in a somewhat similar case, held that the case would come under Article 132 of the Limitation Act. There the plaintiff lent a certain quantity of rice and the bond provided that if default was made in the *kists*, the mortgagees would be competent to realise the money which would be due at the rate of Rs. 6 per *man* and that the realization might be made by sale of the mortgaged property mentioned in the schedule to the bond and of all other moveable and immoveable properties belonging to the mortgagors. The learned Judges distinguished the case of *Rash Bihari Das* v. *Kunjabihari Patra* (3).

We may also refer to the case of *Nilmony Singha* v. *Haradhan Dass* (2) (Appeal from Appellate Decree No. 2804 of 1907). In that case the interest was payable in kind (paddy) and the case was held by Mookerjee, J., to be governed by Article 132.

In the present case as stated above, the bond expressly provided that the mortgagee would be entitled to realise the price of the paddy together with interest at $1\frac{1}{2}$ pice per rupee per month by sale of the mortgaged property.

We are accordingly of opinion that the case is governed by Article 132 of the Limitation Act.

The decree of the lower Appellate Court is, therefore, set aside and that of the Court of first instance restored with costs.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 704 OF 1917.

June 13, 1919.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

SUKHU KOERI—PLAINTIFF—APPELLANT

versus

RAM LOTAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XVII, r. 3—Party unable to proceed with case—Procedure—Court, duty of.

Where a litigant finds that he is unable from any cause to proceed further with his case, it is the business of the Court to dispose of the case upon the materials before it and not to dismiss it for default. [p. 851, col. 2.]

Second appeal against the decree of the Subordinate Judge, Jampur, dated the 6th March 1917.

Messrs. *B. E. O'Conor* and *Gokal Prasad*, for the Appellant.

Messrs. *Iqbal Ahmad*, *Mukhtar Ahmad* and *P. L. Banerji*, for the Respondents.

JUDGMENT.—This case seems to be a chapter of obstinacy and misfortune. It is difficult to imagine it happening in any other country and one is not surprised that the Code, which in some respects has gone out of its way to provide elaborate provisions for default, failure to appear and so forth, has not foreseen what in fact happened in this particular case in the year 1916, and there is really nothing to guide the Courts in the present position. But every Court has inherent power, so far as it is not limited and prohibited by express provisions, to do what is right to both parties when there has been some

failure or miscarriage, and to impose appropriate terms where that failure or miscarriage is clearly shown to be the fault of one party so that any injury to the other party may be avoided.

The plaintiff filed this suit sometime in the month of February 1916 making a claim which in substance turned upon the question whether he was a member of a joint or separate Hindu family, which does not in itself seem an extremely difficult point for a man to explain to a Judge in person. A written statement was put in and either in July or September, we have it under the Munsif's own signature that it happened in July, the plaintiff went into the box apparently at that time being looked by a Pleader and told his story with apparent conciseness and clearness and was partially cross-examined by the Pleader for one of the other defendants. From that it must be inferred that at any rate up to that stage the plaintiff had a *bona fide* belief in his own case which he wished to pursue. The cross examination was not completed apparently, judging from the Munsif's notes, by arrangement between the Pleaders. Therefore, it may be assumed that the plaintiff's own evidence was not completed to suit the convenience of the Pleaders on both sides. The 22nd of September 1916 was fixed for the renewed hearing. The plaintiff on that occasion appears to have been in a double difficulty. His Pleader was absent and some of the witnesses who had been summoned were not in attendance. The Court treated him with consideration. It gave him time till next day. It told him to go on with such witnesses as were present and to arrange to summon others by warrant at a fresh date to be fixed for their appearance. The adjournment for the next day was clearly to enable the plaintiff to provide himself with another Pleader or make arrangements for conducting the case. On the next day he was present in person. He said that he had secured a Vakil who had a criminal case pending against him. Whether that was a moral objection to the Vakil or a physical objection in the sense that his bodily presence was required elsewhere does not appear very clearly, but the net result was that the plaintiff was confronted with the choice of going on as best he could without any legal assistance. Here he seems either to have lost his head or to have shown unnecessary obstinacy. It would probably have been better if he put his witnesses in the box, but he declined either suggestion. He did not, in our opinion, withdraw the suit but merely confessed his inability to go on any further. The position at that stage was just as though any gentleman of the Bar arguing a case before one of us suddenly sat down; it would be our business to deliver judgment. And if a litigant finds himself unable to proceed further, we think that it is the business of the Court to dispose of the case on the materials before it, and that the learned Munsif who obviously was in considerable difficulty at this series of misfortunes was wrong in saying that the plaintiff did not want to prosecute the case. That was just what he did, but he did not wish to do it in the way in which he was invited to do. We think the Munsif had no alternative but to dispose of the case. The plaintiff at that stage put himself hopelessly in the wrong. After the Munsif had treated him with consideration and given him every opportunity, the plaintiff declined to call the witnesses who were available and even to engage another Vakil. The Munsif in disposing of the case purported to dismiss it for default. An appeal was brought from that judgment and the learned Subordinate Judge practically adopted what the Munsif had done and even put it in stronger language that the plaintiff had abandoned his suit. As we have said, we cannot agree that this is the correct view. This appeal is now brought by the plaintiff who wants his case heard. An objection is raised to the appeal upon the ground that the suit was dismissed for default and that no appeal lies from such order either to the lower Appellate Court or to ourselves. So far as that is concerned, the nearest rule applicable to the circumstances we have described is Order XVII, rule 3, of the Code of Civil Procedure and there is a decision binding upon us that where that rule applies, the duty of the trial Court is to dispose of the suit on the merits and not to dismiss it for default [*Badam* v. *Nathu Singh* (1)]. And the view taken in that case at any rate is that the unsuccess-

(1) 25 A. 194; A. W. N. (1903) 6.

ful party has a right of appeal for what it is worth. We, therefore, hold that we are bound to entertain this appeal. On the other hand there being no express rule exactly applicable, we think we ought in the exercise of our inherent jurisdiction to do what appears to us most nearly to meet the ends of justice. As we have said, the plaintiff was entirely at fault and the defendant had a right to have the suit disposed of on the merits.

We think the proper order to make under the circumstances is that the plaintiff shall, at any rate as a condition of having his suit tried at all, put the defendant in the same position as if this miscarriage had never occurred, that is to say, he must pay in cash into the Court of the Munsif a sum of Rs. 369 2 9, representing the costs due to the three defendants in the two Courts as set out in the decree of the lower Appellate Court, unless, of course, any of these costs have already been paid, in which case credit for such payment must be given. He must also deposit in cash or security, sufficient in the opinion of the Munsif, a sum of Rs. 250 as security for the future costs of the suit in the trial Court only, that is to say, whatever the costs in the trial Court for the further hearing may be. The plaintiff will be entitled any surplus between that amount and the sum of Rs. 250. Upon the payment of the first sum in cash into the Munsif's Court and the deposit of the second sum either in cash or in some other form of security by way of security for the future costs within three months from this date, we allow the appeal, set aside the orders of both the Courts below and remand the case under Order XLI, rule 23, of the Code of Civil Procedure to the Court of first instance through the lower Appellate Court, with directions to re admit the suit, under its original number in the register of civil suits and proceed to determine it according to law. The costs of this appeal will abide the ultimate result of the suit, including fees on the higher scale. If at the expiration of three months those sums have not been either paid or deposited, the plaintiff's suit and this appeal will stand dismissed with costs including in this Court fees on the higher scale.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 257 OF 1918.

May 26, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Duval.

ANANDA CHANDRA PAL—DECREE-HOLDER—APPELLANT

versus

Srimati ASRAB BHANU AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Landlord and tenant—Kaimi raiyati, *meaning of.*

Kaimi raiyati does not necessarily import fixity of rent, and such a holding is not transferable and, consequently, is not liable to attachment and sale in execution of a decree for money.

Appeal against the order of the District Judge, Tipperah, dated the 27th April 1918, reversing that of the Munsif, 3rd Court, Chandpur, dated the 13th December 1917.

FACTS appear from the judgment.

Babu *Prakash Chandra Majumdar*, for the Appellant.—The decree holder is the appellant. He proceeded to execute the decree. The judgment-debtor objected to the execution on the ground that the holding could not be attached as it was an occupancy holding. My point is that the holding, which the judgment-debtor calls *kaimi raiyati* holding, does not mean a non-transferable occupancy-holding. It has been proved that the holding was transferred from time to time. Further the parties themselves mean by a *kaimi raiyati* holding a transferable holding. The lower Appellate Court did not reverse the first Court's findings because it disbelieved them, but simply on philological grounds, which is erroneous.

Babu *Hemendra Kumar Das*, for the Respondents.—I never admitted that the holding was a transferable holding. The rent receip's showed that the holding was an ordinary *raiyati* holding. The landlord describes the holding as *raiyati*.

Babu *Prakash Chandra Mazumdar* replied briefly.

JUDGMENT.—It is found that the holding sought to be attached and sold in execution of the decree for money is not transferable.

It is contended, however, that the judgment-debtor set up a distinction between *kaimi raiyati* and ordinary *raiyati* and it was the case of the judgment-debtor that the holding was not *kaimi raiyati*. *Kaimi raiyati* does not necessarily import fixity of rent, and the mere fact that the distinction was set up by the judgment-

debtor between *kaimi raiyati* and ordinary *raiyati* cannot estop him from showing that his holding was merely an ordinary occupancy holding. The Judge has taken into consideration the fact of the previous transfer and the statements contained in the deeds of sale, and has come to the conclusion that the holding is non transferable.

The appeal must accordingly be dismissed with costs, one gold *mohur*.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 558 OF 1919

June 13, 1919.

Present:—Mr. Justice Dundas.

MAULA BAKHSH AND OTHERS—DEFENDANTS—APPELLANTS

versus

DASONDHI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Village common land—Appropriation by small section for particular use, whether permissible.

It is not permissible to convert a *takia* built on *shamilat* into a mosque, thereby diverting the property from the purpose for which it was given and depriving a considerable section of the community of its use [p 854, col. 1.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 3rd February 1919, reversing that of the Subordinate Judge, 2nd Class, Hoshiarpur, dated the 2nd December 1918, dismissing plaintiffs' suit with costs.

The Hon'ble Mian *Muhammad Shafi* and the Hon'ble Mian *Fazl i-Husain*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—Plaintiffs in this case sued for an injunction to restrain certain Musalmans of Basti Hast Khan in the Hoshiarpur District from building a *pucca* mosque on a plot of land in the village *abadi* described as a *takia*. The first Court found, first, that the Hindus of the village had never actually used this *takia* for their marriage parties; secondly, that the plaintiffs, who suffered no special damage, had no *locus standi* to object to the completion of the mosque; and thirdly, that, as a matter of fact, the pre existing platform had been used as a place of prayer. The District Judge differed from these findings. He concluded that the *takia* was not a mosque, although the spot may have been used for the purposes of *janaza* prayers. He recorded a finding that "there is ample evidence in the present case to the effect that this *takia* is used by persons other than Musalmans," and lastly he considered that the conversion of this *takia* into a mosque would certainly affect the plaintiff whose house is closeby and whose cattle are tethered on the land in front. The learned District Judge was much influenced by the decision of the Chief Court in a very similar case, *Sawan* v. *Mehr Din* (1) (Civil Appeal No. 3139 of 1916, decided on the 6th May 1918). The defendants have preferred a second appeal.

The first ground of appeal merely points out that Muhammadans formerly owned the entire village and it is only in recent times that a small portion, in fact only a one-twelfth share, has been sold to Hindus. This way of putting it is, however, somewhat misleading, inasmuch as it would appear that the number of Muhammadans is small. In fact there are only some four houses of Muhammadans as opposed to some forty houses inhabited by Hindus and the greater number of the population are evidently Hindus. Then it is pointed out that the offer of Dasondhi, plaintiff, to provide a piece of ground for the mosque elsewhere is vague as he does not own anything except a share in the *shamilat*. This, however, does not seem to be very material. It is quite evident that the conversion of this *takia* into a mosque will certainly be a nuisance to the plaintiff, Dasondhi, but he could not probably object to it on that ground alone.

The appellants' great difficulty is the finding of the learned District Judge that this *takia* has been used from time to time as the resting place for the marriage parties of Hindus. This is a finding of fact and the learned Counsel for the appellants can only get round this difficulty by questioning the fact that the District Judge did come to any such finding opposed to the conclusion of the first Court. There can, however, be no doubt as to what the

(1) 45 Ind. Cas. (o.s.) 108 P. W. R. 1918.

learned District Judge means and there is a very considerable amount of evidence on the record that many marriage parties, of which the names and occasions are given, have used this *takia*. This fact must be regarded as now beyond question and it disposes of the contention that the spot can be regarded as a mosque. As indeed has been pointed out by the respondents, this place is described in the Settlement as *shamilat*, a *takia* occupied by Daula Shah and others, and there is no hint that the call to prayers is ever given here or that there is any *imam* or *mutwalli*. Now taking the finding that this *takia* is used by all sections of the community and is not a mosque, it is evident that those persons who would be deprived of the use of this piece of common land have a right to object to its entire appropriation by the smaller section, *vide* sections 225 and 227 of Rattigan's Digest.

I have been referred to one or two old cases in which a co-sharer has built a house on some portion of a village common land but its demolition has been refused, but these cases are not entirely in point. The matter has been most fully discussed in the recent Chief Court judgment quoted above and the conclusion arrived at that it is not permissible to convert a *takia* into a mosque, thereby diverting the property from the purpose for which it was given and depriving a considerable section of the community of its use.

The facts in that judgment were on all fours with the facts in the present case, and the decision in this case must follow that then given, which indeed, on the finding that the place is not a mosque, was conceded before the learned District Judge.

The appeal is dismissed with costs accordingly.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1846 OF 1917.

February 3, 1919.

Present:—Mr. Justice Teunon and Mr. Justice Walmsley.

GADADHAR BHATAK—PLAINTIFF—APPELLANT

versus

SATISH CHANDRA GHOSE AND OTHERS —DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Property in possession of one member—Presumption—Transferee from member, position of—Burden of proof.

A transferee from a member of a joint Hindu family of property, acquired and standing in the name of his vendor, must show that the property was the separate property of his vendor, although there was no nucleus of ancestral joint family property. [p. 855, col 2.]

The presumption that property standing in the name and in the possession of a member of a joint Hindu family is joint family property would arise even where there was in fact no nucleus of ancestral joint family. [p. 855, col. 2.]

Taruck Chunder Totadar v. *Joodheshteer Chunder Koondoo*, 19 W. R. 178; 11 B. L. R. 193 and *Dhunookdharee Lall* v. *Gunput Lall*, 10 W. R. 122; 11 B. L. R. 201 *note*, relied upon.

Appeal against the decree of the Additional District Judge, Howrah, dated the 18th May 1917, modifying that of the Subordinate Judge, Howrah, dated the 27th April 1915.

FACTS appear from the judgment.

Babu *Dhirendra Lal Kastgir* (with him Babu *Khitish Chandra Sen*), for the Appellant, contended that the learned Court of Appeal below decided the case by wrongly throwing the onus on the plaintiff. It was an undisputed fact that Harakumar and Satcouri had not got any ancestral property by inheritance. They had separate earnings of their own, although they used to live together, in jointness. While thus living together, Satcouri purchased the property and subsequently obtained a permanent lease from the landlord. The finding also was that Satcouri, and after his death his widow, the plaintiff's vendor, were all along in possession of the property, exercising all the acts of full ownership. Satcouri and Harakumar did not constitute a joint family in the sense in which that expression is used in Hindu Law. Considering that there was no nucleus of ancestral joint family property, the presumption that would arise under the Hindu Law would

be that the disputed property was the self-acquired property of Satcouri, and unless the defendant could prove that it had been purchased with the joint funds of the two brothers in the name of Satcouri, plaintiff was entitled to succeed. The authorities show that where there was no nucleus of ancestral joint family property, the mere fact that the brothers were joint in mess would not constitute any and every property acquired by a brother to be a joint family property.

[TEUNON, J.—The brothers were living jointly at the time when the property was acquired; you must show that it is your self-acquired property.]

Merely living jointly does not constitute a Hindu joint family in the legal sense of the expression. The onus was on the defendant to show that it was the joint property of the two brothers. The presumption would arise in favour of the plaintiff, and the defendant must rebut that presumption by giving proof in support of his case.

Mr. *H. D. Bose* (with him Dr. *Dwarkanath Mitter* and Babu *Haradhan Chatterjee*), for the Respondents, urged that the plaintiff could not succeed unless he could prove that it was the self-acquired property of one of the two brothers who were living together as members of a Hindu joint family. Even if there was no nucleus of ancestral joint family property, the presumption was in favour of the defendant. Referred to *Dhunookdharee Lall* v. *Gunput Lall* (1) and *Taruck Chunder Totadar* v. *Joodheshteer Chunder Koondoo* (2).

Babu *Dharindra Lal Kastgir* briefly replied.

JUDGMENT.

TEUNON, J.—The appeal arises out of a suit brought by the plaintiff to recover possession of a certain plot of land on declaration of title.

It appears that in the town of Howrah there were two brothers, named Haranath and Satcouri. In the year 1877 a parcel of homestead land was bought in the name of Satcouri and in the year 1879 a confirmatory *pattah* was granted by the landlord also in his name. On this parcel of homestead land stood a building to which at some later period certain additions were made. The elder brother Haranath died about the year 1887. His son Jogendra died in 1892. Satcouri lived to the year 1905. Thereafter in the year 1911 the widow of Satcouri sold this parcel of land with the building standing thereon to the plaintiff, and in the same year the widow of Jogendra sold the same property to the defendants. The contest in this suit and in this appeal is between these two rival purchasers.

The contention of the plaintiff is that the premises were the sole self-acquired property of Satcouri, while the case of the defendants, the respondents before us, is that it was joint family property. Now the facts as found are these: The premises, as we have already said, were bought in the name of Satcouri, in whose name also was issued the confirmatory *pattah* in the year 1879. It has then been found by the Judge that in this house Haranath and after him Jogendra lived with the younger brother Satcouri as members of a joint Hindu family. It has been found that there was in fact no nucleus of ancestral joint family property. It has further been found that at the time when the premises were purchased and again at the time when the additions were made, Haranath and after him Jogendra, and Satcouri alike were earning substantial incomes. In this state of facts the learned Judge has thrown upon the plaintiff-appellant the onus of proving that this property was purchased by Satcouri on his own account and was his separate property. The only question in the appeal is whether in doing so he has misplaced the onus. The contention of the appellant is that the presumption that all property in the possession of any member or members of a joint Hindu family is joint property arises only when it has been shown that there is a nucleus of joint family property. Now, on that point there is in the decision of this Court some conflict. But we think that we ought to follow in this case the decision of Chief Justice Couch and Mr. Justice Glover: *Taruck Chunder Totadar* v. *Joodheshteer Chunder Koondoo* (2). In that case after an analysis of the decisions of their Lordships of the Judicial Committee, Couch, C. J., clearly laid down that though it might be

(1) 10 W. R. 122; 11 B. L. R. 261 *note*.
(2) 19 W. R. 178; 11 B. L. R. 193.

useful for the plaintiff in such a case as this to show that there was a nucleus of property, he could not agree in such a case that plaintiff-appellant was bound to prove the existence of such nucleus. Much to the same effect is the decision of Jackson and Dwarka Nath Mitter, JJ., in *Dhunookdharee Lall* v. *Gunput Lall* (1). No doubt in that case there was a nucleus, but it was found, as a fact, that this nucleus was insufficient. On the authority of these two cases which have not been overruled by a decision of the Full Bench of this Court or by any decision of the Judicial Committee, we must hold that the learned District Judge was right in placing the onus on the plaintiff-appellant who asserted that the premises were the separate property of his vendor.

This appeal is dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 519 OF 1916.

June 9, 1919.

Present :—Mr. Justice Walsh and Mr. Justice Ryves.

JAGDISHWAR PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHEO BAKHSH RAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Public policy—Contract to pay money after performance of marriage, validity of—Hindu Law—Alienation by female—Legal necessity—Money paid for one purpose diverted to another.

Where a contract provides that when a marriage has been arranged and performed the parent of either the boy or the girl who is a party to the marriage shall pay a certain sum of money, the contract is not void *ab initio* as being opposed to public policy. [p. 856, col. 2.]

The fact that money advanced to a Hindu female for one legal necessity is used or diverted to some other purpose equally valid is not sufficient in itself to invalidate the transaction. [p. 857, col. 1.]

Second appeal against the decree of the District Judge, Allahabad, dated the 31st May 1915.

The Hon'ble Dr. *Tej Bahadur Sapru*, Messrs. *D. C. Banerji* and *Kanhya Lal*, for the Appellants.

Dr. *S. N. Sen* and Mr. *Gokul Prasad*, for the Respondents.

JUDGMENT.—We have come to the conclusion that this appeal must be dismissed. There is nothing in the question of public policy raised. No doubt, it is the law in India as in England that a contract to provide a child in marriage in consideration of a money payment will not be enforced in a Court of law. That is a very different thing from saying that when a marriage has been arranged and performed, a payment by the parent of either the boy or the girl who is a party to the marriage is a contract which is void *ab initio* as being against public policy. No authority has been quoted which goes to this length and which would involve condemning a large proportion of marriage contracts in this country. Secondly, we cannot find anything in section 92 of the Evidence Act against which this case, as found by the Courts below, offends. In substance the document in question stipulated for consideration divided into three classes, Rs. 500 for pilgrimage to Gya, Rs. 500 for debts in connection with the lady's daughter's marriage and Rs. 200 for the repairs of her house. Each of these classes of liability would be sufficient, if established in fact, to support legal necessity. On the facts found Rs. 1,200 of the Rs. 2,000 was money retained by the mortgagee to be used as and when it suited the mortgagor's purpose for the repairs of the house. Circumstances, however, becoming too strong for her and involving a change of intention, Rs. 1,000 of this Rs. 1,200, in the events which happened, was utilised to discharge a liability which she had incurred to the father of her daughter's husband in respect of her daughter's marriage. Whether or not owing to the fact that her daughter had already been betrothed and had reached the somewhat advanced age of eighteen exceptional pressure was exercised upon her does not really matter in our opinion. The long and short of it is this that whereas the money was advanced for legal necessity which included amongst other things liabilities in respect of the daughter's marriage, in the event, after it was advanced, it was used or diverted to some other purpose equally

valid, which would have been sufficient to support the transaction if it had been the original object and stated consideration for which the advance was made. We do not think that this circumstance is sufficient in itself to invalidate the transaction. We, therefore, agreeing with the lower Appellate Court, dismiss this appeal with costs, including in this Court fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 134 OF 1918.

October 22, 1918.

Present:—Mr. Justice Abdur Rahim.

T. VENKATAKRISHNAMA CHARLU—DEFENDANT—PETITIONER

versus

Karnam ARUNACHALAM PILLAY—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 70, scope of—'Lawful payment' meaning of—Payment made on behalf of another, whether can be recovered.

A payment is said to be "lawful" within the meaning of section 70 of the Contract Act, if it is shown to have been made in good faith or was not an unlawful payment, and the person making the payment did not intend the payment to be gratuitous, but expected compensation for it. What is lawful payment will depend on the facts of each particular case. Where a payment is made against the protest of the person on whose behalf it purports to have been paid, it would not be covered by the section. [p. 858, cols. 1 & 2]

Chedi Lal v. *Bhagwan Das*, 11 A. 234; A. W. N. (1889) 67; 6 Ind. Dec. N. S.) 577 and *Panchkori Ghosh* v. *Hari Das Jati*, 34 Ind. Cas. 341; 21 C. W. N. 394; 25 C. L. J. 325, not followed.

Ram Tuhul Sing v. *Biseswar Lall Sahoo*, 23 W. R. 205; 15 B. L. R. 208; 2 I. A. 131; 3 Sar. P. C. J. 477; 3 Suth. P. C. J. 136, distinguished.

Damodara Mudaliar v. *Secretary of State for India*, 18 M. 88; 4 M. L. J. 205; 6 Ind. Dec. (N. S.) 410, *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar*, 3 Ind. Cas. 110; 33 M. 15; 6 M. L. T. 162; 19 M. L. J. 489 and *Saptharishi Reddiar* v. *Secretary of State for India*, 28 Ind. Cas. 309; 28 M. L. J. 284; 17 M. L. T. 234; 2 L. W. 329; (1915) M. W. N. 256, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Chittoor, in Small Cause Suit No. 611 of 1917.

Messrs. *V. Lakshminarayana* and *P. M. Srinivasa Aiyangar*, for the Petitioner.

Messrs. *A. Chidambaram* and *C. L. Nilakanta Mudaliar*, for the Respondent.

JUDGMENT.—It is found by the District Munsiff that the payment of a quit-rent by the plaintiff was made for the benefit of the defendant, who was liable for the quit-rent. At the same time he has found that the payment was not made at the request of the defendant. The Munsif, however, finds upon the facts, and no doubt rightly, that the plaintiff did not intend to make the payment gratuitously. Under section 70 of the Indian Contract Act, "where a person lawfully does anything for another person or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered." The wording of the section, as has been observed in a number of cases, is very wide and is wider than the rule of the English Common Law. But there are cases in which a narrow interpretation has been placed on the word "lawfully." For instance in *Chedi Lal* v. *Bhagwan Das* (1) it is stated by Straight, J., at pages 242 and 243: "I pointed out to Mr. Simeon that if you could read section 70 of the Contract Act without the word 'lawful' in it, I might go to the full length of the contention set up by him. But I presume that the Legislature intended something when it used the word 'lawful' and that it had in contemplation cases in which a person held such a relation to another as either directly to create or by implication reasonably to justify an inference that by some act done for another person the party doing the act was entitled to look for compensation for it to the person for whom it was done." Reliance is also placed by the learned Vakil for the petitioner on the ruling of the Privy Council in *Ram Tuhul Sing* v. *Biseswar Lall Sahoo* (2), where it is stated as a general proposition: "It is not in every case in which a man has benefited by the money of another, that an obligation to repay the money arises. The question is not to be determined by vice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or

(1) 11 A. 234; A. W. N. (1889) 67; 6 Ind. Dec. (N. S.) 577.

(2) 23 W. R. 205; 15 B. L. R. 208; 2 I. A. 131; 3 Sar. P. C. J. 477; 3 Suth. P. C. J. 136.

implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B*'s debt. Still less will the action lie when the money has been paid, as here, against the Will of the party for whose use it is supposed to have been paid, *Stokes* v. *Lewis* (3). Nor can the case of *A* be better because he made the payment not *ex mero motu*, but in the course of a transaction which, in one event, would have turned out highly profitable to himself, and extremely detrimental to the person whose debts the money went to pay." This is a statement of law which is not based on the words of section 70 of the Contract Act and if we read this proposition in the light of the facts, I think the case is easily distinguishable from the present case. In the present case there can be no doubt that the payment by the plaintiff was made in good faith; he certainly did not intend the payment to be gratuitous; he expected compensation for it. As has been pointed out by Pollock and Mulla in their commentary on the Contract Act, section 70 enacts a law wider than the English Common Law on the subject. The preponderance of rulings in this High Court does not support the restricted view which found favour with the Allahabad High Court in *Chedi Lal* v. *Bhagwan Das* (1) or with the Calcutta High Court in *Panchkori Ghosh* v. *Hari Das Jati* (4). It was laid down in the latter case that "to entitle a person to claim the benefit of section 70 of the Contract Act, the payment must have been *laufully* made, that is, by a person having a lawful interest in making it and not some interest from the point of view of the payer." If by that is meant that there must be some interest like that mentioned in section 69, I must, with great respect, observe that I find no warrant for any such limitation. On the other hand as far back as *Damodara Mudaliar* v. *Secretary of State for India* (5), it was held by this Court: "Certainly there may be difficulties in applying a rule stated in such wide terms as is that expressed in section 70. According to the section it is not essential that the act shall have been necessary in the sense that it has been done under circumstances of pressing urgency, or even that it shall have been an act necessary to be done at sometime for the preservation of property. It may, therefore, be extended to cases into which no question of salvage enters, it is not limited to persons standing in particular relations to one another; and, except in the requirement that the act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done." This view of the law has found acceptance in later rulings of this Court. *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (6) and *Sapthavishi Reddiar* v. *Secretary of State for India* (7). In the last mentioned case it was the view of Ayling, J., that the payment must be held to be lawful within the meaning of the section, if it could be shown to have been made in good faith or that it was not an unlawful payment. It may not be easy to define what are the circumstances in which the payment would not be lawful; the case, for instance, in which a payment is made against the protest of the defendant would, I think, not be covered by section 70. I think the ruling in *Gajapathi Krishna Chandra Deo* v. *Srinivasa Charlu* (8) also supports the view which I am inclined to take in this case, and I do not think that the decision of the learned Chief Justice and Srinivasa Aiyangar, J, in *Jagapatiraju* v. *Sadrusannamarad* (9) lays down any proposition inconsistent with *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (6) and the other rulings to which I have referred. I, therefore, dismiss the petition with costs.

M.C.P.

Petition dismissed.

(3) (1785) 1 T. R 20; 99 E. R. 949.

(4) 34 Ind. Cas. 341; 21 C. W. N. 394; 25 C. L. J. 325.

(5) 18 M. 88 at p. 91; 4 M. L. J. 205; 6 Ind. Dec. (N. S.) 410.

(6) 3 Ind. Cas. 110; 33 M. 15; 6 M. L. T. 162; 19 M. L. J. 489.

(7) 28 Ind. Cas. 309; 28 M. L. J. 384; 17 M. L. T. 234; 2 L. W. 329; (1915) M. W. N. 256.

(8) 20 Ind. Cas. 445; 25 M. L. J. 433; (1914) M. W. N. 99; 14 M. L. T. 20; 38 M. 235.

(9) 31 Ind. Cas. 255; 39 M. 795; 29 M. L. J. 639; 2 L. W. 1046; 18 M. L. T. 464.

LACHMAN PRASAD *v.* RAM CHANDRA RAO.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 333 OF 1918.

February 18, 1919.

Present:—Sir Henry Drake-Brockman, KT., J. C.

LACHMANPRASAD—PLAINTIFF—APPELLANT

versus

RAM CHANDRA RAO—DEFENDANT—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), ss. 37, 64, 62—Hundi, *suit on—Presentment, failure to make —Liability of drawer, whether ceases.*

Plaintiff sued upon a *hundi* drawn by the defendant on himself and payable in 181 days. Defendant pleaded that there had been no presentment of the *hundi*. It was found that the *hundi* was not presented and the plaintiff's suit was dismissed on the ground that, under section 64 of the Negotiable Instruments Act, the defendant was not liable to the holder:

Held, that there was no necessity in this case for the bill to be presented for acceptance at all, the defendant, as drawer, being liable under section 37 of the Negotiable Instruments Act as principal debtor and there being no separate drawee. [p. 859, col. 2.]

The non-presentment for payment at maturity of a *hundi*, or bill of exchange, the presentment of which is required by section 66 of the Negotiable Instruments Act, has not the effect of relieving the drawer from liability. [p. 859, col. 2.]

Ramakistnayya v. *Kassim*, 13 M. 172; 4 Ind. Dec. (N. S.) 832, *Farzand Ali* v. *Agra Savings Bank*, A. W. N. (1896) 201 and *Phul Chand* v. *Ganga Ghulam*, 21 A. 450; A. W. N. (1899) 167; 9 Ind. Dec (N. S.) 994, followed.

Under the general law it is for the debtor to seek out the creditor for the purposes of performance. [p. 860, col. 1.]

Ganesh v. *Sidhakaran*, 13 C. P. L. R. 74, *Meghraj* v. *Johnson*, 31 Ind. Cas. 880; 11 N. L. R. 189 at p. 192 and *Walton* v. *Mascall*, (1844) 67 R. R. 671 at pp. 675, 676; 13 M. & W. 452; 14 L. J. Ex. 54; 2 Dowl. & L. 410; 153 E. R. 188, followed.

Presentment of a negotiable instrument is not necessary in the case of a maker of the note, in order to render the acceptor liable, unless the note is, in the body of it, made payable at a particular place. [p. 860, col. 1.]

Appeal against the decree of the District Judge, Nimar, in Civil Appeal No. 54 of 1918, dated the 18th April 1918, arising out of Civil Suit No. 167 of 1918, decided by the Subordinate Judge, Harda, on the 31st January 1918.

Mr. *G. L. Subhedar*, for the Appellant.

Mr. *M. Gupta*, for the Respondent.

JUDGMENT.—The appellant in this Court sued upon a *hundi* drawn by the respondent on himself on the 10th May 1914 and payable in 181 days. Both the Courts below have found that as pleaded by the respondent no presentment of the *hundi* was made. The trial Judge gave the plaintiff a decree in spite of this finding on the strength of certain transactions with which we are not now concerned. The defendant appealed to the District Court contending, *inter alia*, that the suit should have been entirely dismissed on account of the plaintiff's failure to present the document for acceptance and the plaintiff filed a cross-objection claiming additional interest. The District Judge allowed the appeal and dismissed the suit on the ground that under section 64, Negotiable Instruments Act, 1881, the defendant is not liable to the holder. The fact that in the memorandum of appeal failure to present for acceptance, not failure to present for payment, was relied upon apparently escaped the lower Appellate Court's notice: in this connection I would observe that there was in this case no necessity for the bill to be presented for acceptance at all, the defendant as drawer being liable under section 37 of the Act as principal debtor and there being no separate drawee.

In this Court it is urged on the plaintiff's behalf that the non presentment for payment at maturity of a *hundi* or bill of exchange, the presentment of which is required by section 66, Negotiable Instruments Act, has not the effect of relieving the drawer from liability. There is ample authority to support this contention and none to the opposite effect has been cited for the respondent. The cases in point are *Ramakistnayya* v. *Kassim* (1), *Farzand Ali* v. *Agra Savings Bank* (2) and *Phul Chand* v. *Ganga Ghulam* (3). Section 64 of the Negotiable Instruments Act requires a bill of exchange to be presented for payment to the acceptor and lays down that in default of such presentment the other parties thereto are not liable thereon to the holder. Section 66 requires a bill made payable at a specified period after date to be presented for payment at maturity, but does not prescribe any penalty for failure. In the present case the drawer and the acceptor are identical and

(1) 13 M. 172; 4 Ind. Dec. (N. S.) 832.
(2) A. W. N. (1896) 201.
(3) 21 A. 450; A. W. N. (1899) 167; 9 Ind. Dec. (N. S.) 994.

he is in practically the same position as the maker of a promissory note. In English Law when a bill is accepted presentment for payment is generally not necessary in order to render the acceptor liable, and it is similarly superfluous in the case of the maker of a note unless the note is, in the body of it, made payable at a particular place. In both instances the bringing of a suit is itself sufficient and that though the instrument be payable on demand. The reason is that under the general law it is for the debtor to seek out the creditor for the purposes of performance: see *Ganesh* v. *Sidharkaran* (4) and *Meghraj* v. *Johnson* (5). The English Law in a case of the maker of a promissory note was thus stated by Parke, B., in *Walton* v. *Mascall* (6):—

"It is clear that a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made: if they have not, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him the debt when due. ... .No request or presentment is necessary to charge the acceptor of a bill or the maker of a note; he is bound to pay it at maturity, and to find out the holder for that purpose."

Other authorities to the same effect will be found cited in "Byles on Bills" at page 219 (17th Edition).

The decision of the lower Appellate Court is wrong and its decree is hereby set aside The case is remanded to that Court for determination of the grounds of appeal which were left undecided and of the cross-objection. The Court-fee paid on the memorandum of second appeal will be refunded and other costs in this Court will be paid by the defendant respondent. Costs hitherto incurred in the Courts below will be costs in the cause.

Decree set aside.
Case remanded.

(4) 13 C. P. L. R 74 at p. 77.
(5) 31 Ind. Cas. 880; 11 N. L. R. 189 at p. 192.
(6) (1844) 67 R. R. 671 at pp. 675, 676; 13 M. & W. 452; 14 L. J. Ex. 54; 2 Dowl. & L. 410; 153 E. R. 189.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 117 OF 1919.

March 24, 1919.

Present:—Mr. Justice Martineau.

THE RAMPUR SUGAR STATE FACTORY, THROUGH THE MANAGER OF THE FACTORY—DEFENDANT—APPELLANT

versus

DIWAN CHAND ISHAR DAS, THROUGH DIWAN CHAND—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), ss. 5, 6, 7 – Proposal and acceptance—Revocation, when complete.

In a suit for recovery of a certain sum of money as damages for alleged breach of contract to supply 500 bags of sugar, it appeared that in reply to the plaintiffs' letter of the 1st February 1915 the defendants intimated their rates, whereupon the plaintiffs telegraphed on the 4th February their acceptance subject to their approval of the samples which they asked the defendants to send, and confirmed the telegram by a letter of the same date. The samples were sent and reached the plaintiffs on the 11th, on which date the defendants sent a telegram to the plaintiffs saying that they could not hold stock after that evening and asking them to wire instructions This telegram was not delivered to the plaintiffs as the address they gave had not been registered On the same date, the defendants sent the plaintiffs a letter in confirmation of the telegram. On the 12th February the plaintiffs sent earnest-money and wrote to the defendants that they would send instructions the next day. The defendants, on the same date, wrote informing the plaintiffs that they could not hold stock for them and refused the earnest-money sent by the plaintiffs:

Held, (1) that, there had been no unqualified acceptance by the plaintiffs of the defendants' offer up to the time when the latter sent their telegram on the 11th February; [p. 861, col 2.]

(2) that, inasmuch as the defendants' telegram did not reach the plaintiffs in consequence of the latter's own misrepresentations about their telegraphic address, the plaintiffs must be deemed in law to have received information of the defendants' revocation of their proposal on that date; [p 862, col.1.]

(3) that, consequently, the plaintiffs' claim could not succeed. [p. 862, col. 1.]

Second appeal from the decree of the District Judge, Amritsar, dated the 26th October 1918, affirming that of the Munsif, 1st Class, Amritsar, dated the 31st January 1918, decreeing the claim.

Mr *O. Bevan Petman*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT.—In this case an Amritsar firm has sued the Rampur Sugar State Factory for Rs. 1,000 as damages for the non-delivery of 500 bags of sugar. A decree has been passed in favour of the plaintiffs and

has been upheld by the District Judge. The defendants have filed a second appeal in this Court.

The question in the case is whether there was a complete contract between the parties for the delivery of 500 bags of sugar. In reply to a letter of the 1st February 1915 from the plaintiffs asking the defendants whether they would reduce their rates for sugar, the defendants on the 3rd February intimated the rate they would accept. The plaintiffs telegraphed on the 4th February that they accepted 500 bags at the rate mentioned subject to the approval of the sample which they asked the defendants to send, and confirmed the telegram by a letter of the same date. The defendants wrote on the 6th informing the plaintiffs that they were sending the samples. The samples were sent and are said to have reached the plaintiffs on the 11th. The defendants sent the following telegram to the plaintiffs on the 11th: "Received firm offer for sugar. Cannot hold stock for you after this evening. Wire." That telegram was addressed to "Bawa, Amritsar." which had been mentioned in the plaintiffs' letters as their telegraphic address, but it was not delivered because the plaintiffs had not had the address registered at the telegraph office.

The defendants sent a letter to the plaintiffs on the same date in confirmation of the telegram, but the plaintiffs have not produced it though they were given a notice to do so. On the 13th February the plaintiffs sent a money order for Rs. 100 less one rupee commission through their dealers to the defendants on account of earnest money and wrote on the same date informing the defendants of this and saying that they would send instructions about the sugar the next day. The defendants on the same date wrote informing the plaintiffs that they could not hold stock for them, and that previous correspondence regarding the rates should be considered as null and void. They refused the money order sent by the plaintiffs.

The learned District Judge holds that the plaintiffs' letter of the 13th February amounted to an unqualified acceptance of the proposal contained in the defendants' letter and telegram of the 3rd, and that there had been no valid revocation of that proposal by the defendants. With regard to the defendants' telegram of the 11th, he says that it was admittedly undelivered and that the revocation of the proposal could be complete against the plaintiffs only when it came to their knowledge. With regard to the letter of the same date, he says that there is nothing to show that the plaintiffs received it before sending their letter of the 13th, that the letter itself would not show when it was received, and that the plaintiffs were not asked to produce the envelope from which this fact might be determined. He, therefore, considers that no inference adverse to the plaintiffs can be drawn from their not producing the letter.

The case hinges on the defendants' telegram and letter of the 11th February, in which they informed the plaintiffs that their offer would hold good only up to the evening of that day. Admittedly there had been no unqualified acceptance of the offer up to that time, as the plaintiffs had accepted it only subject to the approval of the sample. Therefore, if the defendants' revocation or qualification of their original offer came to the knowledge of the plaintiffs before the plaintiffs sent their letter of the 13th, the claim must fail.

Now, with regard to the letter of the 11th February the mistake which the learned District Judge makes is in assuming that the letter itself would not show when it was received. It is quite likely that when the plaintiffs received it, they may have noted on it the date of its receipt or made some endorsement which would show on what day it was received. This would account for their not producing the letter, and there is no reason for not drawing the natural presumption from their failure to produce the letter which they were given notice to produce, namely, that if it had been produced it would have shown that they received it on the 12th. The presumption is all the stronger because a letter posted at Rampur on the 11th would, in the ordinary course of events, have been delivered at Amritsar the next day.

As regards the telegram sent by the defendants on the 11th, this also, although their learned Counsel did not argue the point, appears to me to be alone a

sufficient answer to the plaintiffs' claim, since it was in consequence of the plaintiffs' misrepresentation that the telegram did not reach them. In their letters to the defendants they wrongly stated "Bawa, Amritsar" to be their telegraphic address. Had they not done so, the defendants would have addressed the telegram to the plaintiffs by name, and it would in the ordinary course have been delivered to the plaintiffs on the 11th.

Supposing that the defendants had sent a registered letter to the plaintiffs revoking their offer and the plaintiffs had refused to accept the letter from the postman, or supposing that the plaintiffs had received the defendants' letter, but allowed it to remain unopened, could the plaintiffs' plea that they were ignorant of the revocation have been entertained? Clearly not. The defendants did all that was in their power to inform the plaintiffs that their offer would hold good only till the evening of the 11th February, and it was entirely owing to the plaintiffs' misrepresentation about this telegraphic address that the defendants' telegram was not delivered. In these circumstances the plaintiffs must be deemed in law, though not in actual fact, to have received the information on the 11th February.

There was consequently no complete contract between the parties, and it is unnecessary to go into the question whether it was also essential for the plaintiffs to send Rs. 500 as earnest money to make the contract complete.

I accept the appeal, reverse the decrees of the Courts below, and dismiss the suit with costs throughout.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2955 OF 1916.

March 25, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Panton.

KALU—DEFENDANT No. 2—APPELLANT

versus

HAMIJUDDI HOWLADAR—PLAINTIFF, AND OTHERS—RESPONDENTS.

Appeal, second—Question necessitating remand, whether can be raised for first time.

A question which necessitates a remand and the taking of evidence, if not raised in the Courts below, cannot be raised for the first time in second appeal. [p. 863, col. 2.]

Where, therefore, it was objected for the first time in second appeal that, in order to give jurisdiction to the Sub-Registrar in whose jurisdiction a certain lease-deed had been registered, a fictitious plot of land had been entered in the lease, the High Court refused to entertain the objection. [p. 863, col. 2.]

Appeal against the decree of the Subordinate Judge, Khulna, dated the 16th November 1916, reversing that of the Munsif, 2nd Court, Bagerhat, dated the 23th April 1915.

FACTS appear from the judgment.

Babu *Sarat Chandra Roy Chowdhury* (with him Babu *Satya Charan Sinha*), for the Appellant.—The lower Appellate Court was wrong in setting aside the judgment and decree of the first Court, as it did not take into consideration and deal with the following material points for decision of the case :—

(*a*) The *dakhilas* (rent receipts) produced by the defendant showing payments of rent to the landlord.

(*b*) The oral evidence of the agents of the superior landlords proving the rent payable by the defendant, who was a lessor under an assignment of the rent by the husband of the lessor dealt with at all.

(*c*) The documentary evidence, Exhibit B a letter by which the lessor's husband made arrangements to pay the rent through the defendant.

The Record of Rights upon which much reliance has been placed by the Appellate Court bears no date.

The document described as Exhibit 2 has no existence.

A certain fictitious plot of land has been brought within the area of the mortgaged land in order to bring it within the jurisdiction of the Registration Office at Jhalakati. It is a fraud according to the Registration Act. Thus the document upon which the plaintiffs claim their title is invalid. *Harendra Lal Roy Chowdhuri* v. *Srimati Hari Dasi Debi* (1).

Babu *Narendra Kumar Bose*, for the Respondents.—My learned brother's argument

(1) 23 Ind. Cas. 637; 18 C. W. N. 817; 27 M. L. J. 80; 41 C. 972; (1914) M. W. N. 462; 16 M. L. T. 6; 19 C. L. J. 484; 1 L. W. 1050; 16 Bom. L. R. 400; 12 A. L. J. 774; 41 I. A. 110 (P. C.).

is based on the findings of fact in second appeal and as such is not maintainable.

The learned Sub-Judge has said that *dakhilas* cannot be relied on.

In *khewat* No. 90 of the Record of Rights mention is made of the disputed land.

The date of the Record of Rights was mentioned by the first Court. The Record of Rights must have been prepared before 1321 B. S.

In the Settlement Records Nos. 90 and 91 are two different lands and No. 91 refers to the disputed land.

The point about the Registration Act is taken here for the first time.

In *Harendra Lal Roy Chowdhuri* v. *Srimati Hari Dasi Debi* (1) the case was that the land was not in existence at all and thus it is distinguishable.

Babu *Sarat Chandra Roy Chowdhury*, in reply.—On plaintiff's own admission it is clear that this plot of land was inserted to bring the *kabuliyat* to be registered within the jurisdiction of Jhalakati Registration Office. The plaintiff says in his evidence, "I do not possess that land. That plot was brought in order to have the *patta* registered at Jhalakati by creating jurisdiction of the Court."

Thus it was a fraud upon the registration law, as has been pointed out by the Privy Council case.

The lower Court does not say anywhere that the *dakhilas* are forgeries but still it does not take into consideration the entries in those receipts.

When the substantial portion of evidence was not considered by the Appellate Court, as was done by the first Court, the decision is wrong in law.

JUDGMENT.—Both the plaintiff and the defendant No. 2 claimed title to the disputed land under leases said to have been granted by the landlord. The defendants relied upon a lease executed in the year 1312, and the plaintiff relied upon another lease executed in 1319. The Court of first instance held that the lease in favour of the defendant was proved and that, therefore, the plaintiff could not succeed. On appeal that decree was set aside by the learned Subordinate Judge and the defendant No. 2 has appealed to this Court.

Two questions have been raised in this Court, the first is that the lease under which the plaintiffs claimed is void inasmuch as a fictitious entry of a plot of land was made in it in order to give jurisdiction to the Sub-Registrar of Jhalakati in whose Registration Office the document was registered, and reliance was placed on a recent decision in the case of *Harendra Lal Roy Chowdhuri* v. *Srimati Hari Dasi Debi* (1).

This question however, was not raised in either of the Courts below and the necessary facts have not been gone into by them.

Reliance is placed upon certain statements made by the plaintiff in cross-examination; but the plaintiff stated that there is a plot of land within the Jhalakati Sub Registrar's jurisdiction, which was included in the *kabuliyat*. The question whether it was intended at the time of granting the lease that the plot of land should form part of the lease was not gone into by the Court below, as it was not raised by the defendant; and we are not disposed to allow this question to be raised after the case has passed through two Courts, which would necessitate a remand and further evidence on the point.

The second contention is that the learned Subordinate Judge has not considered some of the facts found by the Court of first instance in reversing the decision of that Court It is pointed out that the learned Subordinate Judge has not considered the *dakhilas* produced by the defendants showing payment of rent to the landlord, and the evidence, oral and documentary, showing that the rent payable by the lessor to the superior landlord was paid by the defendant under an assignment of the rent made by the husband of the lessor.

The learned Subordinate Judge says: "The evidence about defendant No 2's possession and payment of rent is not reliable". That covers all the evidence on the point. It is true that he does not discuss the evidence and that it would have been more satisfactory if he had more specifically mentioned the documents and discussed them. But we are unable to hold that he did not consider all the evidence.

Then it is contended that the Record of Rights, on which so much reliance was placed, does not bear any date.

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There is oral evidence, however, on the point, which goes to show that the settlement proceedings took place a year after the execution of the *kabuliyat*. The learned Subordinate Judge points out that there are two *khewats*. One is No. 90 which relates to certain lands which are admittedly held by Ajimuddi and Najimuddi under defendant No. 4, who is the lessor and that the disputed land which appertained to *khewat* No. 91 was shown in the Record of Rights as being in the *khas* possession of defendant No. 4, the lessor. The learned Subordinate Judge says that if these disputed lands had been in the possession of defendant No. 2, there is no reason why they could not have been entered in his name in the Record of Rights.

In these circumstances, we think that the appeal must be dismissed. We make no order as to costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 234 OF 1918.

March 22, 1919.

Present:—Mr. Findlay, A. J. C.

NARHAR, JUDGMENT-DEBTOR—APPLICANT

versus

G. M. BUTI – DECREE-HOLDER—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), *O. XXI, r.* 66, *App. E, Form* 29—*Execution of decree—Proclamation of sale—Omission to state time of commencement of sale—Irregularity—Sale, whether can be set aside.*

Order XXI, rule 66, read with Form 29 of Appendix E of the Civil Procedure Code, requires that the time of the commencement of an execution sale should be specified. [p. 864, col. 2.]

The omission to state the time of sale in a proclamation for sale of immoveable property is a material irregularity which entitles the judgment-debtor to have the sale set aside, provided he proves that loss has been caused to him by the irregularity. [p. 864, col. 2.]

Proof of such loss may consist either of direct evidence in the narrow sense or of evidence of facts which warrant an inference that the irregularity was the cause of inadequate price. [p. 865, col. 1.]

Even if no objection is specifically raised in this connection in the lower Courts, the irregularity is one which would vitiate the sale and would be set aside in second appeal. [p. 865, col. 1.]

Application for revision of the order of the District Judge, Nagpur, dated the 20th July 1918.

Mr. *M. Bhawani Shankar Niyogi*, for the Applicant.

Mr. *M. R. Indurkar*, for the Non Applicant.

ORDER.—The present revision application is concerned with the question whether omission to state the time of sale in a proclamation for sale of immoveable property is a material irregularity which entitles the judgment-debtor to have the sale set aside, provided he proves that loss has been caused to him by the said irregularity. Assuming for the nonce that the omission to state the time of sale did occur, it has been urged on behalf of the non-applicant, on the strength of the decisions in *Duri* v. *Mohanlal* (1) and *Ganesh Prasad* v. *Musammat Rewa Bai* (2), that the present case is one in which a mere erroneous view of law has been taken, and that this Court should not in any event interfere by way of revision. This contention seems to me, in the circumstances of the case, an impossible one. On the assumption I have made, there has *prima facie* been an illegality and a serious flaw in the procedure which is specially laid down in the Civil Procedure Code for sale of immoveable property. The decision in *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (3) in reality is against the present non-applicant, for the remarks of Woodroffe, J., made therein, clearly indicate that, if there had been an error in procedure, he would have thought it his duty to interfere in revision. In my opinion, therefore, the present case is one where I should interfere if the facts alleged by the applicant are established.

It is practically admitted that there was an omission to state the time in the proclamation, while Order XXI, rule 66, read with Form 29 of Appendix E of the Civil Procedure Code, clearly requires that the time of commencement of sale should be specified. It seems to me impossible that the entry 6/6 could be intelligently construed in any way as specifying that the sale was to last from six in the morning to six at night;

(1) 4 N. L. R. 184.
(2) 41 Ind. Cas. 883; 13 N. L. R. 116.
(3) 23 Ind. Cas. 977; 41 C. 323.

which contention has been seriously put forward in this Court. I need hardly point out that the Code does not provide for such a sale lasting for 12 hours; all that is necessary is to specify the time of the commencement of sale. Even if one could accept the suggestion that the proclamation ordered the sale to last for 12 hours, it is not seriously contended that this did in fact occur. For the purposes of the present case, therefore, we must take it that the proclamation did not state the time of sale.

That being so, the decisions in *Surno Moyee Debi* v. *Dakhina Ranjan* (4) and *Bhikari Misra* v. *Rani Surja Moni* (5) are ample authority for the view that this omission was a material irregularity. It has, however, been urged that the present applicant did not in the lower Court specifically put forward this plea in his two objections to the confirmation of sale. It seems to me, however, that even if we assume that the applicant did not specifically put forward this contention in the lower Courts, the irregularity was one which would *prima facie* vitiate the sale, *cf. Sant Pershad Singh* v. *Sheo Narayan Singh* (6). Moreover, it is perfectly clear that the contention was, as a matter of fact, agitated between the parties, at any rate, in the lower Appellate Court, for the learned District Judge has devoted a considerable portion of his judgment to dealing with the matter. The only point, therefore, which I have to decide is whether material loss has been caused to the judgment-debtor by the irregularity in question. Proof of such a loss is required, and this proof may consist either of direct evidence in the narrow sense or of evidence of facts which warrant an inference that the irregularity was the cause of inadequate price. Now in this case there are several circumstances indicating that the property did not realise the price which it might reasonably be expected to do. The only bidders present appear to have been the decree-holder and the brother of a servant of his and still another servant of his. The time, I may say, was one when plague was raging; the judgment-debtor alleged that the property was worth Rs. 6,000, whereas only Rs. 1,250 were realised. The original figure at which the Naib Nazir attempted to start the auction was Rs. 4,000 and this certainly suggests that the ultimate price realised was an abnormally small one. All these facts satisfy me that the present case is one where one may justifiably draw the inference that substantial injury has been caused to the applicant by reason of the irregularity in question, and for these reasons I am of opinion that the property in question must be re-sold. It is urged that the second application, dated 23rd April 1918, should have been held to be time-barred, but I think it must be considered as one in continuation of the earlier one dated 22nd March 1918.

The judgment of the District Judge, dated 22nd July 1918, as well as the order of the junior Subordinate Judge, dated 23rd April 1918, confirming the sale are, therefore, set aside and the case is remanded to the latter Court for re-disposal of the application for execution, dated 22nd September 1917. I make no order as regards costs in the present application.

Case remanded.

(4) 24 C. 201; 12 Ind. Dec. (N. S.) 861.
(5) 6 C. W. N. 48.
(6) 15 Ind. Cas. 728; 16 C. W. N. 1022.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 330 OF 1916.
April 22, 1918.
Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.
LALMAN PANDE—PLAINTIFF—APPELLANT
versus
SHEO NARAIN PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Agreement between mortgagor and mortgagee as to redemption of earlier mortgages, unregistered—Agreement acted upon—Registration, objection to, whether can be taken subsequently.

The manager of the plaintiff's family entered into an agreement with the defendants-mortgagees that the latter should redeem certain earlier mortgages whereupon they would become owners of the redeemed property except a 4-pie share which was to be made over, unencumbered, to the plaintiff's father. The agreement was not registered, but it was acted upon by the parties to it, in that the plaintiff's father obtained a decree for the 4-pie share, and, subsequently, partition proceedings were taken on the basis of defendants being the owners, and not merely mortgagees, of the property. Plaintiff now sued the original mortgagees for redemption:

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Held, that the suit was not maintainable, and the fact that the agreement was not registered, as it should have been, did not affect the validity of the redemption by the defendants, the second parties to the agreement.

Second appeal from a decree of the Subordinate Judge, Basti.

Mr. *Harnandan Prasad*, for the Appellant.

Mr. *Kailas Nath Katju* (for the Hon'ble Dr. *Tej Bahadur Sapru*), for the Respondents.

JUDGMENT.— This appeal arises out of a suit for redemption. The property was mortgaged in the year 1880. The property was in a sense redeemed in the year 1898 by the defendants of the first party. In truth and in fact the redemption took place in this way, that the manager of the plaintiffs' family entered into an agreement with the defendants of the first party that the latter should redeem two mortgages and that the defendants were to become the proprietors of all the property redeemed except a 4 pie share which was to be made over unencumbered to the plaintiffs' father, who represented the plaintiffs' family. This document was not registered and accordingly it could not be used to show that the equity of redemption had rested in the answering defendants. It was proved in the Court below, apparently without any objection on legal grounds, that as a matter of fact the agreement, though unregistered, had been acted upon. The 4-pie share had been recovered in a suit brought by the plaintiffs' father in 1902 and partition proceedings had subsequently taken place on the basis that the answering defendants were the actual proprietors, and not merely mortgagees of the share of which they were in possession. Under these circumstances we think that the Court below was justified in dismissing the suit; we think that the principle, upon which the case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (1) was decided, may be applied to this case. We dismiss the appeal with costs.

Appeal dismissed.

(1) 28 Ind. Cas. 930; 42 C. 801; 17 Bom. L. R 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2011 OF 1917.

April 23, 1919.

Present:—Mr. Justice N. R. Chatterjea.

Sreemati NITYA KALI DUTT—PLAINTIFF —APPELLANT

versus

SARAT CHANDRA BOSE AND OTHERS —DEFENDANTS—RESPONDENTS.

Appeal—Appellate Court, duty of—Evidence, exclusion of, from consideration, effect of—Procedure.

The plaintiff sued for a declaration of her title to, and possession of, a mango garden. It appeared that the garden appertained originally to a *taluk* which was amicably partitioned into three shares: later on, one of these shares was partitioned and the garden fell to the share of one *N. A.* from whom the plaintiff purchased it. In order to prove her title to, and exclusive possession of, the garden the plaintiff produced certain documents, but the Sub-Judge, on appeal, considered these documents only in connection with the question of partition, and excluded them from consideration on the question of possession, holding that they were inadmissible in evidence:

Held, that this was wrong; the documents were title-deeds and contained an assertion of title to, and possession of, the property in dispute on behalf of the predecessor-in-title of the plaintiff, and were thus evidence in favour of the plaintiff and against the defendant, and should not have been excluded from consideration on the question of possession. [p. 868, col. 1.]

Appeal against the decree of the Subordinate Judge, Dacca, dated the 29th June 1917, reversing that of the Munsif, Munshiganj, dated the 30th June 1916.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Asitaranjan Ghosh*), for the Appellant.—This appeal arises out of a suit for declaration of plaintiff's title to a certain mango garden which he acquired by virtue of his exclusive possession for more than 12 years. The first Court decreed the suit. The lower Appellate Court dismissed it. The disputed garden is situate in Taluk No. 6821, which was partitioned in three *hisyas*, *viz*, $8\frac{1}{2}$ annas, $5\frac{1}{2}$ annas and 2 annas. The first *hisya* belonged to two brothers Sher Ali and Nur Ali, which they divided equally between themselves. We claim the disputed garden as belonging to the *hisya* of Nur Ali. Nur Ali had two sons *A* and *B*. In 1872 a *kobala* was executed by them in favour of *A's* wife with respect to 2-annas 2-*gandas* 2-*karas* share, where it was asserted

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that the disputed garden appertained to the $8\frac{1}{2}$-annas *hisya*. In 1879 a *katkobala* was executed in favour of third persons by *A*, where also there was a similar assertion as before. In the same year *B* and his wife executed a *katkobala* containing a similar assertion. In 1881 plaintiff purchased a 2-annas 10 *couries* share under a *kobala* by *A's* wife, *A*, *B* and *B*'s wife, where also a repetition of a similar assertion was made. In the same year *A*'s wife executed a *katkobala* in favour of plaintiff's husband in respect of 1-anna and 5-*couries* share. A suit for foreclosure on the same was decreed in 1892 and possession was delivered. The next *katkobala* was executed by *A* and his wife in favour of plaintiff's husband for a portion of the *hisya* in 1883. A suit for foreclosure based thereon was decreed and possession was delivered in 1892. The third suit for foreclosure based on a *katkobala* dated 1886 by *B* and his wife in plaintiff's husband's favour with respect to a portion of the *hisya* was decreed and possession was delivered in 1895. In all these decrees the mango garden was stated to be in plaintiff's possession which has been continuing ever since. The learned Judge seemed to think that these decrees were not admissible in evidence. The defendant's possession dates from 1903, in which year he purchased 1-anna 5-*karas* share of the *hisya*. In his conveyance there is no mention whatever of the mango garden. The defendant's vendor himself deposed that he had never been in possession of the mango garden. My title has perfected by reason of my adverse possession of the garden for over 40 years. My title-deeds, which are good evidence showing the disputed garden in my exclusive possession, ought not to have been shut out. The decrees conclusively show that the garden belonged to my vendors. My next grievance is that the learned Judge was wrong in holding that my possession was not adverse to the co-sharers in view of the fact that I was a stranger. The defendant, who is a Pleader of 31 years' standing, could not adduce any evidence except that of his own.

Babu *Rajendra Chandra Guha* (with him Babu *Prokash Chandra Pakrashi*), for the Respondents.—The only defect in the learned Judge's judgment is the passing remark that the documents are inadmissible. The story of an amicable partition has not been proved. The documents do not specially mention the garden to be in plaintiff's vendors' share. Even an error would not justify the reversal of a judgment if it has not affected the merits of the case. All the documents have been considered and findings on them recorded. The statement of the defendants' vendor directly contradicts his statement in the conveyance.

Babu *Jogesh Chandra Roy*, in reply.—The documents have not at all been considered. The documents are noticed merely to show that there was no partition. They were not considered in the light of plaintiff's possession. I would remind your Lordship of the well-known English principle that where there is no evidence to go to the Jury, the Appeal Court cannot reverse the finding of the first Court. The learned Judge has misdirected himself on the question of possession. The case ought to go back for re-trial.

JUDGMENT.—The appeal arises out of a suit for a declaration of the plaintiff's title to, and recovery of possession of a mango garden known as *tin takia amra bagicha*.

The garden appertains to a *taluq* which, it is admitted by both parties, was amicably partitioned with three *hisyas*, namely, one of $8\frac{1}{2}$ annas, another of $5\frac{1}{2}$ annas and a third of 2-annas share. The plaintiff's case is that the $8\frac{1}{2}$-annas share again was amicably divided between two brothers Nur Ali and Sher Ali and that the disputed garden fell into the share of Nur Ali who held it as his *khamar*.

The Court of first instance found that although there was no formal partition, the whole garden was in the exclusive possession of Nur Ali and his heirs. On appeal, the learned Subordinate Judge came to the conclusion that the plaintiff had failed to prove either an actual partition or that the garden had been in the exclusive possession of her vendor Nur Ali and his heirs.

The plaintiff has appealed to this Court, and it is contended on her behalf that the learned Subordinate Judge was wrong

in excluding from his consideration the title-deeds and other documents, which show that the mango garden was exclusively in the possession of her vendors, and that the Judge was wrong in holding that there was not "a tittle of evidence" to show that the plaintiff's predecessor-in-title was in exclusive possession of the land.

There is no doubt that the learned Subordinate Judge has considered some of the documents in connection with the question of partition, and so far as the question of exclusive possession is concerned, he disbelieved the oral evidence for the plaintiff. But referring to a certain mortgage and *katkobala* he says: "It was not till the mortgage and *katkobala* were executed in favour of the plaintiff's husband that we come to the case of exclusive possession of the land by Nur Ali's son Hossain Ali and his daughter in law Noachi Bibi. But these documents are not admissible against the defendant No. 1 or his predecessors, who were strangers to these documents." The learned Subordinate Judge is in error in holding that the documents are inadmissible against the defendant No. 1 or his predecessor. The decision to which he refers has no application to the present case.

The documents relied upon are the title-deeds under which the plaintiff claims: and in those documents title to, and possession of, the land in dispute were asserted on behalf of the plaintiff's predecessor in-title. They are, therefore, evidence in favour of the plaintiff and against the defendant.

The learned Pleader for the respondent also says that the above observation of the learned Subordinate Judge is erroneous, but it is contended by him that that does not affect the decision because in the earlier part of the judgment he has referred to, and considered, most of the documents and rejected them on the grounds stated in the judgment.

The learned Subordinate Judge appears to have considered the documents in connection with the question of partition but so far as the exclusive possession is concerned, he does not seem to have considered them because in his opinion they were not admissible in evidence.

In the very next passage he says: "There is not a tittle of evidence on the record from which I can safely conclude that Hossain Ali and his legal representatives and Noachi Bibi were in exclusive possession of the land." Now, this conclusion must have been arrived at by him after excluding the documents which, in his opinion, were inadmissible in evidence.

The learned Munsif says: "I find from a series of old registered documents and also from old collection papers and *chitta* filed by the plaintiffs that the land in suit which has been proved by unrebutted evidence to be known as *tin tukia amra bagicha* was dealt with as appertaining exclusively to Nur Ali's *hisya* by his sons and their transferees (see Exhibits 2, 2A, and 3)."

Then again he observes that "the plaintiff was in possession of the land in suit to the exclusion of all heirs of Nur Ali for at least the last 22 years." There is also a statement made by the defendant's vendor, (summoned as a witness in the case) that there was a separate *hisya* of Nur Ali and Sher Ali and that this *dag* was allotted to Nur Ali's *hisya*.

The learned Subordinate Judge no doubt has come to the finding that the exclusive possession on the part of the plaintiff's vendor had not been proved. This finding could not be interfered with in second appeal, were it not for the fact that the learned Subordinate Judge says that the documents *katkobalas* and others, upon which the Munsif came to a finding in favour of the plaintiff, were inadmissible in evidence: and as already stated, although they were considered by the learned Subordinate Judge in connection with the question of partition, they were not considered by him in connection with the question of exclusive possession: I think that they should be considered in connection with the question of possession.

The next contention on behalf of the appellant is that the learned Subordinate Judge was wrong in holding that the defendant being a co sharer, no question of adverse possession could arise. The learned Judge says:

"The defendant No. 2 is a co-sharer of the land. Such possession by the plaintiff was not adverse to the defendant No. 1

and his predecessor until a hostile claim was set up by her to their knowledge."

No doubt, possession by one co-sharer is not hostile to the other co-sharers unless there is ouster, or a hostile title is set up to their knowledge. But in the present case it is contended that the plaintiff purchased a certain share more than 12 years before the suit and had *khas* possession to the exclusion of the other co-sharers and that there was in fact an ouster of the defendant. This matter should also be gone into by the lower Appellate Court, if the question of exclusive possession is found in favour of the plaintiff on the whole evidence including those held to be inadmissible by the Court below. Lastly, it has been contended that the defendants not having claimed any title to more than 2-annas share of the garden, the plaintiff's title to the remaining fourteen-annas share ought to have been declared.

The respondent has no objection to a declaration of the plaintiff's title to the 14 annas, but he says that there is no cause of action with regard to this 14 annas. The defendants, however, do not claim anything more than 2 annas. Under the circumstances, a declaration might be made in favour of the plaintiff in respect of the 14 annas of the garden in any case.

In these circumstances I think that the case should be sent back to the lower Appellate Court in order that the Court may take into consideration all the evidence on the record and then dispose of the appeal according to law.

Costs will abide the result.

Case sent back.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2171 OF 1917.

January 10, 1919.

Present:—Mr. Justice Phillips and Mr. Justice Krishnan.

CHAKRAVARTHI v. JAGANNATHA CHARIAR AND ANOTHER—RESPONDENT No. 2 NEWLY ADDED RESPONDENT—APPELLANTS

versus

SEENU BHATTACHARIAR *alias* RAMASAMI BHATTACHARIAR AND OTHERS—PLAINTIFFS AND DEFENDANTS Nos. 5, 7, 8, 9, 12 TO 14—RESPONDENTS.

Hindu Law—Temple—Hereditary archaka, *suspension of, by temple trustees*—Interim *suspension pending enquiry—Enquiry not held for long period*—Interim *order treated as punitive till vindication of character in law Court—Validity of order—Right of* archaka *to damages and restoration of office—Liability of temple funds.*

The trustees of a temple have the right to make an *interim* order suspending an hereditary *archaka* pending enquiry into his conduct without previous notice, but such power should not be exercised except in cases of urgency where, from the nature of the misconduct alleged and other circumstances, immediate suspension from office becomes a necessity to safeguard the interests of the institution [p. 871, col. 2.]

If, however, the intended enquiry is not held within a reasonable time after the *interim* order is passed, the *interim* order becomes illegal and invalid and the *archaka* has the right to maintain a suit for possession of the office and for damages. [p. 872, col. 1.]

In such a suit it is not the duty of the Court to enquire into and adjudge upon the charges against the person suspended and to confirm the order if the charges are found to be true. The plaintiff is entitled to have an order by the trustees, after notice to himself and proper enquiry, before he is punished, the Court's order not being an adequate substitution for it. [p. 872, col. 1.]

Where an *interim* order of suspension is afterwards converted into an order to subsist till the suspended *archaka* vindicates his character in a Court of law, it becomes punitive and illegal. [p. 872, col. 2.]

The temple funds are liable for the claim for damages where the trustees, in passing such order, acted, in what they conceived to be, for the best interests of the temple. [p. 872, col. 2.]

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 187 of 1915, preferred against the decree of the Court of the District Munsif, Thiruthuraipundi, in Original Suit No. 317 of 1912.

FACTS appear from the judgment.

Messrs. *T. Narasimha Iyengar, C. V. Rajagopalachariar* and *S. Panchapagesa Sastri*, for the Appellants.—The trustees have power to pass an *interim* order of suspension and enquire into the charges made by the Tarwade

Seshadri Aiyangar v. *Ranga Bhattar* (1). Here, they directed the Archaka to proceed against the newspaper which published the imputations against him and vindicate his character in a Court of law. Such an order is within the competence of the trustees and is not illegal.

As a matter of fact the action of the trustees was amply justified by the finding of the trial Court that the Archaka bore a reputation for immorality.

The order should be looked upon as a punitive one, which was justified by the misconduct of the plaintiff.

In any event the temple funds are not liable for the tortious action of the trustees.

Messrs. *S. T. Srinivasagopalachariar* and *T. R. Venkatarama Sastri*, for the Respondents.—*Seshadri Aiyangar* v. *Ranga Bhattar* (1) only recognizes the power of trustees of a temple to pass an *interim* order of suspension of an Archaka pending enquiry. Such an order could only be legitimately passed in cases of urgency. Here there was no urgency to justify the trustees' action. The intended enquiry should anyhow be completed within a reasonable time and could not be indefinitely postponed. It offends against the first principles of natural justice that a man should be condemned unheard. No enquiry was held for full 14 months.

The fact that in a suit by the plaintiff for damages the Court finds the charges against the suspended man proved does not cure the initial defect in the proceedings by the trustees It is the duty of the trustees to assign reasons for their action after an enquiry made by themselves.

The order of the trustees could not be treated as punitive. If punitive, it is illegal because the plaintiff was not given an opportunity of meeting the charges.

The temple funds are liable for the plaintiff's claim, because the new trustees only maintained an existing order *bona fide* and in what they conceived to be for the best interests of the temple.

JUDGMENT.

KRISHNAN, J.—In the suit from which this second appeal has arisen, plaintiff sued to recover the office of hereditary Archaka in the temple of Sri Sarangapani in Kumbakonam, which he alleged he was entitled to, and to restrain the defendants from obstructing him in the discharge of his duties and in the enjoyment of the emoluments appertaining to his office and to obtain damages for his wrongful suspension from it by the trustees, which resulted in loss of emoluments to him. Defendants Nos. 1 to 5 were the trustees and the remaining defendants were the plaintiff's co-Archakas. The trustees denied plaintiff's claim to his Archakaship being hereditary, but the lower Courts have found as a fact that he is an hereditary Archaka and we must accept the finding in second appeal.

The suspension complained of, was by an order of the trustees, Exhibit O, made in September 1910 and served on the plaintiff, which stated "on account of the imputations made in the petition concerning you received from the committee office as also in the 'Yathartbavachani' newspaper and the allegations made against you by various respectable persons, the trustees are greatly dissatisfied with you. Pending searching enquiry into a final disposal of the same you are suspended from your office. You shall, therefore, take notice that, even during the Murai of any other Archaka, you should not act as a substitute." Subsequently in April 1911, when the 2nd respondent before us became a trustee he confirmed the order of suspension. No notice was given to, and no explanation was taken from, the plaintiff before the order was passed. The suit was filed in November 1911; it was admitted that no enquiry was held into the plaintiff's conduct and it is found that no real attempt to hold such an enquiry was ever made by the trustees. Though the order, in its inception, was one of temporary suspension pending enquiry, the trustees seem to have subsequently treated it as a final order of suspension till the plaintiff cleared his character in a Court of law against the newspaper. They say so in Exhibit II. The charge against the plaintiff was that he was leading an immoral life by frequenting a dancing girl's house and he was, therefore, unfit to perform the duties of an Archaka. The District Munsif, while holding that the allegations of actual immorality against the plaintiff had not been proved, found that he was seen in her company and that he had compromised his

(1) 10 Ind. Cas. 548; 35 M. 631; 21 M. L. J. 580; 10 M. L. T. 14.

good name for purity by his conduct and that there was a widespread public opinion about his immorality. He, therefore, held that the order of suspension was a valid one and dismissed the plaintiff's suit.

The District Judge, on appeal, refused to go into the question of plaintiff's alleged immorality and held that, as the trustees had failed to make the intended enquiry within a reasonable time after the order of suspension was passed, their action in keeping plaintiff indefinitely out of office, without a definite finding after notice to him and proper enquiry that he was unfit to do the duties of that office, was wrongful and that they were, therefore, liable in damages. He gave a decree declaring that the plaintiff was an hereditary Archaka and that the order of suspension had ceased to be in force from the date of suit, and directed that the plaintiff be restored to his office and awarded damages to him at Rs. 250 a year from the date of plaint to the date of re-instatement. He directed defendants Nos. 1 and 5, who were parties to the order of suspension, to pay each 1/5th of the damages and costs personally and as the other trustee defendants were new trustees, he ordered the balance to be recovered from the trust funds.

The second appeal to us has been filed only against that portion of the decree which is against the temple, the trustees against whom personal decrees were passed not appealing. The main question argued before us was that the learned Judge should have given a finding on the question of plaintiff's immorality, because it was contended that, if the immorality alleged was established, the order of suspension should be held to be valid and in force at the date of suit, whether viewed as one pending enquiry or as one passed by way of punishment for misconduct, any want of notice or of proper enquiry being immaterial. Reliance was placed for this contention on *Seshadri Aiyangar* v. *Ranga Bhattar* (1).

Before, however, considering this argument it may be mentioned that it has not been contended before us that the alleged immorality, if proved, would not amount to misconduct, justifying the suspension of an hereditary Archaka by the trustees. Though an hereditary Archaka does not hold office at the will and pleasure of the trustees; it was conceded that he might be removed or suspended from office by them for proved misconduct. We need not, therefore, consider these questions for the disposal of this second appeal.

The case in *Seshadri Aiyangar* v. *Ranga Bhattar* (1) was, no doubt, one where an Archaka had been suspended by the trustees pending enquiry into his conduct without previous notice; but before suit the intended enquiry had been held and the offence charged had been found to be proved and apparently the *ad interim* suspension order pending enquiry had been terminated and replaced by an order after enquiry. That ruling is, no doubt, an authority for the contention that previous notice and enquiry are not essential to validate an order of suspension pending enquiry, if it is subsequently found that the charge alleged was well founded. It is not necessary to consider whether this ruling should be followed, though it may be remarked that some of the observations in it do not seem to be quite in consonance with the views expressed by the learned Chief Justice in *Thiruvambala Desikar* v. *Chinna Pandaram* (2) and in *Venkata Narayana Pillai* v. *Ponnuswami Nadar* (3). The objection raised in the present case to the validity of the suspension order has reference not so much to its inception as to its continuance beyond a reasonable time without a proper enquiry. Even if the trustees be held to have the power to pass an *ad interim* order of suspension without notice, it seems to me that such power should not be exercised except in cases of urgency where, from the nature of the misconduct alleged and other circumstances, immediate suspension from office becomes a necessity to safeguard the interests of the institution. There was hardly any such urgency in the present case. But even if the order was a good one when it was first passed, I am fully in agreement with the District Judge in thinking that it should not have been continued in force for a longer period than was reasonably necessary. There can be no doubt in the present case that the period which elapsed after the date of the order and before the date of the suit, *viz.*,

(2) 34 Ind. Cas. 57; 40 M. 177; 30 M. L. J. 274; (1916) 2 M. W. N. 13, 4 L. W. 3 (6.

(3) 44 Ind. Cas. 205; 41 M. 357; 33 M. L. J. 660; (1917) M. W. N. 389; 22 M. L. T. 454; 7 L. W. 85.

about 14 months, was an unduly long period and I accept the Judge's view that there was unreasonable delay and that the order as an *interim* order ceased to be valid before the date of suit.

This position was hardly denied by the 1st appellant's Vakil, but he argued that the order should be looked upon as a punitive one which was justified by the plaintiff's misconduct. It is doubtful whether the order can be looked upon as a punitive order at all, because, whatever the intention of the trustees might have been, plaintiff was never informed that it had that character. But assuming that it could be done, I am of opinion that the order as a punitive one should be held to be invalid as having been passed without notice and without enquiry, whatever the merits of the case may be. It is a fundamental principle of natural justice that a person charged with an offence or with a misconduct must be given notice of it and heard in his defence, if he wishes to defend before he is condemned. That principle must be recognised and anything done contrary to it cannot be upheld. As the learned Chief Justice quotes in *Thiruvambala Desikar* v. *Chinna Pandaram* (2), "the laws of God and man both give the party an opportunity to make his defence, if he has any." The *interim* order of suspension pending enquiry without notice does not offend against this principle, as it is only a disciplinary and not a punitive one, and the ruling in *Seshadri Aiyangar* v. *Ranga Bhattar* (1) is confined to such disciplinary orders. The observations of the Chief Justice in *Venkata Narayana Pillai* v. *Ponnuswami Nadar* (3) may also be referred to in this connection. As pointed out by his Lordship there, the Privy Council in *Willis* v. *Gipps* (4) recommended that an order on a motion without due notice should be set aside although, on the merits, there were sufficient grounds for making it. It is no answer to the invalidity of the order in the present case viewed as a punitive one to say that the trustees are prepared to prove facts which would justify it in the opinion of the Court. Plaintiff was entitled to have an order by the trustees after notice to him and proper enquiry before he was punished; the Court's order is not an adequate substitute for it. To hold otherwise will be to compel the person punished to submit to punishment without knowing the grounds for it or to resort to a Court of law before he can find out the grounds on which he had been punished. I am, therefore, of opinion that the order of suspension the moment it was treated as a punitive order by the trustees became illegal and invalid.

In any view, therefore, the order was invalid at the date of suit. It is not necessary to ascertain when exactly before the suit the order became invalid, as the District Judge has not given the plaintiff any damages before the date of suit and plaintiff has not appealed against the disallowance of damages prior to suit claimed by him. In awarding plaintiff possession of his office I think it was open to the District Judge to grant a decree for its emoluments by way of damages, as he has done, from the date of suit to date of re instatement. No argument has been addressed to us about the quantum of damages.

It was finally argued that the temple funds should not be made to bear any portion of the damages but that the trustees who were the tort-feasors should pay them personally. There can be no doubt in this case that the trustees in passing the order of suspension and continuing it acted in their capacity as trustees and in what they conceived to be the proper discharge of their duties as such and on behalf of the temple. In these circumstances I am of opinion that temple funds are liable and plaintiff is entitled to have recourse to them for damages. Whether the trustees are liable to make good the loss caused to the temple by their action need not be decided in this case.

I would, therefore, dismiss the second appeal with costs of the 1st respondent.

PHILLIPS, J.—I agree. If the suspension order is treated as an *interim* order pending enquiry, I think the District Judge is right in holding that the trustees were guilty of unreasonable delay in deferring the enquiry for over a year, for this conduct of theirs practically converted the *interim* suspension into a punitive suspension. Treated as a punitive order, it cannot be justified because it was passed without giving plaintiff an opportunity of defending himself. It may seem anomalous that

(4) (1846) 5 Moore P. C. 379; 53 E R. 536.

the trustees should be mulcted in damages for passing an order which, the District Munsif has found, was in the circumstances a justifiable order, but the trustees should not have left it to the Court to decide after enquiry whether such an order was justifiable and should have exercised the discretion vested in them to pass such an order after due enquiry. It may be open to them to treat the enquiry that has now been held as adequate and to pass such orders as they think fit hereafter, and on this point I express no opinion, but they are liable in damages for causing loss to plaintiff without giving him an opportunity of being heard in self-defence. I agree that the second appeal should be dismissed with costs.

Appeal dismissed.

M. C. P.

PATNA HIGH COURT.

CIVIL REVISION No 284 OF 1918.

March 28, 1919

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

Musammat DHANWANTI KUER—JULGMENT-DEBTOR—PETITIONER

versus

SHEO SHANKAR LALL—DECREE-HOLDER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 89—Execution of decree—Sale—Judgment-debtor who has parted with property to stranger, whether can apply to set aside sale—Jurisdiction—Revision—High Court, interference by.

A judgment-debtor who has, subsequent to the sale of his property in execution of a decree, parted with the property to a third person, can, nevertheless, apply under rule 89 of Order XXI of the Civil Procedure Code to set aside the sale. [p. 874, col. 2; p 875, col. 1.]

The question whether a judgment-debtor is entitled to make an application under Order XXI, rule 89, of the Civil Procedure Code is one of jurisdiction, and a decision of the Court below upon the question is subject to the revisional jurisdiction of the High Court under section 115 of the Code. [p. 873, col. 2; p. 874, col. 2.]

Civil revision against an order of the District Judge, Shahabad, dated the 9th September 1918, setting aside an order of the Subordinate Judge, Arrah, dated the 8th July 1918.

Messrs. *Susil Madhab Mullick* and *Narendra Nath Sen*, for the Petitioner.

Messrs. *Kulwant Sahay*, *Tribhuban Nath Sahay* and *Nitai Charan Ghosh*, for the Opposite Party.

JUDGMENT.

MULLICK, J.—A preliminary point is taken by the learned Vakil for the opposite party that no question of jurisdiction is involved; that the Court had a right to decide whether or not a judgment-debtor who has sold his property subsequently to the sale is entitled to make a deposit under Order XXI, rule 89, and if the Court has made an error of law in deciding the point, that error does not constitute any illegality or material irregularity in the exercise of jurisdiction. In my opinion the principles of *Malkarjan* v. *Narhari* (1) do not apply. Here the Court could only adjudicate upon the application, if it was presented by a person fulfilling the character required by rule 89. The Court's decision upon the point whether the applicant has the necessary legal character is clearly a question involving jurisdiction. An erroneous decision on a question of law or fact, after jurisdiction has been once legally assumed, would not be a ground for interference under section 115 of the Code of Civil Procedure, but if the decision is the very basis and foundation of jurisdiction in its limited sense as distinguished from powers, it at once comes within the purview of the section. The judgment of their Lordships of the Privy Council in *Balkrishna Udayar* v. *Vasudeva Aiyar* (2) is, in my opinion, authority for this view.

The next question is, whether the decision of the Subordinate Judge should be restored.

Now Order XXI, rule 89, amends section 310A of the former Civil Procedure Code, by which deposits could be made by any person whose immoveable property had been sold. The amending words "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale" have, by letting in persons who are not parties to the execution pro-

(1) 25 B. 337 (P. C.); 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739.

(2) 40 Ind. Cas 650; 22 C. W. N. 50; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 624; 40 M. 793; 6 L. W. 501; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

seedings, clearly widened the operation of the rule.

Bearing this in mind as the object of the amendment, how has it affected the judgment-debtor?

The Statute itself does not set at rest the conflict of decisions under the older Code, in illustration of which it is only necessary to state that while Jenkins, C. J., in *Maganlal* v. *Doshi Mulji* (3) held that section 310A enables a judgment-debtor to make a deposit who had sold the property after the sale, their Lordships of the Allahabad and Madras Courts in *Ishar Das* v. *Asaf Ali* (4) and in *Subbarayadu* v. *Lakshminara Samma* (5) took the view that unless the applicant is, at the time of the application, an owner, or holds an interest in the property, he cannot get the benefit of the rule. These authorities have been carefully considered by a Division Bench of the Bombay High Court in *Pandurang Laxman Uphade* v. *Govinda Dada Uphade* (6), and I venture to think with great respect that the object and scope of the rule have been correctly stated in that judgment.

It seems to me that the matter really turns upon the effect of the auction sale. As has been observed by their Lordships of the Privy Council, the property passes from the judgment debtor to the auction-purchaser at the moment of the sale irrespective of the time of confirmation [*Bhawani Kumar* v. *Mathura Prasad Singh* (7)]. If that is so, then the judgment-debtor retains no transferable interest after the sale. He may have a right to make a deposit, but that is not a right which can be transferred. For the purpose of making an application under rule 89, he can be neither an owner nor a person holding an interest in the property at the time of the application. If, therefore, rule 89 is to be limited to a person so qualified at the time of the application, then the judgment debtor, who certainly is one of the persons for whose benefit the rule was enacted, is incompetent to apply. Therefore, I think that the qualification must refer to the moment immediately before ownership passed. I agree with their Lordships of the Bombay Court in thinking that the law intended to assist the judgment-debtor if by making a private sale subsequent to the auction-sale he could secure a better price for his property.

A further point was taken by the learned Vakil for the petitioner that the decree-holders had not obtained a valid title to the property, and that the judgment-debtor was still the owner thereof. It is contended, first, that the judgment debtor was not holding the estate of a Hindu widow; and secondly, that the deed of release executed by her not being sufficiently stamped could not be treated as a conveyance transferring the property to Namdeo. Now these are questions which it was competent for the Subordinate Judge to decide after he had assumed jurisdiction. They are not necessary for the foundation of jurisdiction, and, therefore, whether they have been rightly or wrongly decided is immaterial for the purposes of section 115 of the Code of Civil Procedure. The result is that the learned District Judge has, in my opinion, wrongly refused to exercise jurisdiction in declining to accept a deposit from the judgment-debtor. Under section 115 of the Code of Civil Procedure we set aside his order and direct that the order of the Subordinate Judge be restored with costs throughout.

JWALA PRASAD, J.—I agree that the question raised in this appeal as to whether the judgment-debtor was entitled to apply under Order XXI, rule 89, of the Code is one of jurisdiction, and the decision of the Courts below upon the point is, therefore, subject to our revisional jurisdiction under section 115 of the Code. The property in dispute was sold in execution of a decree on the 4th December 1917 as belonging to the judgment debtor Dhanwanti Kuer. She disposed of the property on 22nd December 1917, and on the 2nd of January 1918 applied to have the sale set aside on her depositing in Court the necessary amount. The learned District Judge, disagreeing with the Subordinate Judge, has held that the judgment-debtor has no *locus standi* to make an application to set aside the sale under Order XXI, rule 89, inasmuch as she did not at the date of the application own the property in

(3) 25 B. 631; 3 Bom. L. R. 255.
(4) 13 Ind. Cas. 134; 34 A. 186; 9 A. L. J. 19.
(5) 22 Ind. Cas. 193; 38 M. 775; 15 M. L. T. 98; (1914) M. W. N. 147; 1 L. W. 59.
(6) 37 Ind. Cas. 211; 40 B. 557; 18 Bom. L. R. 571.
(7) 16 Ind. Cas. 210; 40 C. 89; 16 C. W. N 985; 23 M. L. J. 311; 12 M. L. T. 352; (1912) M. W. N. 944; 14 Bom. L. R. 1046; 16 C. L. J. 606; 39 I. A. 228 (P. C.).

question. It is contended on her behalf that the view taken by the learned District Judge is not correct in law. The point is not free from difficulty, and, as a matter of fact has led to great divergence of opinion in the Courts that had hitherto occasion to interpret the law in the present Code. The Allahabad and the Madras High Courts have taken the view that a judgment-debtor who, after the sale, has parted with the property is not entitled to come under Order XXI, rule 89, whereas the Bombay High Court has taken a contrary view. The cases have already been referred to in the judgment of my learned brother. I have myself felt very great difficulty in making up my mind. In fact, the language in the aforesaid rule is not happily worded. After a careful consideration of the object and scope of the rule, as well as upon a true construction of it, I have come to the conclusion that the judgment-debtor is not deprived of his right to have the sale set aside under the aforesaid rule, which he undoubtedly had under the old Code. The words in the present Code "Any person either owning such property or holding an interest therein by virtue of a title acquired before such sale" have been substituted for the words in the old Code "Any person whose immovable property has been sold."

The property may be owned by the judgment-debtor, or it may be owned by some other person, and sold as the property of the judgment-debtor. It is with a view to allow such persons other than the judgment-debtor, as well as those who as co-sharers or as mortgagees may have held some interest in the property by virtue of a title acquired before the sale, that the aforesaid amendment was made. The object of the amendment in the present rule is, therefore, not to curtail the rights of the judgment-debtor but to widen the scope of the rule by allowing persons other than the judgment-debtor to come in. The words in the rule, therefore, if not repugnant otherwise, should be so construed as to give effect to the intention of the Legislature. It is obvious that the intention of the Legislature was not to take cognizance or notice of any event subsequent to the sale, for the rule expressly recognises only such interest in the property as may have been acquired before such sale. Any act committed by the judgment-debtor affecting the property will not, therefore, be taken notice of by the Court in an application under rule 89, and, hence the judgment-debtor's disposing of his property will not deprive him of the right to come in under that rule.

Keeping the above remarks in view, the language in the rule, though not happily worded, will, after careful consideration, support the construction that the judgment-debtor may, in spite of his having parted with the property, claim the benefit of the rule. Leaving out the words in the rule that do not apply to the present case, it will run as follows :—

"Where immoveable property has been sold in execution of a decree any person owning such property may apply to have the sale set aside." These words carry the same import as the words in the old Code—"Any person whose immoveable property has been sold may apply to have the sale set aside." It is obvious that any person owning immoveable property at the time of its sale in execution of a decree may apply to have the sale set aside. The judgment-debtor, who has made the present application to set aside the sale under rule 89, will, therefore, clearly come under the said words. If it was intended that the owner of the property, such as the judgment-debtor owning the property at the date of the sale, should not be allowed to apply on account of his having parted with the property by sale or otherwise subsequent to the execution sale, it would have been clearly stated in the rule. In the absence of a clear restriction upon the right of a judgment debtor which he had at the time of the sale, it would be manifestly unjust to refuse the judgment-debtor the benefit of the rule. It would be beyond the scope of rule 89 to enquire into any transaction subsequent to the sale and to find out the motives for such a transaction.

With great respect to the learned Judges of the other High Courts, who have taken a contrary view, I am of opinion that the judgment debtor's application was properly made and that the Court had no option but to entertain it. I, therefore, agree with the order proposed by my learned brother.

I do not consider it necessary to give any opinion as to whether the judgment-

debtor had any interest in the property after the sale and before the confirmation of the sale which he could validly transfer.

Order set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1282 AND 1283 OF 1917.

February 20, 1919.

Present:—Sir John Wallis, KT., Chief Justice, and Justice Sir William Ayling, KT.

SRI KANCHI KAMAKOTI PEETATHIPATHI AVERGAL SIKKUDAIYAR SWAMI AVERGAL JAGATHGURU SRI SANKARACHARYA SWAMIGAL, BY AGENT RAMASWAMI SASTRIAL—PLAINTIFF—APPELLANT IN BOTH APPEALS

versus

MANALI SARAVANA MUDALIAR AND ANOTHER - DEFENDANTS - RESPONDENTS IN BOTH APPEALS.

Evidence Act (I of 1872), ss. 21, 35, 48—Admission, evidentiary value of - Statement of public servant, recital of, in public record, relevancy of, to prove particular grant by Government.

An admission by a party is of considerable weight as evidence against him, and may, if unexplained, be even decisive. [p. 877, col. 2.]

A recital in a public record as to a statement made by a public servant with reference to a particular grant by the Government may be admitted, under section 35 of the Evidence Act, as proving that the public servant made the statement that he is stated to have made, if the fact that he made such a statement is a relevant fact. But such a recital would not be admissible under section 48 in a case where a specific right claimed by a particular individual, and not a general right, is being dealt with. [p. 878, col. 1.]

Second appeals against the decrees of the District Court, Chingleput, in Appeal Suits Nos. 424 and 460 of 1915 and 425 and 461 of 1915, preferred against the decrees of the Court of the Additional District Munsif, Poonamallee, in Original Suits Nos. 57 and 78 of 1914, respectively.

These second appeals came on for hearing on the 25th October 1918 before Ayling and Krishnan, JJ.

IN S. A. No. 1282 OF 1917

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Messrs. *K. Srinivasa Aiyangar* and *V. V. Srinivasa Aiyangar*, for the Respondents.

IN S. A. No. 1283 OF 1917

Mr. *M. N. Krishna Aiyar*, for the Appellant.

Mr. *V. V. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.—These second appeals arise from two suits brought by the present Sikkudayar Swami of Kanchi Kamakoti Mutt of Kumbakonam against the defendants, who are the Shrotriemdars of the 3 plaint Shrotriem villages in the Chingleput District, for payment of Sikkudayar Merai alleged to be due to him from them for 12 years from Fasli 1309.

Plaintiff's case, as finally put forward by him in Court, was that the Msrai, which was a share in the crop, was to be deducted and given to him from the outturn of the produce of the lands in the Shrotriem villages in Chingleput District at a fixed rate after deducting 1/5th for common expenses and before the division of the crop between the Shrotriemdar and the Kudivaramdar. It was stated that the Sikkudayar Swami obtained the right to this Merai as an Inam from the Hindu Chola Rajas, that the British Government recognised it and for some time collected and paid it to the Swami themselves, that at time of the settlement and the grant of the Sanads to the Shrotriemdars they deducted this Merai in fixing the Peishcush and directed the Shrotriemdars to take it and pay it over to the Swami, and that payments had been made accordingly for many years and that in cases of default, payments had been enforced by decrees obtained against some of the Shrotriemdars. Plaintiff also suggested that the Merai was really a part of the Government revenue which was granted to the Swami for the upkeep of the Mutt.

The defendants denied the plaintiff's title and their liability to collect and pay the Merai to the Swami, and pleaded that they had never made any such payments before and that even if they had paid, such payments were merely voluntary. It is not necessary to refer to their other pleas, at present,

With reference to the above pleas, two issues were framed, *viz.*—Issues Nos. 2 and 3, the former as to whether the Merai was part of the Government revenue and the latter as to whether the defendants were legally bound to collect and pay the Merai to the plaintiff. We observe that the words "if so" in the 3rd issue is a mistake; for the question raised in it is, on the pleadings, independent of the question raised in the 2nd issue; but as the lower Courts have treated it so, it is not necessary to have the issue amended now. In considering this issue it should be borne in mind that, according to the plaintiff's case, this Merai, which is in the nature of a rent charge, was payable one-half from the Shrotriemdar's share and the other half from the Kudivaramdar's share, as the whole was payable from the produce before division between them. The alleged obligation of the Shrotriemdar to collect has, therefore, reference only to the Kudivaramdar's share; the Shrotriemdar's share will be in his own hands and he will only have to pay it over. Separate issues were not, however, framed; and it was not necessary to do so as both the obligations were based upon the same evidence and treated as falling under the same issue.

Both the lower Courts have found on the 2nd issue that the Merai was not shown to be a portion of the Government revenue, and we accept that finding. But on the 3rd issue, as to the defendants' obligation, the lower Courts have differed. The District Munsif found that there was an express or implied contract between the Government and the defendants' ancestors that the Shrotriemdar should collect the plaint Merai and pay it over to the Swami and that he was entitled to take advantage of it. Apparently the District Munsif treated this contract as a covenant attached to the grant. He decreed the suits. But on appeal the learned District Judge held that there was no evidence to support such a conclusion and that there was no legally enforceable claim proved by the plaintiff and dismissed the suits.

Though the Judge's finding is one of fact, Mr. T. R. Ramachandra Aiyar for the appellant argues that it cannot be accepted as it is based upon a misconstruction of certain documents and a mistake of law as to the admissibility of evidence. In considering this argument we may observe that though the District Judge purports to begin the discussion of Issue No. 3 in paragraph 10 of his judgment, the discussion in paragraph 9 is more relevant to that issue than to Issue No. 2.

The most important point made by the learned Vakil is as regards Exhibits J, G and H. The District Judge says that there is no admission in them that the plaint Mutt is entitled to the Merai or that the defendants are liable to collect it and pay it over to the plaintiff. We are unable to agree with him, as we think there is a clear admission on both the points in the plaint Exhibit G, see paragraph 2 and the first two sentences of paragraph 6. The weight of those admissions as evidence is not affected, as apparently the District Judge thinks, by the further statement that by a special arrangement the defendants' predecessors were allowed to keep the Merai after collecting it. Such a special arrangement is not now pleaded. The statements in Exhibits J and H are in accordance with the statement in Exhibit G. It need hardly be pointed out that an admission by a party is of considerable weight as evidence against him and may, if unexplained, be even decisive: see *Chandra Kunwar* v. *Chaudhri Narpat Singh* (1) We cannot, therefore, accept the District Judge's finding and must call for a revised finding on the 3rd issue.

In doing so we may point out that the way in which the learned District Judge has dealt with Exhibits A, B and C series, and D is not satisfactory. It is not clear why the evidentiary value of Exhibit D should be nullified, as the Judge thinks, because it is an executive and not a judicial order. The District Judge should consider whether, taken with the evidence that the order was carried out, Exhibit D should not be given weight. He should also consider if Exhibits B and C series, which range from 1817 to 1893, do not afford good evidence of the plaint claim as, though they refer to other villages, the claim regarding them was made on the same basis as that now made against the plaint villages.

(1) 29 A. 184 at p. 194; 9 Bom. L. R. 267; 2 M. L. T. 100; 17 M. L. J. 103; 5 C. L. J. 115; 11 C. W. N. 321; 4 A. L. J. 102 (P. C.).

Exhibit A is of importance to show that the plaint Merai was recognised by the Government so early as 1801 ; and Exhibits E and F series, though recent, show the position of the Government now in this matter of Sikkudayar Merai. We think Exhibits L-1 and M-1 should also be considered with reference to this issue. We need not refer further to particular documents or to the other evidence, as the learned District Judge will submit his fresh finding on the whole of the evidence in the case.

We may in conclusion observe that though according to *Byathamma* v. *Avulla* (2) the recital in Exhibit B may be admitted under section 35 of the Evidence Act, as proving that the Collector made the statement that he is stated to have made, if the fact that he made such a statement is a relevant fact, it does not appear that it is a relevant fact in the present case. To be a relevant fact the statement should be admissible as evidence of what is stated in it. It is suggested that it would be admissible under section 48 of the Evidence Act ; but in the present case we are not dealing with a "general right" but a specific one claimed by a particular individual, the Swami of the Mutt. The statement itself has no reference to any general custom or right but to a particular grant by the Government. Section 48 does not, therefore, seem to apply. It is not claimed that the statement will be admissible under any other section. We think, therefore, the District Judge was right in excluding that evidence.

The lerned District Judge will submit his revised finding cn the evidence on record in six weeks. The time for filing objections is seven days.—

In compliance with the order contained in the above judgment, the District Judge of Chingleput submitted the following

FINDING.

1. The High Court has called for a revised finding on the third issue, which is "Whether the defendants as Shrotriemdars are legally bound to collect and pay the plaint Merai to the plaintiff" on the evidence already on record.

2. The defendants in these suits admit that the plaintiff is entitled to the plaint Merai but deny their liability to collect it from the Kudivaramdars and pay it over to him. They concede that if they collect it they are bound to pay it over to the plaint Mutt. On behalf of the plaintiff it is urged that the defendants are liable to collect and pay over the plaint Merai to him.

3. The first set of documents relied upon by the plaintiff is Exhibit A series, extracts from the *dowle* accounts of the plaint villages, which show that the plaint Merai was in force in these villages in 1801, that the Government recognised it and that it was a deduction from the gross produce before its division between the Melvaramdar and the Kudivaramdar. It is argued on behalf of the plaintiff that they show that the defendants are liable to collect the Merai which is a common burden as, after the Permanent Settlement, they stand in the shoes of the Government. On behalf of the defendants it is urged that these accounts themselves do not prove any liability on their part to collect the Merai

The next document relied upon is Exhibit D, dated 2nd May 1816, a copy of the order of the Collector of Chingleput District to Shrotriemdars| to pay up the arrears of the plaint Merai without delay and threatening them with legal proceedings in case of default. This order was relied upon and given effect to in various suits filed against Shrotriemdars, Zamindars, Ijaradars, etc., to recover the plaint Merai (*vide* Exhibit B series). It is contended on behalf of the plaintiff that it shows that after the Permanent Settlement the Government gave instructions to their successors-in-title, namely, Shrotriemdars, Zemindars, etc., to collect and pay the plaint Merai to the plaint Mutt and that this evidence coupled with that furnished by Exhibit A series proves the defendants' liability to collect and pay the plaint Merai to the plaintiff. No doubt, as urged on behalf of the defendants the original of Exhibit D was not a general order to collect and pay the plaint Merai, the complaint to the Collector having been only that the Shrotriemdars and others concerned had not paid over the collections made by them in full to the plaint Mutt and not that they had refused to collect the Merai and pay it over, but I think that the plaintiff's contention that Exhibit D coupled with Exhibit A series casts a liability on the

(2) 15 M. 19; 5 Ind. Dec. (N. S.) 363.

defendants as Shrotriemdars to collect the plaint Merai is well founded.

4. Exhibits B and C series are judgments of Courts ranging from 1817 to 1898, in which the plaint Merai was enforced in respect of other villages. The defendants in those suits were Zemindars, Shrotriemdars, Izaradars from Government and even Pattadars. They are instances in which the plaint right was recognised and the liability of Shrotriemdars was enforced. It is pointed out on behalf of the defendants that there was not adjudication in any of these suits as regards the liability of Shrotriemdars to collect the plaint Merai inasmuch as their liability was practically admitted. From some of these judgments it no doubt appears that the plaint Merai had been already deducted from the gross produce but had not been paid over to the Mutt, nonetheless it must be held that they afford evidence as to the enforceability of the plaintiff's right against Shrotriemdars.

5. Exhibit E series are not of much importance for the consideration of this issue. Exhibit F and F (1), which are of recent date, show that officers of Government have recognised the plaint Merai even in recent times and have given instructions to Karnams to furnish the plaint Mutt with accounts for calculating the total of Merai due from each village. So far only it can be said that they are of any value, but on the question of the liability of the defendants they, it seems to me, throw no light.

6. The next and perhaps the most important set of documents consists of Exhibits G, H and J. The High Court have held that they contain a clear admission on the part of the defendants' predecessors-in-title both as to the plaintiffs' right to the Merai and as to the defendants' liability to collect it and pay it over to him. It is not now open to the defendants to argue that they only contain an admission of their right to collect and appropriate the plaint Merai to themselves under a special agreement. The argument advanced on their side is that they collected and appropriated the Merai as agents of the plaintiff's predecessor-in-title under a special agreement. In the remand judgment of the High Court, their lordships observe that the special arrangement set up does not affect the weight of the admissions as evidence. No further explanation is now offered to explain the above said admissions. The effect of Exhibits J., G and H is, therefore, to furnish evidence that the defendants' predecessors were collecting the plaint Merai till 1890 for 50 or60 years prior to it, and it is rightly arg ued on behalf of the plaintiff that this can only be referred to the circumstance that they are liable as Shrotriemdars to collect it. The defendants allege and have adduced evidence to show that they have not been collecting the plaint Merai for some years. It is urged on their behalf that after the decision, Exhibit II, they have not been able to collect the plaint Merai, and there is no positive evidence on behalf of the plaintiff to the contrary, but reliance is placed on plaintiff's behalf on Exhibits L (1) and M (1) as showing that even after 1900 they incorporated the plaint Merai in their Muchilikas. In paragraph 3 of Exhibits L (1) and M (1) we find the year 19..., showing that they relate to years after 1900 and not prior to it. It seems to me that no inference can be drawn from them that the plaint Merai was actually collected and that they only indicate that they had an intention to collect it.

7. It is next pointed out on behalf of the plaintiff that as from the written statements of the defendants it appears that they themselves are the Mirasdars of the major portion of the lands in the plaint villages they are not entitled to plead that the plaintiff should sue the Kudivaramdars for the plaint Merai. This point does not, it seems to me, arise on the pleadings.

8. For the reasons given above, I have to arrive at a conclusion different from my original finding; the evidence furnished by Exhibits G, H and J turns the scale against the defendants and goes to show that as Shrotriemdars they are liable to collect the plaint Merai and the other documentary evidence corroborates it. I accordingly find Issue (3) in favour of the plaintiff.

These second appeals coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We must accept the revised finding of the District Judge on the

3rd issue. We think the evidence justifies the inference that this payment of the disputed Merai had a lawful origin and was not merely voluntary.

The only other point argued is that of limitation. Both lower Courts have found that there was no refusal of plaintiff's claim which would render the present suit barred under Article 131 of the Limitation Act.

The appeals are allowed, the decrees of the District Court are set aside and those of the District Munsif restored with costs throughout the decree of the District Court as regards costs in Appeal Suit No. 460 of 1915 and No. 461 of 1915 will, however, stand.

M.C.P.

Appeals allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 222 OF 1918.

June 12, 1919.

Present:—Pandit Kanhaiya Lal, A. J. C.

ANANT RAM—PLAINTIFF—APPELLANT

versus

KALWA AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption before certain period, stipulation as to, effect of—Term fixed for payment—Fallow season, redemption in, provision as to—Suit, maintainability of.

In cases where there is no stipulation restraining redemption, but only a period is fixed for payment, the term fixed for payment can only be regarded as a protection for the debtor till the contrary intention is shown. [p. 880, col. 2]

Where a mortgage-deed in respect of houses or groves provides for redemption in the fallow season, such embargo has no significance, and it is not necessary that a suit for redemption of such mortgage should be filed in the fallow season. [p. 881, col. 1.]

Sheikh Karim Bakhsh v. *Idu Shah*, 40 Ind. Cas. 381; 4 O. L. J. 334, distinguished.

Appeal against the order of the Subordinate Judge, Unao, dated the 5th April 1918, upholding that of the Munsif, (South) Unao, dated the 21st November 1917.

Mr. *A. P. Sen* and Babu *Hari Kishan Dhaon*, for the Appellant.

Babu *Rudra Dat Sinha*, for Respondent No. 5.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage effected by Kalwa, Jhuri and Jhunna, the predecessors-in-title of the plaintiff, in favour of Ganga Sewak and Bishun Dat on the 9th January 1908. The property mortgaged comprised a half share in two groves, certain stray trees and a house. The mortgage deed provided that redemption shall take place within 20 years in the fallow season. The suit was filed on the 14th July 1917 and was resisted by the mortgagees, whose contention was that it was premature.

The Courts below dismissed the claim. The view taken by the Court of first instance was that the mortgage could be redeemed within 20 years, but the claim for redemption could not be maintained, because no tender had been made in the fallow season. The view of the lower Appellate Court was that no redemption could be permitted before the lapse of 20 years. The latter view is obviously incorrect, because the mortgage deed in suit provides for the payment of the mortgage money in 20 years and contains an express covenant that if payment is made within 20 years in the fallow season, the mortgagees shall accept the mortgage money and allow redemption.

As pointed out in *Gopal Singh* v. *Karan Singh* (1), in cases where there is no stipulation restraining redemption before a certain period, but only a period is fixed for payment, the term fixed for payment can only be regarded as a protection for the debtor till the contrary intention is shown. In this case, there is nothing in the deed to indicate that the intention was to postpone redemption till the expiry of 20 years and the suit cannot, therefore, be regarded as premature on that ground.

It still remains to consider whether the suit was filed in the fallow season to permit a decree being passed for the redemption of the mortgage. On behalf of the defendants-mortgagees reliance is placed on the decision in *Sheikh Karim Bakhsh* v. *Idu Shah* (2); but in that case the property mortgaged was agricultural land, in regard to which time was of the essence of the contract; inasmuch as if redemption had been allowed at a time when some crop was standing on the land

(1) 25 Ind. Cas. 302 17 O. C. 218.
(2) 40 Ind. Cas. 381; 4 O. L. J. 334.

mortgaged, the mortgagee might have been put in a position of considerable disadvantage. Here the mortgage related to a grove, certain trees and a house. The trees were mostly fruit-bearing trees, but it is not clear whether on the date on which the suit was filed any fruits actually existed in the grove or trees. It is possible that at that time the grove and the trees may have had no fruits left. It is equally possible that they may have borne no fruits that year. The embargo placed by the deed of mortgage may not have been in those events of any avail to the mortgagees. As far as the house is concerned, the reference to the fallow season was, of course, without any significance. There was no agricultural land mortgaged. Several fallow seasons have elapsed since the date of the suit. The suit cannot in the circumstances be regarded as premature.

The appeal is, therefore, allowed and the claim decreed for redemption of the mortgaged property subject to the payment of Rs. 361-1-0 to the defendants mortgagees. In case of non-payment the defendants-mortgagees will be entitled to bring the mortgaged property to sale. The decree will be framed in terms of Order XXXIV, rule 7, of the Code of Civil Procedure. The parties will bear their own costs throughout.

Appeal allowed.

PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.

APPEAL FROM ORIGINAL ORDER NO. 5 OF 1918.

April 11, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Roe.

RATNAKAR GOUNTIA AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHAMRA SATPASTY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 3—Foreclosure suit—Preliminary decree, non-compliance with—Final decree not passed—Mortgagor, whether entitled to redeem—Procedure—Waiver by parties, effect of.

If the preliminary decree in a foreclosure suit is not complied with, the mortgagors have no absolute right to pay the redemption money and avoid foreclosure merely on the ground that a final decree has not been passed. [p. 883, col. 2.]

If the parties consent to a course which is not strictly in accordance with the procedure prescribed by the rules, and take no objection to it, they are not entitled to turn round afterwards and seek to get some benefit from the failure to abide by the procedure in the same way as if they had objected at the start or if they had no notice of it. [p. 884, col. 2.]

Appeal from an order of the Subordinate Judge, Sambalpur, dated the 19th February 1918.

Mr. *B. N. Sinha*, for the Appellants.

Mr. *Satish Chandra Bose*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal from an order of the Subordinate Judge of Sambalpur, dated the 19th February 1918, dismissing an application for an extension of the time for redeeming a mortgage in a foreclosure suit by three of the defendants in that suit, who were interested in the property as mortgagors. The plaintiffs in the suit were second mortgagees of the property in question, and, before they instituted their suit the first mortgagees had obtained a mortgage decree. The plaintiffs, therefore, made the second mortgagees as well as the mortgagors the defendants in the present suit. The first mortgagees are the defendants Nos. 18 and 19, the other defendants are the mortgagors or others interested claiming through them. The defendants who have brought the present appeal are the defendants Nos. 11 to 13 in the suit. The suit was decreed in favour of the plaintiffs on the 1st May 1914 and an order was made that the plaintiffs should be at liberty to redeem the prior mortgagees, the defendants Nos. 18 and 19, and that the other defendants including the present appellants, as mortgagors, should within six months from the date when the prior mortgagees were redeemed by the plaintiffs pay off to the plaintiffs the decretal amount, including the sum which they had paid to the prior mortgagees, within six months from the date of payment; otherwise foreclosure was ordered.

RATNAKAR GOUNTIA *v.* CHAMRA SATPASTY.

It appears that an appeal was lodged against that decision and came up to the High Court, and by consent of the parties the case was remanded by the High Court to the Subordinate Judge with directions to ascertain the improvements which it was claimed by the prior mortgagees, who had been in possession, that they had made to the property, because this sum apparently had not been ascertained and they could not be redeemed until the sum was ascertained. It was directed that the amount found due to the prior mortgagees for improvements should be added to the redemption money payable by the plaintiffs. The matter went back then to the Subordinate Judge and the amount for improvements was ascertained and assessed at a sum of Rs. 1,100. It is obvious from what I have said that the original decree having been modified, it was necessary that a further decree in the case should be passed. In the meantime, on the 18th November 1916, the defendants by an order of the Subordinate Judge of that date were allowed six months in which to redeem the plaintiffs from the date when the plaintiffs redeemed the defendants Nos. 18 and 19, and failing this there was to be a foreclosure. At that time the amount of the improvements had not been ascertained, but they subsequently were ascertained, and on the 15th May 1917, a preliminary decree was passed whereby it was ordered that the plaintiffs should pay into Court a sum of Rs. 1,100 to the account of the defendants Nos. 18 and 19 within two months (that would bring the date up to the 15th July 1917), and that the other defendants, including the present appellants, should pay the sum decreed in the mortgage suit, including the Rs. 1,100, to the plaintiffs within four months from that date. (That would bring it up to the 15th November 1917.) The money, in fact, was deposited by the plaintiffs within time, that is to say, on or before the 15th July 1917, and therefore, under that decree which I have just referred to of the 15th May 1917, the time allowed to the present appellants and the other defendants would expire on the 15th November. On the 22nd December 1917, neither the appellants nor the other defendants having taken any steps to redeem the plaintiffs, the matter came before the Subordinate Judge to pass the final decree, and it appears that at that time one Gokul Chandra Babu had acquired the right and title of the whole of the defendants, other than Nos. 18 and 19, in their equity of redemption, and he presented a petition for final orders in the case and for a final decree, praying in fact that foreclosure might be ordered, he not being in a position to pay off the mortgagees. It ought to be mentioned that that application was made and heard before the Subordinate Judge in the presence of all the defendants or their Pleaders who represented them and in the presence of the Nazir of the Court who was the guardian of the present appellants, who were minors. That appears from the decision of the learned Subordinate Judge in the order which is appealed from and which I shall refer to presently.

The decision come to on that occasion by the learned Subordinate Judge was that which appears in the order-sheet as Order No. 117, dated the 22nd December 1917. It says:—

"Judgment debtors have not deposited the decree money. So on the petition of Gokul Chandra Babu decree is made final, and it is ordered that the judgment debtors are debarred absolutely from redeeming the mortgaged properties. Plaintiffs will be put into possession of the mortgaged properties free from all claims of the judgment-debtors."

And in pursuance of that decision a decree was drawn, which undoubtedly contains certain clerical errors. The decree, which is dated the same day and signed by the Judge, apparently on the 11th January 1918, instead of referring in the preliminary part of it to the application of Gokul Chandra Babu and instead of referring to the preliminary decree passed on the 15th May 1917 (the earlier one of the 1st May 1914 having been set aside when the case was remanded by the High Court), did in fact read in this way:—

"Upon reading the decree passed in the above suit on the 1st day of May 1914 and the application of the plaintiffs dated the 1st day of December 1914 and after hearing Babu B. P. Chatterji, Vakil for the plaintiffs, and Babu J. N. Sen, Vakil for the defendants Nos. 18 and 19, and Babu R. N. Misra, for Nriparaj Gountia, and

Babu Parsuram Misra, Pleader for other defendants, and it appearing that the payment directed by the said decree has not been made, it is hereby decreed as follows....."

Then follows the operative part of the decree, which debars the defendant and all persons claiming through or under him from all right to redeem the mortgaged property and ordering the plaintiffs to be put in possession.

There was no appeal from that judgment and decree, which was the final decree in the case directing foreclosure and giving possession to the plaintiffs. But the present appellants, on the 28th January 1918, filed a petition, notwithstanding that the final decree had been passed, claiming an extension of the time prescribed by the preliminary decree for redeeming the plaintiffs and getting back possession of their property, and setting out the history of this case their petition prays that it may be held that the order (the word is "order" but it is a mistake for decree), dated the 22nd December 1917, forfeiting the right of redemption and the order of the 15th May 1917 (which is the preliminary decree) are invalid and inoperative, and the applicants may be permitted to deposit the entire decretal amount and redeem the mortgaged property.

When that application came before the Subordinate Judge on the 19th February 1918, the questions which were discussed before him were questions as to the power of the Subordinate Judge in the preliminary decree of the 15th May to order, as he did, that the defendants should redeem the plaintiffs four months after they had redeemed the prior mortgagees, because under the previous order of the 18th November 1916, the plaintiffs had been allowed six months to redeem. The learned Judge, however, pointed out that in the preliminary decree he had properly interpreted the order previously made on the 18th November and he also pointed out that this order had not been set aside; and, further, it was pointed out that the final decree had been passed in the case and there had been no appeal from that. But in any case the learned Subordinate Judge came to the conclusion that the applicants in their affidavit really disclosed no case whatever for extending the time, even if the applicants were to be allowed six months from the time when the plaintiffs redeemed the prior mortgagees, and that even when that time expired they were not then in a position to pay the money into Court. Further, he pointed out that all the orders in the case and the decrees had been made in the presence of the Nazir who represented the applicants, now the appellants, and that, therefore, not having appealed from the final decree, they could not at a later date come before him and ask for an extension of time in respect to a matter which was concluded by the final decree.

From that order the appellants have appealed. It seems to us that this appeal cannot possibly stand. In the first place, it is quite clear that a final decree has been made in this case and that unless it is set aside by a proper procedure, it is absolutely binding upon the applicants. It can only be set aside in one of three ways—either by an appeal to the High Court or by an application under Order IX or by an application for review of judgment, and none of these courses has been taken. The appellants, however, ask us to say that the final decree passed on the 22nd December is invalid and inoperative, and, therefore, that in fact no final decree in the case has been passed at all, and they go further and say that where no final decree has been passed notwithstanding that the preliminary decree limits the time within which they may apply to redeem, nevertheless they may still apply after the time has expired and before a final decree has been passed, and claim as a right to pay in the redemption money and avoid foreclosure. It is not necessary for us in this case to decide that last point, although some argument has been addressed to us upon it and various cases not under the present Code of Civil Procedure but under section 86 and the following sections of the Transfer of Property Act have been referred to. It seems to me, reading the order and rules of the Civil Procedure Code which relate to this matter, that it is clear that if the preliminary decree is not complied with, the mortgagors have no absolute right to pay the redemption money and avoid foreclosure merely on the ground that a final decree has not been passed. It seems to me quite clear that Order XXXIV, rule 3, by the proviso to clause (2) of that rule, contemplates that the Court may or may not, as it shall think fit, extend the time for the payment, and if

it is to be held that the mortgagors have an absolute right to pay in the money after the time for payment has expired, it is difficult to see what can be the meaning of the proviso to which I have just referred. However that may be, it is not necessary, as I say, to determine this question because we have come to the conclusion without much difficulty that the final decree passed on the 22nd December 1917 is a valid decree. The first reason which has been urged before us for treating it otherwise is that there appear in the preliminary part of that decree two errors which, in our opinion, are clearly clerical errors. I have already referred to them in an earlier part of this judgment, and it is not necessary to repeat them again. It is not difficult to see how these errors may have arisen. It is probable that the decree *muharrir*, in making this decree, in going through the record which is one of some length and looking for the applications for a final decree and endeavouring to ascertain what was the preliminary decree, had come across the application by the plaintiffs dated the 1st December 1914, which in fact was made on the first preliminary decree dated the 1st May 1914, and then through carelessness, not realising that that decree had been set aside and that a fresh preliminary decree had been made after the case was remanded and that a fresh application for a final decree had consequently been made, went no further in his search in the record. But these are purely clerical errors, such as can be rectified by the Court which passed the decree and they do not seem to me to affect the matter in any way.

The next objection which was taken and the last is one in which I also think that there is no substance. It was contended that under the rules the application for a final decree must be made by the plaintiff and that in the present case no such application had been made, and, therefore, the decree was in itself a nullity. It is quite true that the application in this case was not made by the plaintiffs, but was made, as I have said, by Gokul Chandra Babu who was at that time standing in the shoes of the defendants, having purchased their interest. The present appellants, who were represented as I have said by the Nazir, were parties to that, in that the application was made in their presence and no objection was taken to it at that time. The plaintiffs themselves were also acquiescing parties in that application, and I do not think that the present appellants, who are the defendants, have any right, after the matter had been determined in their presence and without objection, to turn round and say that there was no jurisdiction in the Court to pass a final decree. It is unnecessary to deal with the matter further. It is quite clear to me that if the parties consent to a course which is not strictly in accordance with the procedure prescribed by the rules and take no objection to it, they are not entitled to turn round afterwards and seek to get some benefit from the failure to abide by the procedure in the same way as if they had objected at the start or if they had had no notice of it. In my opinion, this appeal must be dismissed with costs.

I think the final decree of the 22nd December 1917 must go to the Subordinate Judge to be corrected in conformity with the judgment. The judgment clearly refers to the petition of Gokul Chandra Babu, and the decree refers to an application of the 1st December 1914. Again, by what is obviously a clerical error, the preliminary decree is referred to as that passed on 1st May, 1914, whereas in fact it was a decree passed at a later date.

ROE, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 22 AND 23 OF 1913.

September 1, 1916.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Sheepshanks.

AMRITA LAL SHAHA AND OTHERS —DEFENDANTS—APPELLANTS

versus

GOSSAIN GANPAT GIR AND OTHERS —PLAINTIFFS—RESPONDENTS.

Hindu Law—Succession among Sanyasis—*Will made*

by Giri—Debutter, *creation of*—Shebait, *appointment and removal of*—Punch *removing* shebait, *validity of*—*Probate and Administration Act* (*V of* 1881), *s.* 90—*Sanction for sale obtained by fraudulent misrepresentation—Sale, validity of.*

One Amrita Giri, belonging to the religious sect of 'Giris' who are succeeded by *chelas* or disciples, died leaving a Will by which he dedicated all his properties to the deities, Salgram and Shiva Thakur, established by him. The Will stated that all the properties and the profits thereof would be *debutter* properties of the deities and provided for succession to the office of the *shebait*, who was to carry on the *sheba* and perform other acts mentioned in the Will according to the custom and usages of the family. It further provided that none of the *debutter* properties would be sold or subjected to any charge for any debts contracted by any *shebait* and that if any such thing happened, the same would be liable to be set aside by the next *shebait* executor according to law, that if any person who might be appointed to the office of the *shebait* acted arbitrarily or became extravagant or was found by the *panch* of the Giri community guilty of any grave offence he would be removed from the office of *shebait*, and some other *shebait* appointed in his place and the person so removed would not be competent to object to the same. After Amrita Giri's death succession to the office of *shebait* was according to the Will ; the last person named therein executed a Will, by which he appointed the defendant No. 1 as *shebait* after his death. The defendant No. 1 succeeded to the office of *shebait* and obtained Probate of the Will, but he neglected the *debsheba* and other trusts of the *mutt*, led an immoral life, contracted debts and by fraudulent misrepresentation of facts obtained the sanction of the District Judge under section 90 of the Probate and Administration Act to sell some of the *debutter* properties and sold them to the defendants Nos. 2, 3, 6 and 7. The other Giris of the community, finding that the defendant No. 1 was misconducting himself and wasting the *debutter* properties, excommunicated him and by a *panchnama* removed him from the office of *shebait*, appointing the plaintiff instead. The plaintiff then brought this suit for a declaration that the properties in suit were *debutter*, that he was the *shebait* and also for recovery of possession of the properties sold by the defendant No. 1:

Held, (1) that the *debutter* created by Amrita was an absolute *debutter* ; [p. 886, col. 2.]

Ashutosh Dutt v. *Doorga Churn Chatterjee*, 5 C. 438 (P. C.); 5 C. L. R. 296; 6 I. A. 182; 4 Sar. P. C. J. 58; 3 Suth. P. C. J. 694; 3 Ind. Jur. 571; 3 Shome L. R. 32; 2 Ind. Dec. (*n. s.*) 888, distinguished.

(2 that the ordinary rules of inheritance in their entirety could not be applied to the 'Giris' who were *sannyasis*, for, although the succession was through *chelas*, any question as to preference between *chelas* must, in the absence of any provision made by the *guru*, be decided by the customs and usages of the community, and the representatives of the community were the proper persons to decide such matters ; [p. 888, col. 2.]

(3) that the *panch* validly removed the defendant No. 1 from *shebaitship* and rightly appointed the plaintiff, who was the nearest *gaddinashin gotia* of the defendant No. 1, as the *shebait* according to the customary rules of the community under the powers conferred by the Will, though not clearly so stated in the *punchnama*; [p. 891, col. 1.]

(4) that as the defendant No. 1 obtained sanction by fraudulent misrepresentations under section 90 of the Probate and Administration Act to sell some of the *debutter* properties and as the alienees were not *bona fide* purchasers without notice of the fraudulent misrepresentations upon which the sanction had been obtained, the alienations should be set aside ; [p. 896 col. 1.]

(5) that the expression "family" or "ancestral gods" in the Will was not to be understood in the same sense as when applied to ordinary persons, but referred to the spiritual family and relationships of the sect to which the testator belonged. [p. 887, col. 1.]

Appeals against the decrees of the Subordinate Judge, Rajshahye, dated the 30th September 1912.

Babus *Dwarka Nath Chackerbutty* and *Krishna Komal Maitra*, for the Appellants.

Babus *Mohini Mohan Chakerbutty* and *Nishitha Nath Ghattack*, for the Respondents.

JUDGMENT.—These appeals arise out of a suit instituted by the plaintiff Gossain Ganpat Gir as Shebait of the deities, Salgram and Shiva Thakur, to recover possession of the properties in dispute, alleged to be the Debutter of the said Thakurs, after setting aside the alienations thereof, said to have been improperly made by the defendant No. 1, the former Shebait.

One Amrita Gir, who belonged to the sect of "Giri," one of the ten classes of Dasnami Gossains, established the Thakurs Salgram and Shiva at Arapur in the District of Maldah. Persons belonging to the sect to which he belonged are bound to observe celibacy but can acquire properties and are succeeded by Chelas or disciples. Amrita Gir acquired certain properties and by his Will dedicated the properties acquired by him to the said deities, the exact nature of the dedication being one of the main questions in this case. By his Will he directed that on his death his Chela Bissonath Gir would be the Shebait and executor, and on the death of the latter his Chela grandson Alum Gir Gossain and on his death Udit Narain Gir, the Chela of Bissonath, would be appointed to the office, and carry on the Sheba, and perform other acts mentioned in the Will according to the custom and usages of the family. There were other provisions in the Will which will be noticed later on. After Amirta Gir's death, his

Chela Bissonath Gir obtained Probate of his Will on the 30th April 1878, carried on the trusts, and with the surplus income of the properties acquired certain other properties. On his death his Chela Udit Narain Gir succeeded him as Shebait. Udit Narain made a Will on the 5th Chait 1310 (18th March 1910), by which he appointed his Gurubhai Ram Narain (the defendant No. 1) as the Shebait after his death. Ram Narain accordingly succeeded Udit Narain on his death and obtained Probate of his Will on the 14th June 1904. He appears to have been a man of immoral character. He neglected the Debsheba and other trusts of the Mutt and contracted debts. On the 9th August 1905 he applied under section 90 of the Probate and Administration Act to the District Judge for permission to sell certain properties and having obtained the permission, sold the properties in respect of which permission was granted as well as some other properties. Some of the properties were sold to the defendants Nos. 2 and 3 and some others to the defendants Nos. 6 and 7; practically all the Debutter properties have been sold away.

It is alleged by the plaintiff (who belongs to the same order of Gossains) that the other Gossains belonging to the same community in the District of Maldah assembled, and having found that the defendant No. 1 was guilty of misconduct and had wasted the Debutter properties, excommunicated him and by a Punchnama dated the 20th November 1906 removed him from the Shebaitship, appointed the plaintiff as Shebait as being the nearest and most preferential Gotia in the family to which Amirta Gir belonged. The plaintiff then applied for revocation of the Probate granted to the defendant No. 1 and was appointed administrator *pendente lite*, but subsequently (on the 26th May 1908) was permitted to withdraw his application for Letters of Administration with liberty to make a fresh one. He was also directed to vacate the office of administrator *pendente lite*. The plaintiff brought the present suit on the 8th November 1908 for declaration that the properties in suit are Debutter, that he is the Shebait, that the defendants had not acquired any right under their purchase, and for recovery of possession of the properties and for other reliefs. The suit was decreed by the Court below and the defendants Nos. 2 and 3 have preferred Appeal No. 22 of 1913, and the defendants Nos. 6 and 7 (and defendant No. 19 who was subsequent to the institution of the suit added as defendant) have preferred Appeal No. 23 of 1913.

The questions for consideration in these appeals are:—

1. Whether the Debutter created by Amrita Gir was an absolute Debutter.

2. Whether the right of the defendant No. 1 as Shebait had been legally put an end to, and whether the plaintiff is entitled to be Shebait even if the defendant No. 1 had been validly removed.

3. Whether the alienation of the properties made by the defendant No. 1 in favour of the defendants Nos. 2, 3, 6 and 7 can be set aside.

With regard to the first question, it is contended on behalf of the appellants that the trust is a private one and there being no direction as to the surplus after meeting the Debsheba and other expenses which, moreover, were left uncertain (nothing being stated as to the amount to be spent in the Debsheba or other acts), the Shebait could appropriate the residue, and that being so it was not an absolute Debutter, but that the Shebait had a disposing power over the properties subject to the trusts. We are of opinion, however, that the Will of Amirta Gir created an absolute Debutter. The Will purports to deal with "all the properties" and clearly states that all the properties, moveable and immoveable, and the profits of the said properties will be deemed as the Debutter properties of the two deities Salgram and Shiva Thakur. It then provides for succession to the office of Shebait who is to carry on the Sheba and "entertain guests according to the custom and usages of my family and will maintain as usual the other dependents and perform acts of conferring spiritual benefits to myself and my ancestors. None of the properties left by me will be liable to be sold or be subject to any charge for any debts contracted by the said three persons or by any person who will be appointed

to that office after them. If any such thing happens, the same will be liable to be set aside by the next Shebait executor according to law."

It is to be borne in mind that Amirta Gir belonged to a religious order, and persons belonging to the order cannot marry or have children. The expression "family" or "ancestral gods" is not to be understood in the same sense when applied to ordinary persons, but refers to the spiritual family and relationships of the sect to which he belonged. No beneficial interest in the properties is reserved for the successors and having regard to the fact that the successors would be Chelas (disciples), there is no reason to think that any beneficial interest was intended to be given to them. The Will in unambiguous language dedicates all the properties together with the profits thereof to the deities to be appropriated for their service and for the other objects mentioned in it. We have been referred to the case of *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (1). That case, however, is clearly distinguishable. There a Hindu lady left by Will to her sons lands belonging to her to support the daily worship of an idol and defray the expenses of certain other religious ceremonies, with a provision that in the event of there being a surplus after those uses had been satisfied out of the revenue of the said lands, such surplus should be applied to the support of the family and the Judicial Committee held that it could not be said that the property was wholly Debutter but that the Will created a charge upon the property for the expenses of the daily worship of the idol as it was performed at the time of the death of the testatrix, and of the other religious ceremonies for which provision was made by the Will. Their Lordships, referring to the provision in the Will that "if there be a surplus then the family will be supported therefrom," observed: "Their Lordships not without some doubt and hesitation have come to the conclusion that these words amount to a bequest of the surplus to the members of the joint family for their own use and benefit." In the present case there was no provision in the Will that any person was to enjoy any portion of the income of the properties and the whole of the properties together with the profits thereof were dedicated for the maintenance of the trusts and for those only. The word "dependent" apparently refers to persons connected with the Mutt for the performance of the trust.

It is pointed out that the Will provides for carrying on the Debsheba and entertainment of guests and other acts according to the custom and usages of Amrita Gir's family, that there is no evidence as to how much was spent in the time of Amirta Gir and that the income of the properties is about Rs. 1,500, whereas the expenses of the Debsheba are only Rs. 430 a year, as would appear from the judgment of the Court below. But the said sum of Rs. 430 is stated to be the expenses connected with the daily Debsheba only as it was carried on during the time of Ram Narain. It does not include the expenses connected with the entertainment of guests nor the occasional festivals.

It appears from the evidence that the Debsheba in the time of Amrita Gir, Bissonath Gir and Udit Gir consisted of cooked rice, *dal* and vegetables, etc., in the morning and *loochi*, *rooti* and sweets in the evening, and there were expenses connected with the occasional festivals which were performed with some *eclat*, but that since a year after the defendant No. 1 became the Shebait they had been stopped, and the figure Rs. 430 represents the expenses to which they had been reduced by the defendant No. 1 when he was wasting the properties, and the Debsheba appears to have dwindled down to the mere performance of the worship without offerings of proper *bhog* for the deities. It is not at all clear that there would be any surplus left if the trusts enjoyed by the Will were performed in the same manner, as they were performed during the time of Amrita Gir and his immediate successors, which according to the witness consisted in not only performing the worship, but also [illegible] offerings [illegible] to the deities, the celebration of the occasional

(1) 5 C. 458 (P. C.); 5 C. L. R. 256; 6 I. A. 182; 4 Sar. P. C. J. 58; 3 Suth. P. C. J. 694; 3 Ind. Jur. 571; 3 Shome L. R. 32; 2 Ind. Dec. (N. S.) 888.

festivals and the entertainment of guests (which includes persons belonging to religious orders and mendicants.)

The fact that Bissonath Gir and Udit Narain Gir had to borrow monies from time to time for meeting the expenses of the trust (as shown by the documents filed in the case) go to support the view that generally no surplus used to be left. Some surplus might be left in some years which the Shebait would be expected to keep as a reserve fund or to apply in the acquisition of other properties for the Debutter, as appears to have been done by Bissonath Gir who purchased some properties from the income of the Debutter estate.

It is further contended that the successors of Amrita Gir treated the properties as if they were secular properties. The evidence, however, does not establish that they were so treated. A large number of documents such as mortgage bonds, *ijara kabuliyats* and *dakhilas* have been produced in the case to show how the properties were dealt with. With the exception of 3 all the documents expressly recognise the Debutter character of the properties dealt with by them and in most of them the executants are described as Shebaits of the deities Salgram and Shiva Thakur. The properties are described as Debutter and some legal necessity is alleged in the documents. The mere fact that the former Shebaits borrowed monies on mortgages or leases of the properties does not show that they were treated as secular properties, as a Shebait can raise loans for legal necessity. The alienations made by the defendant No. 1 cannot be relied upon to show that the properties were not dealt with as Debutter. They were made the foundation for removal of the defendant No. 1 from the office of Shebait, and for the institution of the present suit for recovery thereof on the ground that the properties had been improperly alienated, and even some of those documents describe the properties as Debutter and recite necessity for the alienations. The three documents in which the Debutter character of the properties dealt with by them was not stated and no legal necessity was alleged were mortgage bonds executed by Bissonath or Udit Gir, but having regard to the numerous documents in which the Debutter character was recognised and the alienations were made as Shebait alleging legal necessity, we do not attach any importance to the said documents.

The next question is whether the right of the defendant No. 1 Ram Narain as Shebait had been legally put an end to, and whether the plaintiff is entitled to be Shebait even if the removal of Ram Narain was valid. It is contended on behalf of the appellants that the trust being a private one, succession is governed by the rules laid down in the deed creating the endowments and in the absence of such rules by the ordinary rules of inheritance governing the family and the defendant No. 1 Ram Narain, having succeeded Udit Naraian, could not be removed by the Punch and that so long as Ram Narain was not removed from the Shebaitship by a Court of Law, the Punch had no power to appoint the plaintiff as Shebait. It is further contended that although the Punch might excommunicate a person of their order for misconduct, such excommunication cannot deprive him of his civil rights. But in the first place it must be borne in mind that these persons are not ordinary Grihasta (householders) but belong to the order of Sanayasis who although they may engage in secular pursuits cannot marry, and are governed by the rules of the community to which they belong. They are supposed to lead a strictly religious life and succession to their property is through Chelas or disciples. The ordinary rules of inheritance in their entirety cannot apply to such persons, for although the succession is through Chelas any question as to preference between Chelas (when it is not provided by the Guru) must be decided by the custom and usages of the community to which they belong, and the representatives of the community are the proper persons to decide such matters. Secondly, although the secular property of a Guru may be inherited by the Chela, the properties in this case were absolute Debutter. The Will of Amrita Gir speaks of the succession to the office of Shebait and lays down that after his death his Chela Bissonath Gir, and on his death his Chela grandson Alum Gir and on the death of the latter Udit Gir Chela of Bissonath would be the succeeding Shebaits respectively The further order of succession (after Udit Gir) is not laid down in the

Will, but it states: "None of the properties left by me will be liable to be sold or be subject to any charge for any debts contracted by the said three persons or by any person who will be appointed to the office after them. If any such thing happens, the same will be liable to be set aside by the next Shebait executor according to law. Be it also known that if the aforesaid persons or any one who will be appointed to that office after them acts contrary to the custom or usages of my family or acts arbitrarily according to his wishes or becomes extravagant or is found by the Punch of our community to be guilty of any grave offence, he will be removed from the office of the Shebait and the person next referred to will be appointed in his place, and take possession of all the moveable and immoveable properties from him and carry on the duties as aforesaid and he shall not be competent to raise any objection to the same." The Punch of the community would naturally be the proper persons to decide the question what constitutes grave offence, or acts contrary to the custom or usages of the family, which means the sect to which he belonged.

There is no doubt that the Will gives the power to the Punch to enquire into misconduct not only of the three succeeding Shebaits expressly mentioned in the Will, but also of those who may be appointed after them and impliedly recognises the authority of the Punch of the community to enquire into the misconduct of the Shebait.

It appears that there were two meetings of the Punch of the community. The first was held at the annual meeting at the time of Ganga Poojah at the house of Protap Gir, who appears to be most influential and the richest of the "landed Gossains" residing in the District of Maldah. It is said that Prayag Gir complained at that meeting that Ram Narain used to drink, visit prostitutes, and was wasting the Debutter properties and the Gossains present asked Ram Narain about his alleged misconduct, whereupon he said "if I do all this what of that to them," and thereupon he was excommunicated. There was a second meeting held at the house of the plaintiffs at Fulbari when an enquiry was held as to the misconduct of Ram Narain, and the Punch by a Punchnama removed him from the Shebaitship and the plaintiff was appointed in his place. It is contended on behalf of the appellants that Ram Narain was condemned before trial. No doubt the proceedings of these Gossains did not take place in the regular manner in which proceedings take place in a Court of law. But the fact appears to be that when Ram Narain on being asked about his misconduct did not deny it and defied the authority of the Punch, they took that as a confession of his guilt and at once excommunicated him. Subsequently they thought, of making a formal enquiry before depriving him of his right as Shebait, and for that purpose the second meeting was held at Fulbari. One Balkissen Gir (who is said to be the Kotwal) was deputed to make the enquiry and he reported that the charges were true. However that may be, the evidence about the misconduct of Ram Narain is overwhelming. There is no doubt that he used to drink wine, eat meat, visit prostitutes, neglect the Sheba and the other trusts and wasted the properties and even sold the bricks of the Thakurbari. Although according to the defendants' witness No. 11, Lachmi Narain Gir, many of the Gossains keep Baishnavis as concubines, and do not lose their Guddi, the defendant No. 1 appears to have offended against all the rules of the order to which he belonged and as some of the witnesses put it, he was "as bad as possible". A person guilty of such misconduct could not be retained as Shebait of a religious institution, and the Punch were quite justified in removing him.

It is contended that even if the Punch had any power of removing the Shebait, all the representative Gossains were not present at the meeting of the Punch.

It appears from the evidence that there are seven Mutts besides, those of the plaintiff and Ram Narain in the locality, that the Gossains of all the Mutts with the exception of three, *viz.*, Luchmi Narayan, Bissumbhur, and Protap Narain were present. Jadunandan, another Gossain, was represented by his Chela, and Balkissen, the Kotwal, was also present. Out of 11 Gossains 8 were present. There is no evidence on behalf of the defendants that there was any other

Gossain who could take part in the Punch and there is no doubt that the majority of the Gossain Punch took part in the meeting.

The case of *Rup Narain Singh* v. *Junko Bye* (2) relied on by the appellants is distinguishable. There a Shebait gave authority to a Punch and the inhabitants of the neighbourhood, but he himself had no such power and even assuming he had, the authority was to be exercised by all the inhabitants.

Luchmi Narayan was at Benares at the time, and he was then under ban of excommunication, Bissumbhar was on pilgrimage, and Protap Narain Gir was insane. The rule seems to be that when a member of the Punch in unable to attend on account of his illness or being on pilgrimage, the other members of the Punch can act.

The defendant No. 1 was served with notice to appear but he did not appear, and the Punch gave their award by the Punchnama which was signed by the Gossains.

The evidence as to the presence of some of the Gossains, the enquiry held, the signing of the Punchnama and as to the fact of Prayag Gir having charged Ram Narain at the first meeting with misconduct, has been attacked on behalf of the appellants. The evidence has been considered by the learned Subordinate Judge and believed by him. We think the evidence has been rightly appreciated by him. Some of the Gossains are persons of substance, Protap Gir being the most influential among them with an income of Rs. 16,000 a year. Nothing has been said against his character, and he has no chance of succeeding to the Mutt. Some of the Gossains are very old men, and there does not appear to be any sufficient reason why these Gossains should join in a conspiracy and perjure themselves.

It is said that the proceedings of the Punch were not *bona fide*, that the Gossains, finding that the properties of a Mutt were alienated to strangers, put their heads together, and that it was merely an attempt to take out the properties alienated by Ram Narain and to restore the same to the Mutt. That no doubt was the object of the Punch, but that does not show that the proceedings of the Punch were not *bona fide*. There being no doubt about the misconduct of Ram Narain and the waste of the Debutter properties by him, we are unable to hold that the proceedings of the Punch for removal of Ram Narain and attempt at restoration of the Debutter properties were not *bona fide*. The Court below finds, "then it is proved by the evidence of all the Gossain witnesses of plaintiffs' side, and not rebutted by those on defendants' side, that the Punch had authority to excommunicate a Gossain for misconduct and to remove him from the Guddi and appoint his successor. Even in Amrita Gir's Will, there is a provision that if any Shebait would be found guilty of misconduct and extravagance in the judgment of the Punch, then he should be deposed."

Reliance is placed, however, upon certain statements of Gossain Ganga Gir, Gossain Jadunandan Gir and Protap Chandra Gir to show that the Punch had no power to remove a Shebait or appoint another in his place according to the rules of their community and independently of the power given in the Will. Gossain Ganga Gir says, "on having the Will read out to us we came to know that we had that power. If there were no such provisions in the Will, we would not have given the Punchnama to the plaintiff. He would have done what he liked."

Protap Chandra Gir says that they came to know of the terms (relating to the removal of the Shebait by the Punch) on reading the Will and Jadunandan Gir's evidence is to the same effect. It is contended that this evidence negatives the case that according to the rules of the community the Punch had the power to remove a Shebait, and appoint another in his place. It is further contended that the plaintiff cannot rely upon the Punchnama, because in the Court below he rested his case, as to the power of removal of Ram Narain and his own appointment by the Punch, under the customary rule of the community, and on that ground was exempted from payment of stamp duty (under Article 7 of Schedule I of the Stamp Act) and penalty on the Punch-

(2) 3 C. L. R. 112.

nama, as would appear from the order of the Court below dated the 24th July 1909. But none of the Gossain witnesses says that independently of the Will of Amrita Gir, the Punch had no power to deal with such matters. All that some of them said was that they came to know from Amrita Gir's Will that they had been given the power to remove a Shebait for misconduct and appoint another in his place, and that were it not for that power, they would not have interfered in the matter and executed the Punchnama.

The power of the Punch to deal with such matters is recognised in the Will of Amrita Gir executed more than 30 years before this suit and Amrita Gir, who presumably knew the rules of the community to which he belonged, would not have made the provisions in the Will had not the Punch the authority to deal with such matters. But even if it be held that independently of the power conferred in Amirta Gir's Will the Punch had not the power to remove a Shebait for misconduct or appoint another in his place, we do not see why the plaintiff should be debarred from relying on the power of the Punch to do so under the terms of the Will. The Court below by its order dated the 23rd July held that the Punchnama required a stamp of Rs. 15 under Article 7 of Schedule I of the Stamp Act and a penalty of Rs. 150, and on the next day on a re-consideration of the matter held that under the Will there was no power given to the Punch to appoint a new Shebait, that the appointment of the plaintiff by the Punchnama was made under the customary rules of the community and that, therefore, the Punchnama did not come under Article 7 of Schedule I of the Stamp Act. We are of opinion that the Will not only gave the Punch the power to enquire into the misconduct of a Shebait and to remove him from the office of Shebait, but also to appoint a new Shebait, at any rate, impliedly and that the Punch appointed the plaintiff as Shebait according to the customary rules of the community under the powers conferred by the Will, though not clearly so stated in the Punchnama. We accordingly directed the plaintiff-respondent to pay the stamp duty of Rs. 15 and a penalty of Rs. 150, and the same has been paid. That being so, the Punchnama becomes admissible for the purpose and the plaintiff can rely upon the authority of the Punch as derived under the Will, not only to enquire into the misconduct of Ram Narain and to remove him from the office of Shebait, but also to appoint him (the plaintiff) in his place.

Moreover, there being no doubt as to the power of the Punch under the Will of Amrita Gir to enquire into the misconduct of Ram Narain and to remove him from the Shebaitship, and of their having acted in those matters in exercise of their power as conferred by the Will, we think that once Ram Narain is removed, the plaintiff steps into his place by virtue of his being the nearest preferential Gotia according to the rules of the order and does not require the appointment by the Punch to the office of Shebait.

It is urged that it is a case of a private trust, and if Ram Narain was guilty of misconduct, the matter ought to have been brought into Court and investigated by it, and if found guilty, the Court might have removed him from the office of Shebait, and the community had no power to do so. But we have found that it was an absolute Debutter, the Shebait for the time being having no beneficial interest in the estate. We do not think that even in the case of a private trust there is anything to prevent the founder from giving to a particular class of persons, such as the Punch of the community, the power to enquire into misconduct of a Shebait which disqualifies him from holding the office of Shebait and to remove him from such office. The Punch may not have the power to enforce the removal, and if resistance is offered by the Shebait, the successor may have to go to a Court of law for obtaining relief. Such considerations, however, do not render the action of the Punch invalid in so far as their award is concerned. In the present case the plaintiff, after the Punchnama was given by the Punch, applied to the District Judge for revocation of the Probate granted to Ram Narain and was appointed administrator *pendente lite*. He entered upon the office of Shebait. It is true that he was removed from the office of administrator *pendente lite*, but he continued to

perform the Sheba and Puja of the deities as Shebait.

We were referred to certain letters written by Ram Narain in July 1908 to the plaintiff before this suit was instituted, and to the fact that Ram Narain at first put in a written statement on the 28th November 1908 contesting the claim and subsequently (on the 23rd April 1909) admitted the plaintiff's claim, and also to the statement of the witness Jadunandan Gir that when Ram Narain was told that he was deposed, he seemed to be pleased as showing that the removal of Ram Narain, the appointment of the plaintiff and the present suit were the result of collusion between Ram Narain and the plaintiff, with the object of recovering the properties from the purchaser defendants. But we are not disposed to attach any importance to the above matters, because Ram Narain had by his profligacy and extravagance ruined the Debutter estate, he could never get back the estate and it might be that he was glad if some one of his order got back the estate by his removal, and even might be disposed to help the plaintiff. If Ram Narain was validly removed, it does not matter that he wrote such letters to the plaintiff or filed a written statement and subsequently admitted the claim.

The next question is whether the plaintiff was entitled to succeed Ram Narain even if his removal was valid.

Upon this point the finding of the Court below is as follows: "Both the plaintiff and the defendant No. 1 belong admittedly to the sect of Giris or 'Giris', who form one of the ten classes of Dasnami Gossains which came to be constituted after the institution of Mutts by Sankar Acharjya. It has been proved on the evidence of plaintiff's witness No. 2, Bangali Roy Bhat, who is the professional herald keeping the pedigree of the Gossains from the District of Mirzapore on the west to the province of Bengal to the east, that Sankar Acharjya had four disciples who founded four Mutts, one of which was called Joshi, and from these four Mutts branch out fifty-two Murhies, and that the plaintiff and the defendant No. 1 as well as the latter's predecessors, Amrita Gir, Bissonath Gir and Udit Narain Gir, belonged to the Kumush Nath Murhi *i.e.*, descendants from the common predecessor Kumush Nath, as recorded in the pedigree book proved by the Bhat as transmitted to him by his forefathers. From the Bhat's evidence with reference to the pedigree book, plaintiff appears to be 13th descendant from Behari Gir, while defendant No. 1, Ram Narain Gir, is the 15th in descent from the same Behari Gir. Plaintiff, his witness No. 2, the Bhat, plaintiff's witness No. 16, Balkissen Gir Kotwal, plaintiff's witness No. 17, Baldeb Narain Gir, as well as the two old Gossains Jadunandan Gir and Ganga Gir and Protap Gir, the richest of landed Gossains in the District of Maldah (the last three examined by commission), as also the defendant's witness No. 1, Luchmi Narain Gir, prove the fact that the plaintiff and the defendant No. 1 are descended from one common ancestor, and that amongst Gossains if one dies leaving no Chela his nearest Gotia succeeds him, the ascendant being preferred to the descendant as plaintiff's witness No. 17, Baladebnarain Gir, deposes. Of the other Gotias of defendant No. 1 there appear Ram Chandra Gir, 13th in descent, Protap Narain Gir, 15th in descent, and Prayag Gir, 16th in descent, from Behari Gir. But Ram Chandra Gir branched off from the original Guddi (as plaintiffs' witnesses Nos. 2 and 3 depose), sold off his properties, and spent the money in dissipation and has been afterwards excommunicated and was also present at the Punch, but did not sign the Punchnama (Exhibit I) saying that he himself had sold all his properties like defendant No. 1. As for Protap Narain Gir he is mad and Prayag Gir is not in the original Mutt and earns his livelihood by selling pice in the Bazar. So the plaintiff is the nearest Guddinashin Gotia and is, therefore, most preferential, as alleged in the plaint. The case in the plaint was distinctly set forth, the plaintiff alleging himself to be the "most preferential" Gotia of defendant No. 1, and the ground of the preference is made out in the evidence and is no afterthought."

We agree in the above finding and would add that the case of the "Guddinashin Gotia" being entitled to preference, if there are more than one Gotia of the same class, was not started for the first

time in the Bhat's evidence, when it was found that there were two persons of the same rank, as contended on behalf of the appellant, but the case of "Guddinashin Gotia" being entitled to preference was put to and proved by the most respectable Gossains who were examined by commission in 1909, about two years before the Bhat was examined in Court, and in the plaint the plaintiff distinctly set up the case that the nearest and the most preferential Gotia succeeds, though the ground for such preference, *viz.*, "Guddinashin Gotia" was not stated. The case of "Guddinashin Gotia" being entitled to preference, therefore, is not an afterthought, as has been rightly pointed out by the Court below.

We are referred to the statements of Gossain Protap Chandra, Gir to show that where there are two Chelas, the worthier of the two succeeds and this is settled by the Guru, but that if both are equally worthy, they act together and in case of disagreement and in the absence of any provision by the Guru, they partition the property between themselves. In the present case the only other Gotia of the same rank with the plaintiff is Ram Chandra Gir, but as already stated, the plaintiff, being the "Guddinashin Gotia," is entitled to preference according to the custom of the sect, apart from the fact that Ram Chandra sold away the properties of his own Mutt, which was a sufficient disqualification. The statements of Protap Chandra Gir probably refer to the succession of secular property left by a Guru among his Chelas, and not to the Shebaitship of absolute Debutter properties which cannot be partitioned. It is unnecessary, however, to consider the question, as the plaintiff being the Guddinashin Gotia was entitled to preference.

"As regards plaintiff's character," the learned Subordinate Judge says: "He is a substantial Gossain keeping his own Mutt at Fulbari and even the defendants' witness No. 1, Lachmi Narain Gir, admitted that the plaintiff was a man of good character, and the insinuations on defendants' side about plaintiff keeping a woman are not at all proved, but merely suggested on hearsay evidence and Subjan Mistry, who is said to have been the source of the information, was asked no questions about it. It appears, however, that the plaintiff only gave some property for the maintenance of Basanti Debya, two of whose younger sons she gave as Chelas to plaintiff, her eldest son Seuraj as plaintiff's Pujari at the Mutt at Arapur. This cannot prove that the plaintiff ever kept her as his concubine as insinuated by the defence."

The plaintiff, it appears, was excommunicated once, for what reason does not appear, but he was re admitted into the community. The age of the eldest son of Basanti Debya is about 40 years, and the Court below has found, and we think rightly, that it was not proved that she was the concubine of the plaintiff as insinuated on behalf of the defendants. So far as character is concerned, the plaintiff does not appear to be below the average run of persons of the order, many of whom as the evidence shows do not possess a good moral character. It may be mentioned that the appellants in this Court have not attacked the plaintiff's character. On the whole we agree with the learned Subordinate Judge in holding that "according to the long established usage of the Gossain community as proved by the evidence, the plaintiff appears to be the most eligible person to succeed the defendant No. 1 to the Shebaitship."

The last question is whether the sale to the defendants Nos. 2, 3, 6 and 7 is protected by the sanction given by the District Judge under section 90 of the Probate and Administration Act.

Before dealing with the above question we will notice an argument advanced by the learned Pleader for the respondent, *viz.*, that no Probate could be granted of the Will of Udit Narain and that as such the sanction given by the District Judge was *ultra vires*. It is contended that Udit Narain had no personal interest in, or power of disposal over, any of the properties, the properties acquired after the death of Amrita Gir having been acquired by Biesonath Gir out of the profits of the properties left by the former. It is urged that Udit Narayan by his Will merely affirmed the Debutter character of the property, and appointed his Shebait and successor, and we have been referred to the case of *Chaitanya Gobinda*

Pujari Adhikari v. *Dayal Gobinda Adhikari* (3) and *Maharaja Jagadindra Nath Roy* v. *Mohunt Madhusudan Das* (4) to show that where a Will merely appoints a Shebait, the document is not a Will and cannot be admitted to Probate. But whatever rights Udit Narain might have in the properties, he described them in the Will as his own. He professes to give a power to his successor to alienate certain properties (those acquired after Amrita Gir's death) in case of necessity, and under the circumstances it cannot be said that he did not make any disposition about his properties and merely appointed a Shebait. The case relied upon is, therefore, distinguishable and we are unable to hold that the Probate proceedings were *ultra vires*.

The Will of Amrita Gir as well as the Will of Udit Narain provided that the Shebait would not be able to alienate any property. Udit Narain's Will gave power to alienate only the four properties specifically mentioned in the Will, but that was only in case of necessity. Ram Narain obtained permission of the District Judge under section 90 of the Probate and Administration Act to sell some of the properties, and the appellants contend that they are fully protected by the sanction. The sanction, however, appears to have been obtained by misrepresentation. In the application dated the 9th August 1905 for permission to sell the properties it was stated that the deceased (Bissonath Gir and Udit Gir) left debts of about Rs. 3,800, out of which Rs. 1,000 was due to Jadub Chandra Chowdhuri, Rs. 1,500 to Kunja Lal Marwari and Rs. 1,300 to Gopi Charan Sen, that the creditors were about to institute suits, and that if suits were brought, it will enhance costs and interest and all the properties belonging to the estate would be sold. It was further stated that "the three properties mentioned in the schedule, if sold, may fetch about Rs. 4,000 and in that case the debts will be paid off and the remaining properties of the estate saved. Rajani Babu and Protap Satia of Maldah and the said creditors Nos. 2 and 3 are willing to purchase the said properties for the prices mentioned in the schedule."

Now, the sanction for sale was given on an *ex parte* application by the Court apparently without any enquiry into the matter on the very same day. It was not pointed out in the application that the properties were Debutter. It has been proved that the debts mentioned in the application had no existence at all. The learned Subordinate Judge has gone into the question fully and has shown that there were no such debts, and that finding has not been challenged in this Court. Then again the three properties, which were stated in the application "may fetch about Rs. 4,000," were sold for Rs. 7,500. That Ram Narain obtained the sanction by misrepresentation of facts and by practising fraud upon the Court, is not seriously disputed in this Court, but it is contended that the purchasers, at any rate the defendants Nos. 2 and 3, were not privies to, and had no knowledge of, the same. It is true the defendants Nos. 2 and 3 are not shown to have been concerned with the application for permission and negotiations about their purchase appear to have commenced about a fortnight after permission was obtained. The three properties for the sale of which permission was obtained from the District Judge, were, first, a Mourasi Jote (valued in the application at Rs. 1,000), second, a mango garden (valued at Rs. 1,000) and third, a Patni Mahal (valued at Rs, 2,000). The defendants Nos. 2 and 3 purchased the Mourasi Jote and the Patni Mahal together with 6 other plots of land (not covered by the permission) for Rs. 7,500 on the 26th October 1905 by the deed of sale (Exhibit C). The defendant No. 2 did not examine himself, but the defendant No. 3 Chandra Mohan Roy has been examined. He admits in his deposition that Ram Narain showed him certified copies of his application for permission to sell and the Judge's order giving the permission.

The application, as already stated, mentioned three debts, Rs. 1,000 due to Jadab Chandra Chowduri, Rs. 1,500 to Kunja Lal Marwari and Rs. 1,300 to Gopi Charan Sen.

The defendant No. 3 says that the debts due to Kunja Lal Marwari and Gopi Charan Sen were paid by Ram Narain in his presence and the latter took back the registered mortgage-bonds. But he admits that he

(3) 32 C. 1082; 9 C. W. N. 1021.
(4) 27 Ind. Cas. 24; 20 C. L. J. 307.

knew Ram Narain from his boyhood as a Chela of Bissonath Gir and that he had Thakurbari at Arapur. Those facts are sufficient to put a purchaser on his guard, but he says that he did not make any enquiry as to what right Ram Narain had in the properties, and whether he had other properties left and how the Sheba of the Thakurs was maintained. He did not take the mortgage-bonds when the creditors were paid off. The defendants did not call for those documents from Ram Narain nor take certified copies from the registration office. As a matter of fact these debts had no existence at all, as found by the Court below, but if, as stated by the defendants No. 2, the creditors were paid off in his presence, he would certainly have taken the bonds. Then the permission granted by the District Judge was to sell three properties worth Rs. 4,000. The defendants Nos. 2 and 3 purchased two of the said three properties (together with a few other plots of lands not covered by the permission) for Rs. 7,500, and it is alleged that they had to redeem an *ijara* on the Patni Mahal at a cost of Rs. 3,400. The defendant No. 3 says that they did not make any enquiry as to why properties "more in value than the debts to be paid off were going to be sold," nor thought it necessary to have permission taken from the District Judge for that purpose. Then again they purchased the first six plots of land of their *kobala* without the sanction of the District Judge.

Having regard to all the circumstances, we are unable to hold that the defendants Nos. 2 and 3 were *bona fide* purchasers, and although there is no evidence to show that they were privy to the fraud practised by Ram Narain upon the Court before the permission of the Judge was obtained, there is no doubt that they purchased with knowledge of the misrepresentation upon which the permission was obtained.

As regards the defendants Nos. 6, 7 and 19, they purchased certain properties by a *kobala* (Exhibit 23) for Rs. 1,450 on the 9th May 1906, *i.e.*, about 10 months after permission was obtained from the District Judge. Only 10 *bighas* out of 14 *bighas* of plot No. 4 of their *kobala* was covered by the permission, and no sanction was obtained with respect to any of the other properties, but properties Nos. 1, 2 and 3 of Schedule *kha* were among those which Ram Narain was authorized by Udit Narain's Will to sell in case of necessity.

Jadab Chandra Chowdhuri was mentioned in the application for permission as one of the intending purchasers. The *kobala* was taken by him in the names of his sons the defendants Nos. 6 and 7, and it expressly states that all the properties were Debutter of the deities Salgram and Shiva Thakur. The application for permission stated the debts for the liquidation of which the properties were to be sold as having been left by Bissonath Gir and Udit Narain Gir and mentioned Jadab Chandra Chowdhuri as one of the creditors towhom about Rs. 1,000 was due. In the *kobala* of defendants Nos. 6 and 7, however, two debts contracted by Ram Narain himself were recited, one being upon a mortgage bond dated the 16th Chait 1312 (March 1906) for Rs. 597 and the other upon a *hath chitta* dated the 25th Bysak 1313 (8th April 1906) for Rs. 175, the total amount due on the date of the sale being stated to be Rs. 803-4-0. Deducting the said amount of Rs. 806-4-0, the balance Rs. 643-12-0 was received in cash. There is no mention of the debt of Jadab Chandra Chowdhuri, for Rs. 1,000 in the *kobala* and the two debts recited in it were contracted by Ram Narain himself in March and April 1905, *i.e.*, several months after the permission of the District Judge was obtained on the 9th August 1905.

The defendants Nos. 6 and 7 were examined in the case and they mentioned debts other than those mentioned in the *kobala*. The former says that Udit Narain and Ram Narain borrowed Rs. 300 on a mortgage-deed (Exhibit E) in 1900 and that the same with interest amounted to Rs. 806-4-0, while his brother the defendant No. 7 says that the debt was due by Bissonath Gir upon the mortgage bond (Exhibit G) dated 16th Magh 1300 (February 1893). The facts that a debt of Rs. 1,000 was stated in the application for permission as one of the debts left by Bissonath Gir and Udit Gir and due to Jadab Chandra and the *kobala* mentioned two debts contracted by Ram Narain himself several months after the application for permission, while defendant No. 6 mentioned a debt

due by Ram Narain upon a mortgage-bond executed in 1900, and his brother the defendant No. 7 mentioned a debt due by Bissonath Gir and Udit Gir in 1893, show that the existence of the debts at the date of the application was an absolute myth.

It appears from the evidence of the defendant No. 7 that his father had money-lending transactions from the time of Bissonath Gir, and their house is only half a mile from the Arapur Thakurbari. There cannot be the least doubt that they were aware of everything, and there is no pretence for saying that they were *bona fide* purchasers without notice of the fraudulent misrepresentation upon which the permission of the District Judge was obtained.

The learned Subordinate Judge has found that there is no reliable evidence to show that Bissonath Gir or Udit Gir left any debts, and we concur in the finding. No attempt has been made in this Court to show that there was any legal necessity for the sales to the defendants. So that apart from the permission of the District Judge, the purchase by the defendants cannot stand and the permission was obtained by fraudulent misrepresentation. That being so, the alienations have been rightly set aside. It may be mentioned that the appellants complained in this Court that they were prejudiced by reason of the Court below having tried the cases of the two sets of defendants together, but no such objection was raised in the Court below nor any application made under Order II, rule 6, for trial of the cases of the two sets of defendants separately. In this Court the cases of both sets of defendants were argued by the same Pleader.

On the whole we agree with the Court below, and these appeals must be dismissed with costs, the hearing fee in Appeal No. 22 being assessed at Rs. 250 and in No. 23 at Rs. 64. The respondents will bear three-fourths of the costs of the respondents' portion of the paper-book, the appellants paying one fourth of the said costs, the amount of such costs, being divided between the two appeals in the proportion of 4 to 1.

Appeals dismissed.

PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.

APPEAL FROM APPELLATE DECREE No. 8 OF 1918.

April 16, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Roe.

SUKURU MALI—APPELLANT

versus

Sri BRAHMAPURA BALBHADRA MAHAPRABHU—RESPONDENT.

Hindu Law—Joint family—Father, power of alienation of, extent of—Antecedent debt—Necessity—C. P. Tenancy Act (XI of 1898), s. 46 (1).

Among Hindus governed by the Mitakshara Law a father has no sort of power to alienate family property, unless the alienation is made in consideration of a pre-existing debt or by reason of legal necessity. Any other alienation is not binding on the sons, or indeed upon anybody, and the sons are entitled to have the transaction set aside. [p. 898, col. 1.]

The Central Provinces Tenancy Act does not in any way limit, or interfere with, or render inapplicable, the ordinary rights and incidents attaching to joint family property, in cases where a family is governed by the Mitakshara Law, to *raiyati* holdings in those localities which are governed by the Act. [p. 898, col. 2.]

Appeal from a decision of the Subordinate Judge, Sambalpur, dated the 11th January 1918, modifying that of the Munsif, Sambalpur, dated the 11th July 1917.

Messrs. *Baikuntha Nath Dutt* and *S. C Chatterji*, for the Appellant.

Mr. *Satish Chandra Mukherji*, for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an appeal by the defendants from the decision of the Subordinate Judge of Sambalpur, dated the 11th January 1918, affirming, in part, a decree of the Munsif of the 11th June 1917. The facts, so far as they are material to the present appeal, are these. In the year 1897 the defendant No. 1 executed a mortgage in favour of the plaintiff, No. 2. On the 11th June 1903 the plaintiff, having instituted a suit for that purpose, obtained a decree for foreclosure against the defendant No. 1 in the Court of the Extra-Assistant Commissioner of Sambalpur, and on the 5th March 1904 that decree was made absolute. In July of the same year the plaintiff No. 2 obtained possession of the property, and on the following day was dispossessed by the defendants. About four years later, namely, on the 22nd December 1908, the plaintiff

No. 2, by a deed of gift, being at that time still out of possession, made over his interest in the property in question to the plaintiff No 1, who is an idol. The plaintiff No. 3 is the son of plaintiff No. 2 and the defendant No. 2 is the son of the defendant No. 1. The three plaintiffs on the 28th July 1906, having been out of possession of the property for nearly twelve years, instituted the present suit, claiming a declaration of title to the land in question and possession after ejectment of the defendants.

Various defences were raised by the defendants to the suit, but the only one with which we are concerned in this appeal is a defence which was raised as an amendment to the written statement of the defendant No. 2. It is to this effect, that the property in suit is the ancestral immoveable property of the defendant; that at the date of the alleged mortgage of the 18th August 1897 and of the decree in the suit for foreclosure the defendant No. 2 was a minor, and that the debt contracted by the defendant No. 1 was not made for any legal necessity or moral purpose, and that the defendant No. 2 is, therefore, not bound by the mortgage or the decree, and he further pleaded, which perhaps is the same thing in another form, that the defendant No. 1 had no right to mortgage the property even to the extent of his own share; or, if he had, that the defendant No. 2's right to redeem the property still subsists.

It is not disputed, indeed it is alleged, in the plaint that, until three years ago, that is, three years from the date of the plaint which was filed in 1916, the defendants Nos. 1 and 2 were members of a joint family, and it is found that the property in question in the suit was the family property. The property which was mortgaged consisted partly of *bhogra* lands and partly of *raiyati* lands, and when the case came before the Munsif he, whilst finding that the property was ancestral property of the defendants Nos. 1 and 2, which, in fact, is not disputed, decided all the other issues, which were numerous but which it is unnecessary to go into for the purposes of this appeal, against the defendants. He came to the conclusion that the mortgage was granted for legal necessity, and that the defendant No. 2 could not in such a case question the foreclosure decree. In deciding the question of whether there was any evidence that the mortgage was not granted for necessary purposes, the learned Munsif appears to have put the onus upon the wrong party, and he decreed the suit in favour of the plaintiffs.

The defendants appealed from this decision to the Subordinate Judge, who arrived at a different conclusion of fact on the question of legal necessity, placing the onus on the right party. He found that no legal necessity had been proved which in law would justify the mortgage. In these circumstances he allowed the appeal of the defendants with respect to the *bhogra* lands. With regard to the *raiyati* lands he arrived at a special finding, which, in his opinion, excluded them from the operation of the ordinary incidents attaching to ancestral property. I cannot do better than read the Judge's own words on this question. He disposes of it in this way :—

"It is an admitted fact that the properties were ancestral. It was, however, urged by the learned Pleader for the respondent that the mortgaged properties consisted of *bhogra* and *raiyati* lands ; that in respect to the latter the son had no vested interest by birth owing to the peculiar nature of *raiyati* interests in this district, as has been laid down in a series of decisions of the Judicial Commissioner, Central Provinces. So far as I know, the decisions have not been doubted anywhere. I accordingly hold that the mortgage and foreclosure decree were valid in respect to the *raiyati* lands."

From that decision the defendants have preferred this second appeal. The plaintiffs are content with the judgment of the Subordinate Judge and have not appealed. The contention of the appellants is that once it is admitted that this is family property, then it cannot be disputed that the defendant No. 2 had, at the time the mortgage was entered into by his father, a vested interest in that property as a member of a joint family. At the time of that transaction in 1897 the defendant No. 2, if his age is correctly stated in the plaint, would be a boy of some eleven years, and his contention is one which appears to me

to be absolutely unassailable that his father had no sort of power to alienate family property unless the alienation was made in consideration of a pre-existing debt or by reason of what is called legal necessity. It is not suggested in this case that there was any pre-existing debt, and it has been found by the lower Appellate Court that the mortgage was not granted for any necessity such as would justify a transaction of that sort. It seems, therefore, to follow that this mortgage transaction is not binding upon the son or indeed upon anybody, and that the son having come of age is clearly entitled to assert his rights which have not been extinguished, and to have the whole transaction set aside.

The respondents, however, contend, following the conclusion arrived at by the Subordinate Judge, that the ordinary rights and incidents attaching to joint family property in cases where a family is governed by the Mitakshara Law, as in this case, do not apply to *raiyati* holdings in those localities which are governed by the Central Provinces Tenancy Act. For that contention they rely upon the decision of Mr. Stanyon, at that time Second Additional Judicial Commissioner in the Central Provinces, in the case of *Ghanya* v. *Ukund Rao* (1). The passage there relied on is to this effect:—

"The Tenancy Act does not recognise such things as succession by right of survivorship, the vesting of a son's interest by birth, and so on. Any tenant may surrender a holding whenever he pleases; if he leaves it uncultivated for two years in some cases he is deemed to have surrendered it. Such provisions obviously ignore anything resembling vested interest in the tenant's sons or other heirs."

I wish to point out that in the particular case in which these observations were made it was not necessary for the learned Judicial Commissioner to decide the question which he is there dealing with. That was a case where there had been a separation between four brothers who were joint. Two of these brothers immediately after separation mortgaged some of the property which formed their share after partition. Subsequently the sons of another brother, who was not a party to that transaction, claimed to set aside that mortgage on the ground that at the time the mortgage was executed they, as members of a joint family, had a vested interest in the property. It was found, as a fact, that a partition had taken place and the sons of one of the brothers who were joint before partition had no right to impugn the validity of any transaction made by any of the other brothers in respect to their portion of the property after partition. I have looked through the Tenancy Act, and we have been referred to certain sections of it, and the only section which has been quoted to us as establishing the proposition contended for by the respondents is section 46, sub-section (1), which is in these terms:—

"When an occupancy tenant dies his right in his holding shall devolve as if it were land."

I confess I can see nothing in that section which in any way supports the contention put forward by the respondents in this case. It may be that under the special provisions of this Act occupancy *raiyats* have certain powers of alienation, and certain rights may also be prescribed by the Act as between themselves and their landlords; but, except so far as ordinary incidents of an occupancy *raiyat* may be specially limited or extended by the Act, I can find nothing in the Act which in any way purports to interfere with the ordinary rules of law governing members of a Mitakshara family and relating to their rights in the ancestral property. It seems to me, therefore, that the learned Subordinate Judge's decision on this point cannot stand. This appeal will be allowed with costs here and below; the judgment and decree of the lower Appellate Court will be set aside, and judgment will be entered for the defendants in the suit.

ROE, J.—I agree. I can see no justification for the suggestion that an occupancy right in the Central Provinces is a thing any more peculiar than an occupancy right in Bihar. The erroneous impression in the mind of the Subordinate Judge seems to be due to a misunderstanding of the well-worn dictum that an occupancy right is a personal right. It is a personal right in this sense only that what has been done by one person towards the acquisition of an occupancy right cannot be continued

(1) 4 N. L. R. 9.

and completed by another. It is also true to say that an occupancy right may be acquired by a contract between the landlord and the person; but in considering this point of view it is necessary to recognise that a person need not necessarily be an individual. It may be a firm or a body corporate or a joint family, and a landlord in contracting with an individual may be dealing with a whole family represented by that individual. An occupancy right may be, and frequently is, a part of the ancestral estate. It has been found as a fact in this case to have been a part of the ancestral estate, and, therefore, the younger sons of a Mitakshara joint family had interests in it which it was beyond the power of the father to destroy or encumber for anything but a family purpose. I agree that the suit should have been dismissed with costs.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 39 OF 1917.

October 17, 1918.

Present:—Mr. Justice Phillips and Mr. Justice Napier.

SAMAYAN SERVAI AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

P. K. KADIR MOIDEEN ROWTHEN AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1, 4 TO 17—RESPONDENTS.

Zemindari *lands—Tank-beds, utilization of, as cultivable lands—Prevention of accustomed source of water supply to ryots owning lands under* aiyacut *—Other facilities for supply of water, existence of, effect of—Right to restore tank-bed for storage of water—Damage, absence of—Cause of action—Injunction—Specific Relief Act (I of 1877), s. 54.*

The rights of a tenant in a *zemindari* tank-bed and *bunds* are no higher than those of grazing, cutting fuel and fishing, arising either by grant or by custom. [p. 902, col. 2.]

Where a tank-bed must necessarily be used for the storage of water for the welfare of the ryots under the *aiyacut*, it must be maintained as such and the *zemindar*, as also the assignees of the tank, should be restrained from converting it to any other purpose. Where, however, the maintenance of a storage tank is unnecessary and the ryots under the *aiyacut* get their accustomed supply from other sources and no damage is caused to them by the tank-bed being used for cultivation or for purposes other than the storage of water, the *zemindar* is under no obligation to preserve the tank for the storage of water. [p. 903, cols. 1 & 2.]

Second appeal against the decree of the District Court, Madura, in Appeal Suit No. 509 of 1915, preferred against the decree of the Court of the Temporary Subordinate Judge, Madura, in Original Suit No. 4 of 1914.

This appeal coming on for hearing on the 26th and 27th September 1918, the Court delivered the following

JUDGMENT.—So far as defendants Nos. 1 and 5 are concerned the appeal is dismissed with costs, as they are unnecessary parties or respondents.

This second appeal again came on for hearing on the 2nd October 1918.

Mr. *K. Srinivasa Aiyangar*, for the Appellants.—The land is Zemindari land and a Zemindari ryot is only entitled to water being made available for irrigating his fields. Beyond that, he is not entitled to insist upon a particular source of supply.

Then, the old source of supply, the Athan Odai, having become obliterated, the plaintiffs have no right to ask that water be stored in this tank for their use.

There is no damage caused to plaintiffs by the acts of the defendants in cutting up the channel. The plaintiffs have a copious supply of water for their fields from the new Periyar channel. The maintenance of this tank for storing water is no longer necessary. The Zemindar's discretion should not be fettered where it does not collide with the interests of the public.

Mr. *Narasimha Iyengar*, for the Respondents.—The respondents, as owning lands under the Aiyacut of the tank, are entitled to see that their source of supply of water is not destroyed. Their usual source of supply was from the tank. They are entitled to insist that it should be preserved as a storage tank. It is the duty of the Zemindar to preserve all sources of water supply.

The fact that respondents have suffered no damage does not deprive them of their cause of action for the infringement of their rights. The supply from the Periyar channel may cease and there is no reason why respondents should give up their

customary right. See *McCartney* v. *Londonderry and Lough Swilly Railway Company, Limited* (1), also observations of the Privy Council in *Collector of Trichinopoly v. Lukkamni* (2) that the preservation of tanks is essential for the welfare, and indeed for the existence, of a large portion of the population of India.

JUDGMENT.

NAPIER, J.—In this suit the plaintiffs as representatives owning lands under the Sallivedan tank claimed relief against the original owner of the tank-bed and certain assignees of land in the tank-bed, alleging various acts by the assignees in the tank bed which had deprived them of their water facilities. The defendants set up a number of pleas and among them alleged that the tank was not the source of irrigation for the plaint lands, that the tank-bed proper was only 3 acres in extent and that they had not encroached on it.

These specific pleas have all been found to be false. Some of the acts alleged against them have not been held established but the findings of the lower Appellate Court are as follows:—

The District Judge has found that the tank-bed has an area of $25\frac{3}{4}$ acres, that it is the source of irrigation of Survey No. 807 in respect of which this representative suit is brought, that up to 1902 the suit lands were regarded as irrigable by the tank, that prior to 1903 the tank-bed was full of Babul trees, that there was then no cultivation and that after 1902 the 4th defendant began the cultivation in the tank-bed. He agrees with the other findings of the Subordinate Judge, which include the finding that the channel forming the main source of supply to the tank has since 1902 been obliterated and converted into *nunja* lands. Then as to the acts of the defendants he finds that defendants Nos. 2 and 3, the assignees of the tank-bed, have cut the channel within the tank bed and put up a *bund* which prevents the water spreading all over the tank-bed and have otherwise prevented the tank being used for the storage of water. These findings are not contested before us and the sole question is whether on the above findings the plaintiffs are entitled to have the tank-bed restored to its original condition.

The Commissioner's plan and the survey plan make it clear what was the position prior to 1896 and what is the present position. The tank lies just below two other tanks named Reddiar tank and Vadukar tank. Prior to 1896 the western tank of the two other tanks, that is, the Reddiar tank, was fed by a stream called Virasamarthu Odai flowing from the north, and the eastern tank by a channel which conveyed water from an Odai called Athan Odai taking its source in the Sirumalai hills. This Odai ran from north to south-east of the two upper tanks and east of the plaint tank, but the water was taken off by the channel at a point north east of the upper tanks. The plan also shows that the Athan Odai channel, besides feeding the eastern tank, ran down between the two tanks and discharged the surplus water into the plaint tank. It appears that some surplus water from the Vadukar tank passed into the plaint tank and a certain amount of rain water, which is practically negligible, flowed off the land south of the upper tank down to the *bund* of the plaint tank. These were the nominal sources of supply for the plaint tank.

In about the year 1896 the Periyar channel was cut across from east to west north of the upper tanks, and the course of supply of all the three tanks was immediately altered. For the Reddiar tank the water was brought from the Periyar channel down the old Virasamarathu Odai direct to the tank, and for the Vadukar tank a new channel was also led from the Periyar channel. This latter channel joined the course of the old Athan Odai channel where it ran between the two tanks towards the plaint tank, and defendants Nos. 2 and 3, the assignees of land in the bed of the tank, have continued this channel down to the tank *bund*, enclosed it by a *bund* and created an outfall from it for the supply of the ryots. The result is that at present the ryots receive water direct from the Periyar channel together with possibly a little surplus from the Periyar water in the two upper tanks. The old channel, the Athan Odai, has, as previously stated, been obliterated and cultivated since 1902 at least. The lower Appel-

(1) (1904) A. C. 301; 73 L. J. P. C. 73; 91 L. T. 105; 53 W. R. 385.

(2) 1 I. A. 268 at 282; 21 W. R. 358; 14 B. L. R. 115; 7 M. Jur. 190; 3 Sar. P. C. J. 318 (P. C.).

late Court has found that plaintiffs have not suffered any damage by the present condition of the Sallivedan tank, and indeed it appears that having this abundant Periyar supply they are now cultivating a second crop. These facts are to be found in the judgments of the Courts and are not disputed here.

The Subordinate Judge states the proposition arising from these findings in paragraph 9 of his judgment as follows:—"The case for the defendants is that since the plaintiffs and other ryots are getting a never failing and sufficient supply of Periyar water, they cannot insist on getting the tank restored to its original state, especially as the channel from the Athan Odai which is its main source of supply is no longer available ownig to disuse and consequent cultivation in the channel bed." He continues: "There is some force in this contention but the Periyar supply is only a supplementary source of irrigation. The ryots have no control over it. Sullivedan tank is the ancient and customary source of irrigation. Why should they sacrifice the natural source of water to which they are entitled as a matter of right, even though they do not now suffer for want of water from the tank? Those two sources are still available and nobody has a right to alter the customary source of irrigation. I must hold that the plaintiffs have a right to have the tank so kept as to allow the accustomed quantity of water to flow through the lands." The District Judge states the proposition more tersely. He says: 'The acts of the defendants restrict the plaintiff's accustomed user of the water of the tank for irrigation and he is entitled to an injunction.'

He says also that the capacity of the tank as tank has, of course, been materially altered for the worse and the plaintiffs are entitled to have the whole tank-bed area of $25\frac{3}{4}$ acres available as a tank It seems to me that the question which arises for determination by us is as follows :—

(1) Whether the ryots have a right that the old customary source of irrigation by a storage tank should be maintained; (2) whether the defendants Nos. 2 and 3 have done anything which infringes that right; and (3) whether, no damage having accrued to the plaintiffs, they have any cause of action against defendants Nos. 2 and 3. Mr. Narasimha Ayyangar has argued that the plaintiffs are entitled to have the storage tank and that defendants Nos. 2 and 3 by cultivation of the lands and by the building of the banks in the tank bed have infringed that right. He contends that the fact that they have suffered no damage at present does not deprive them of their cause of action.

The first difficulty in his way, however, is this, that the old source of supply was the Athan Odai which has disappeared. This disappearance occurred before the defendants did any of the acts complained of and it necessarily follows that the acts of the defendants have not caused the failure of water from the Athan Odai. Mr. Narasimha Ayyangar has been compelled to concede this. But his argument is that if at any time the Periyar water supply ceased, the plaintiffs might be able to get the old Athan Odai channel restored and take the water from their old source of supply. Judging by the plan and from some evidence given in the case, I believe this to be a physical impossibility for it seems to me that the Periyar channel crosses the source of the Athan Odai. But assuming that this contingency might occur, the question is whether the plaintiffs have now a right of suit against the defendants. Mr. K. Srinivasa Ayyangar argued that as there was no damage, the plaintiffs were not entitled to any relief. Mr. Narasimha relies on the doctrine laid down in *McCartney* v. *Londonderry and Lough Swilly Railway Co., Ltd.* (1) that the owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement and that it was not necessary for a person having rights in the water of the natural stream to prove damage. This proposition is in certain circumstances unassailable, but it starts with the proposition that the plaintiffs have a right which may be affected, whereas the important question in this case is what are the rights of the plaintiffs.

Section 54 of the Specific Relief Act provides that a perpetual injunction may be granted to prevent a breach of an obligation existing in favour of the applicant, whether expressly or by implication, when the defendant invades or threatens to invad

the plaintiff's right to or enjoyment of the property and, among others, where the invasion is such that pecuniary compensation would not afford adequate relief. The question, therefore, to be determined is whether the plaintiffs have *a right to, or to the enjoyment of*, the property, namely, the tank-bed and secondly, whether the defendants' action invades or threatens to invade that right. Mr. Srinivasa Ayyangar at the beginning of his argument wished to contend before us that the sole right of a Zemindari ryot was to have his accustomed supply of water made available for his fields and that he was not entitled to look to the tank at all. I am not certain that it is open to us at this stage of the case to consider a proposition which has not been put forward at any earlier stage. We have not before us any of the Pattas held by the plaintiffs, and the sole finding bearing on the question is the finding that the tank was the old source of supply. This important question may arise for decision and I would reserve my opinion on it till then. But assuming the right of the ryots to be to have their water from the tank, the question still remains whether they have such a right in the whole of the tank-bed as to entitle them to insist on its total area being preserved and the tank *bund* being kept up in such a manner as to form a storage tank. In the well-known instructions issued to Collectors under the Presidency of Fort St. George, dated October 1799, on the introduction of the Permanent Settlement of Zamindari Land, the Government distinctly stated their wish to leave the construction and care of the tanks and water-courses entirely to the proprietors (*vide* page 332 of Volume II of the Fifth Report), and this was held by the Privy Council to be the common law of this Presidency in the leading case of the *Madras Railway Company* v. *Zemindar of Carvetinagaram* (3). The passage is as follows:—

"The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognised by Hindu and Muhammadan Law, by regulations of the East India Company, and by experience older than history, as essential to the welfare and, indeed, to the existence of a large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved on Zamindars of whom the defendant is one. The Zemindars have no power to do away with the tanks, in the maintenance of which large numbers of people are interested but are charged under Indian law, by reason of the tenure, with the duty of preserving and repairing them."

The proprietary right of Zemindars in their lands was established by the decision of the Board in the case reported as *Collector of Trichinopoly* v. *Lukkamani* (2), and this right of ownership has always been applied to waste lands and tank Porambokes. And I know of no case in which it has been held that the rights of a tenant in a Zemindari tank-bed and *bunds* are anything higher than the rights of grazing, cutting fuel and fishing arising either by grant or custom. It cannot, therefore, I think, be seriously argued that the plaintiffs, ryots, have any proprietary right to the bed of the tank or its *bunds*, and the sole question really is whether their right to be provided with water from the tank is such a right to the enjoyment of property as cannot be varied. If it was to be contended that the water was property, the plaintiffs would be met with the difficulty that the water which now comes to the tank is not water from the old source of supply and that that old source of supply has been cut off, not by the action of defendants Nos. 2 to 4, but by persons over whom they have no control. Their rights in the tank-bed and *bunds* must be correlative to the duty of Zemindars and the language of the Privy Council stating the duty of the Zemindars is *prima facie* in their favour. I asked Mr. Narasimha Ayyangar for further authority on this proposition, but he was unable to give me any, and indeed for the purpose of his argument assumed the position which is now in dispute. The matter is, therefore, one of first impression and I find considerable difficulty in disposing of it. The Privy Council in the passage above quoted have stated that the preservation of the tanks is essential to the welfare and indeed to the existence of a large

(3) 22 W. R. 279; 14 B. L. R. 209; 1 I. A. 364; 3 Sar. P. C. J. 391 (P. C.).

portion of the population of India. That is the foundation of the duty, and it goes without saying that where a storage tank is essential for the welfare of the ryots under the Aiyacut, that tank must be maintained. But here we have the finding that a storage tank is not essential. The finding is that since 1902 at least, if not a few years previous, the whole of the water given to the ryots out of their tank has come from the Periyar channel. It may be and probably is the fact that for the first few years the water from the channel was allowed to accumulate in the tank bed, but it is obvious that that accumulation conferred no benefit on the ryots of which they have now been deprived. At the present moment they are in fact cultivating a second crop with the Periyar water, a condition of affairs which was unknown under the old source of supply. The result of the action of the defendants has been to do away with this unnecessary storage and lead the water direct to the sluice from which it is supplied to the ryots, and the construction of the *bunds* for that purpose has resulted in the reclaiming of a major portion of the tank-bed for purposes of cultivation. To restore the tank-bed would, therefore, confer no benefit on the ryots and could remove land from valuable cultivation. It seems to me that it is impossible to ignore the modern conditions of irrigation and to insist on the strict application of the language of the Board used with reference to conditions 40 years ago. In the course of argument my learned brother put this proposition to Mr. Narasimha Ayyangar: 'If it had been found possible in modern days to bring water down the old Athan Odai channel through the tank-bed direct to the sluice without filling the tank, could it be suggested that that is an infringement of the plaintiffs' right?' Mr. Narasimha Ayyangar contended that it would be, and this in fact is the fundamental position that he takes up. It is perfectly conceivable that at some time in the future storage tanks with their waste of large areas by submersion may be found to be unnecessary and that by a perfect system of distribution of river water with the aid of pumping schemes, lands may be irrigated by direct flow. I cannot think that the Privy Council intended by the judgment to require adherence by Zemindars to a system that may eventually be found wasteful and unnecessary. I am, therefore, of opinion that the enjoyment of the tank-bed, to the extent of the utilization of water stored in it, is a right which only exists as long as it is the duty of the Zemindar to preserve such a tank, and that where he is in a position to give all proper water facilities from the tank without such storage, he is under no obligation to maintain the old system.

With reference to Mr. Narasimha Ayyangar's further argument that the supply from the Periyar may some day be discontinued, it seems to me sufficient to hold that the right of the plaintiffs against defendants Nos. 2 and 3 will arise when water is brought from the old source to the tank and the condition of the defendants' land is then found to make the storage impossible. I would, therefore, dismiss this suit, but in view of the fact that the defendants set up false defences in both the lower Courts, I would dismiss it without costs in those Courts, only allowing the costs of this appeal against respondents Nos. 21 to 24.

PHILLIPS, J.—It seemed to me that if the plaint tank were Government tank, in exercise of its powers of distributing water it would be entitled to follow the course adopted by defendants Nos. 2 and 3 and there seems to be no reason why a Zemindar, who owns a tank, should not have similar powers. At any rate we have not been referred to any authority to show that his powers are restricted unless, of course, there is an express contract to that effect, and to hold in favour of such restriction would result in harm to the general public, because improved methods of irrigation rendered possible by the discoveries of modern science would thereby become nugatory. It must, of course, be understood that the exercise of his rights by the Zemindar must not in any way be detrimental to the ryots concerned and as in this case it has been found that the plaintiffs have suffered no damage, I agree in the order proposed by my learned brother.

M. C. P.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 95 AND 97 OF 1917.

January 29, 1919.

Present:—Mr. Justice Beachcroft.

IN S. A. NO. 95 OF 1917

DHIRENDRA NATH GHOSE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PURNA CHANDRA DUTTA—DEFENDANT—RESPONDENT.

IN S. A. NO. 97 OF 1917

Babu DHIRENDRA NATH GHOSE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOUR MANDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 50, 105—Presumption arising under s. 50—Kabuliyat executed after inception of tenancy showing rent enhanceable—Rent not enhanced in fact—Presumption, whether rebutted.

In a proceeding under section 105 of the Bengal Tenancy Act, the landlord produced a *kabuliyat* executed by the tenant after the inception of the tenancy showing that the rent was liable to be enhanced, but there was nothing to show that the rent had ever in fact been enhanced:

Held, that the mere fact that the rent was enhanceable was not sufficient to rebut the presumption arising under section 50, clause (2), of the Bengal Tenancy Act, the question being whether the rent was in fact altered or not, and if it was not altered, then the tenant was entitled to the full benefit of the presumption. [p. 905, cols. 1 & 2.]

IN S. A. NO. 95 OF 1917.

Appeal against the decree of the Special Judge, Faridpur, dated the 10th June 1916, reversing that of the Assistant Settlement Officer, Rajbari, dated the 6th February 1915.

IN S. A. NO. 97 OF 1917.

Appeal against the decree of the Special Judge, Faridpur, dated the 8th July 1916, affirming that of the Assistant Settlement Officer, Rajbari, dated the 20th April 1915.

FACTS appear from the judgment.

Babu *Amarendra Nath Bose*, for the Appellants in S. A. Nos. 95 and 97 of 1917.—These two appeals arise out of applications for enhancement of rent under section 105 of the Bengal Tenancy Act. The Settlement Officer allowed enhancement on the ground that by a *kabuliyat* the tenants agreed to pay enhanced rents and, therefore, the presumption under section 50 of the Bengal Tenancy Act had been rebutted. On appeal, the learned Special Judge was of opinion that the *kabuliyat* was merely a recognition of the existing tenancy. Whether the *kabuliyat* shows the creation of a new tenancy or recognition of an old tenancy, it is certainly a declaration by the tenant submitting to an enhancement of rent. The *kabuliyat*, therefore, should be taken as sufficient to rebut the presumption that may arise under section 50. Refers to *Upendra Nath Ghose* v. *Dwarkanath Biswas* (1).

Babu *Preo Shankar Majumdar*, in S. A. No. 95 of 1917 and Babu *Phanindra Lal Maitra*, in S. A. No. 97 of 1917, for the Respondents.—The presumption arising under section 50 of the Bengal Tenancy Act cannot be said to have been rebutted by placing before the Court a declaration by the tenant made in a *kabuliyat* executed subsequent to the creation of the tenancy. To rebut the presumption it is necessary to prove that there had actually been a change in the rate of rent within 20 years before the institution of the proceeding. As there was no actual change in the amount of rent paid by the tenants even after the execution of the *kabuliyat* relied on by the landlords, the presumption under section 50 has not been rebutted. Refers to *Abhoy Sankar Mozumdar* v. *Rajani Mandal* (2).

Babu *Amarendra Nath Bose* briefly replied.

JUDGMENT.

S. A. NO. 95 OF 1917.

This is an appeal by the landlords, who made an application under section 105 of the Bengal Tenancy Act for settlement of rent, and the only question in this appeal is whether the presumption provided for in section 50, clause 2, of the Bengal Tenancy Act has been rebutted or not. The Settlement Officer held that it had. The learned Special Judge held that it had not. The existing rent is Rs. 51-9-0 odd. That has been the rent at least from the year 1837. In that year a *kabuliyat*, which has been found by the Special Judge to be genuine, was executed and the appellants rely on the terms of that *kabuliyat* to show that the presumption provided for in section 50, clause 2, has been rebutted. The learned Special Judge was of opinion that the *kabuliyat* was merely a recognition of the existing tenancy. He referred to the use of certain words, namely, the words 'Khas Kobala'

(1) 44 Ind. Cas. 593; 22 C. W. N. 322.

(2) 47 Ind. Cas. 359; 22 C. W. N. 904; 29 C. L. J. 371.

noted against rent to show that this was merely a recognition of the existing tenancy. Those words mean 'admitted,' they imply that the rent was admitted and they may never be fairly taken to suggest the further point that that was the rent which was being paid before 1837. The learned Pleader for the appellants points to a clause in the *kabuliyat* whereby the tenant undertakes to pay at what may be found to be the Pergana rate. The clause which immediately precedes that clause is one which provides for the measurement of the tenure, and he argues that whether this *kabuliyat* may be looked upon as creating a new tenancy or recognition of the existing tenancy, this clause shows that the rent was enhanceable and that, therefore, following the decision in the case of *Upendra Nath Ghose* v. *Dwarkanath Biswas* (1), the enhancement made by the Settlement Officer should be restored. There is this difference between the *kabuliyat* before me and that in the cited case, that here the tenant merely undertakes to pay at what may be found to be the Perganna rate, whereas in the case reported the tenant undertook to pay at the enhanced rate. This is practically not a very substantial difference because the clause in the *kabuliyat* before me recognises the possibility of there being an alteration in the rate. Now where there has been a *kabuliyat* executed providing for an alteration or enhancement in the rate, this may be followed by one of two sets of circumstances. The rent may subsequently have been enhanced but not in fact paid, or it may not have been enhanced. Now, if in fact it has been enhanced, the mere fact that it was not paid would not protect the tenant under section 50, clause 2, because the question is the rate at which the tenant held the land. From the mere fact that he may not have paid his dues he would not be entitled to pay at the rate at which the rent was actually being paid. But if in fact the rate had not been enhanced, a very different set of circumstances would arise. The position then would be that the land was held for more than 20 years at an unchanged rate and it not being proved that the defendant ever held at any other rate, the presumption must be that he had held at that rate from the time of the Permanent Settlement. I am not prepared to follow the learned Judges when they come to this conclusion that the mere fact that the rent was enhanceable is sufficient to upset the presumption of section 50, clause 2. To my mind the question is whether the rent has, in fact, been altered or not and if it has not been altered, then the tenant is entitled to the full benefit of the presumption. This view was also taken in the case of *Abhoy Sankar Mozumdar* v. *Rajani Mandal* (2). It is sufficient for me to say that I agree with the remarks of Richardson, J., in the right hand column of page 905* of that report.

That being so, this appeal must be dismissed with costs.

S. A. No. 97 of 1917.

This appeal must follow the result of Second Appeal No. 95 of 1917, in which I have just delivered judgment. The *kabuliyat* in this case is clearly a recognition of the existing tenancy as appears from the terms of the *kabuliyat* itself. There is a clause in it showing that the rent was liable to be enhanced, but there is nothing to show that the rent had ever in fact been enhanced. The presumption of section 50, clause 2, therefore, applies and had not been rebutted.

For reasons given in the other judgment just delivered, this appeal must also be dismissed with costs.

Appeals dismissed.

*Page of 22 C. W. N.—*Ed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO 686 OF 1915.

May 30, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Dundas.

THE GURKHA ASSOCIATION, SIMLA THROUGH MR. R. OBBARD, PRESIDENT OF THE ASSOCIATION—PLAINTIFF—APPELLANT

versus

MUHAMMAD UMAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Trade name, use of—Injunction—Company, whether entitled to restrain rival company from using similar name—Principle, whether applicable to charitable societies—Pecuniary loss, whether essential—Malice, whether necessary—Failure to take objection at registration, effect of—Suit, whether lies for mere honour or title.

A company is entitled to obtain an injunction to restrain a new company from carrying on the same kind of business as the old company under a name identical with or so similar to the plaintiff company's

name as to be calculated to deceive the persons dealing with the plaintiff company. [p. 906, col. 2.]

This principle is independent of the statutory rule found in the Companies Act, 1913, and does not recognise a distinction between business concerns and charitable societies, provided it is shown that the similarity in names would cause pecuniary loss. [p. 906, col. 2; p. 907, col. 1.]

The fact that the new company has been registered and that the Registrar took no objection to the registration does not preclude the old company from obtaining an injunction to restrain the new company from carrying on the same kind of business as that of the old company under a name calculated to deceive the public. [p. 906, col. 2.]

A suit does not lie for a mere honour or dignity unconnected with any fees, profits or emoluments. [p. 907, col. 1.]

Sangapa v. *Gangapa*, 2 B. 476; 2 Ind. Jur. 862; 1 Ind. Dec. (N. S.) 740, followed.

Cowley v. *Cowley*, (1901) A. C. 450; 70 L. J. P. 83; 85 L. T. 254; 50 W. R. 81; 17 T. L. R. 725, explained.

Malice is not an essential ingredient of the cause of action in such cases. [p. 907, col. 2.]

The Gurkha Association, a Society registered under Act XXI of 1860, sued certain persons for an injunction restraining them from using the term 'Gurkha Sabha' to describe the rival charitable institution alleged to have been recently founded by them. It was alleged that the plaintiff Association had been in existence for some time and was also known as the Gurkha Sabha, that persons sending subscriptions described it variously as the Gurkha Association or Gurkha Sabha and that the Society started by the defendants was likely to be mistaken for the plaintiff's and to divert to itself the money intended for the plaintiff:

Held, that the facts as set out in the plaint disclosed a cause of action and that the plaintiff's suit was maintainable. [p. 908, col. 1.]

Second appeal from the decree of the District Judge, Ambala, dated the 21st December 1914, affirming that of the Subordinate Judge, 1st Class, Simla, dated the 1st September 1914, dismissing the claim.

Mr. *Santanam*, for the Appellant.

Bakhshi *Tek Chand* for Muhammad Umar, and Lala *Balwant Rai* for Amar Singh, Respondents.

JUDGMENT.—This was an action brought by the Gurkha Association, a society registered under Act XXI of 1860, against certain persons for an injunction restraining them from using the term "Gurkha Sabha" to describe the rival charitable institution alleged to have been recently founded by them. It is alleged in the plaint that the Gurkha Association has been in existence for some time, that it is known also by the name of Gurkha Sabha, that the persons who send donations or subscriptions to the institution describe it variously as Gurkha Association or Gurkha Sabha, and that the society started by the defendants is likely to be mistaken for the plaintiff and to divert to itself the money intended for the plaintiff.

The Courts below, without determining the issues of facts arising upon the pleadings of the parties, have dismissed the suit *in limine*, holding that the allegations made by the plaintiff do not disclose any cause of action. We have listened to the arguments advanced on both sides, and are not prepared to endorse the proposition of law that the facts as set out in the plaint do not confer upon the plaintiff a legal right to invoke the assistance of the Court.

We may clear the ground by stating that the principle of law is firmly established that a company is entitled to obtain an injunction to restrain a new company from carrying on the same kind of business as the old company under a name identical with or so similar to the plaintiff company's name as to be calculated to deceive the persons dealing with the plaintiff company. This principle is independent of the statutory rule, which is now to be found in the enactments relating to companies, *vide*, section 11 of the Indian Companies Act, VII of 1913, which prohibits the registration of a company in the name of a subsisting company which is already registered. We cannot, therefore, accede to the contention that, because Act XXI of 1860, which applies to the charitable societies, does not contain a provision similar to that applying to the companies registered under the Indian Companies Act, the principle upon which the statutory rule is based is inapplicable to a charitable society. It has been repeatedly held that the fact that registration has been accomplished, and that the Registrar took no objection to the registration, does not preclude the old company from obtaining an injunction to restrain the new company from carrying on the same kind of business as that of the old company under a name calculated to deceive the public; *vide*, *inter alia*, *Accident Insurance Co.* v. *Accident, Disease and General Insurance Company* (1).

It is contended on behalf of the defendants that the aforesaid rule applies only to business concerns, and that it cannot be extended by analogy to charitable societies. No authority in support of this con-

(1) (1885) 54 L. J. Ch. 104.

tention is cited, and the principle, upon which the rule proceeds, does not recognize any such distinction, provided that it is shewn that the similarity in names would cause pecuniary loss. In both cases the basis of action is monetary loss sustained or likely to be sustained by the plaintiff by reason of the defendant using the same or a similar name. It is true that the law does not in general recognize any exclusive right to the use of a name, and that an individual is entitled to adopt a name similar to that which his neighbour uses, so long as he does not adopt it in order to pass off his wares or business as being his neighbour's. Nor does a suit lie for a mere honour or dignity unconnected with any fees, profits or emoluments, *vide*, *Sangapa* v. *Gangapa* (2).

The defendants rely upon the judgment of the House of Lords in *Cowley* v. *Cowley* (3), which only shews that the assumption of a title or honour by a person not strictly entitled to it does not give rise to a cause of action. As pointed out by Lord Lindley in that case, "Speaking generally, the law allows any person to assume and use any name, provided its use is not calculated to deceive and to inflict pecuniary loss." This proviso indicates that if the use of the name is calculated to deceive and to inflict pecuniary loss, then the person who is likely to suffer the loss would be entitled to invoke the aid of the Court. There may not be property in the name, but where, as stated by the plaintiff, the defendants by adopting the title identical with or similar to the plaintiff's title lead the public to mistake their institution for the plaintiff institution, there is, in our opinion, an infringement of legal right. Further, the plaintiff alleges actual or prospective pecuniary loss. It appears to us that the requirements of the law have been duly fulfilled.

In this connection the judgment in *Society of Accountants and Auditors* v. *Goodway* (4) is instructive. In that case it was held that the designation "incorporated accountants" had come to denote membership of the plaintiff society, and that the unauthorized use of it by the defendant inflicted injury on the plaintiff society, in respect of which it was entitled to maintain an action. It was further held that the plaintiff society had a pecuniary interest in preventing the defendant association from attempting, by representations and inducements held out to the members of the profession, to reduce the status of the plaintiff society by conferring improperly an indication of that status upon its own members. The Court, quoting a passage from the judgment of a case decided by the Court of Session in Scotland, observed that "a body, however incorporated, has a right to prevent persons who are not members of it from representing themselves to be members of it." It seems that this observation is fully applicable to the case before us.

We are not prepared to endorse the proposition that malice is an essential ingredient of the cause of action. On this point we consider it necessary to refer to the judgment of the House of Lords in *North Cheshire & Manchester Brewery Company Limited* v. *Manchester Brewery Company Limited* (5), where Lord Shand made the following pertinent observations: —"I further agree that it is not necessary in a case of this kind that an improper motive or a fraudulent intention should be made out. Here the simple question to be decided is, assuming *bona fides* on the part of the appellants, whether or not the use of this particular name is calculated to injure another firm which had been using that same name, I believe for a period of 8 years. Whether this question arises under Statute or under the Common Law, the issue which the Court or this House has to decide appears to me to be the same. Was the taking of the name of 'The Manchester Brewery Company, Limited', calculated to induce the belief amongst the public or the trade that the business which was carried on by the respondents is now business carried on by the new firm."

The vital question in this case is whether the persons dealing with the old institution would send their donations or subscriptions to the new institution believing that they were really sending them to the old institution. Upon that question

(2) 2 B. 476; 2 Ind. Jur. 862; 1 Ind. Dec. (N. S.) 740.

(3) (1901) A. C. 450; 70 L. J. P. 83; 85 L. T. 254; 50 W. R. 81; 17 T. L. R. 725.

(4) (1907) 1 Ch. 489; 76 L. J. Ch. 384; 96 L. T. 326; 23 T. L. R. 286; 24 R. P. C. 159.

(5) 68 L. J. Ch. 74; (1899) A. C. 83; 79 L. T. 345 15 T. L. R. 110.

evidence can be adduced by both the parties.

For the aforesaid reasons we are of opinion that the allegations in the plaint disclose a cause of action, but whether that cause of action can be established or not is not a matter which is before us and which can only be decided upon evidence. We accordingly accept the appeal and setting aside the decrees of the Courts below remit the case for decision on the merits. The Court-fees on the memorandum of appeal in this Court as well as on that preferred to the District Judge shall be refunded, and other costs shall abide the event.

Appeal accepted;
Case remanded.

MADRAS HIGH COURT.
ORIGINAL SIDE APPEAL No. 73 OF 1917.
December 12, 1918.
Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Spencer.
OOKERJEE COWASJEE OOMRIGAR AND OTHERS—PLAINTIFFS—APPELLANTS
versus
P. V. SABHAPATHY MUDALIAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), ss. 19, 21 (a)—Contract for purchase of claim unconnceted with immoveable property—Suit on breach of contract—Claim agreed to be purchased barred at date of suit—Compensation, absence of prayer for—Power of Court to award compensation.

In a case where the claim falls under section 21 (*a*) of the Specific Relief Act and cannot be specifically enforced, the plaintiff is entitled to claim compensation in the alternative under section 19, and under the Explanation to that section, the Court is not precluded from granting it by the circumstances that the contract has become incapable of specific performance and that there is no prayer for such relief in the plaint. [p. 908, col. 2.]

Defendants agreed to purchase from the plaintiffs a money-claim which the latter had against a third person. The defendants having made default, the plaintiffs sued on the contract but their plaint did not contain a prayer for compensation. At the date of suit the claim which the defendants had agreed to purchase had become barred:

Held, that, as the contract was not specifically enforceable under section 21 (*a*) of the Specific Relief Act it was competent to the Court to grant compensation under section 19 even though it was not asked for in the plaint. [p. 908, col. 2.]

Jatindra Nath Basu v. *Peyer Deye Debi*, 34 Ind. Cas. 69; 43 C. 990; 14 A. L. J. 527; 20 C. W. N. 866; (1916) 1 M. W. N. 403; 18 Bom. L. R. 509; 24 C. L. J. 67; 20 M. L. T. 25; 3 L. W. 553; 31 M. L. J. 248; 43 I. A. 108 (P. C.), distinguished,

Appeal from the judgment of Mr. Justice Coutts Trotter, dated the 8th of August 1917, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 402 of 1916.

This original side appeal came on for hearing on the 27th and 28th March 1918.

Messrs. *C. P. Ramaswami Aiyar* and *A. Nanabhoy Devay*, for the Appellants.

Messrs. *P. Venkataramana Rau* and *T. S. Rajagopala Aiyar*, for the Respondents.

JUDGMENT.—This is an appeal from the judgment of Mr. Justice Coutts Trotter in a suit brought by the plaintiffs on a contract by the defendant to purchase from them their claim against the estate of a deceased person for Rs. 2,225. Under the agreement executed by the defendant the plaintiffs were restored to their right to sue the estate of the deceased debtor when the defendant failed to pay at the due date, but they did not do so and their claim had become barred when the present suit was instituted. In these circumstances the learned Judge, following *Jatindra Nath Basu* v. *Peyer Deye Debi* (1), has held that the plaintiffs had disentitled themselves to specific performance of the contract by their failure to keep alive the claim against the estate of the deceased, which they agreed to sell to the defendant. Apart from this, the claim is not one which could be specifically enforced, as it falls under clause 21 (*a*) of the Specific Relief Act. The contract in *Jatindra Nath Basu* v. *Peyer Deye Debi* (1), on the other hand, was for the sale of a mortgage decree and was, therefore, a contract relating to immoveable property, as to which the general rule is that compensation in money is not regarded as an adequate relief even to the vendor. That being so, the plaintiffs were entitled to claim compensation in the alternative under section 19 and under the Explanation to that section the Court is not precluded from granting it by the circumstance that the contract has become incapable of specific performance. Here there is a claim in the plaint for other relief which will cover compensation, and even in the absence of such a prayer, the Court may award it.

(1) 34 Ind. Cas. 69: 43 C. 990; 14 A. L. J. 527; 20 C. W. N. 866; (1916) 1 M. W. N. 403; 18 Bom. L. R. 509; 24 C. L. J. 67; 20 M. L. T. 25; 3 L. W. 553; 31 M. L. J. 248; 43 I. A. 108 (P.C.).

Callianji Harjivan v. *Narsi Tricum* (2), *Sheo Niwaz* v. *Gopal* (3). We have, therefore, decided, before disposing of this appeal, to ask the learned Judge to assess the compensation payable to the plaintiffs for the defendant's breach of contract.

In pursuance of the order contained in the above judgment, the Judge sitting in the Original Side of the High Court submitted the following

FINDING.

[CIVIL SUIT No. 402 OF 1916.]

This case is referred to me, "to asses the compensation payable to the plaintiffs for the defendants' breach of contract." The compensation must, I think, be the amount that the 1st defendant ought to have paid, less whatever the claim against the estate of Manicka Mudaliar is worth, *plus* interest.

The only evidence before me is that of the plaintiffs' first witness, who says that he now knows that any claim against this man's estate was at any time worthless, and that it was from first to last an insolvent estate. The 1st defendant could have rebutted that He has neither gone into the box nor called any witness; and the 2nd defendant has called no evidence to show that this estate is worth anything. In these circumstances the equation Rs. 2,225—X is a simple one because X=0.

Therefore, the principal debt I must find is worth Rs. 2,225. Mr. Oomrigar foregoes any claim for interest and is content to take judgment for the principal sum only. I may add that even if the estate was worth some small amount, I think that probably the interest foregone would far more than make up for the value that could be put upon this claim against the estate.

This original side appeal coming on for final hearing after the return of the finding of the Judge sitting on the Original Side of the High Court on the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and under clause 3 of the agreement, by which the performance of the agreement was secured, reversing the decree, we pass a mortgage decree for the amount of damages so found on the security of the properties mortgaged by his deposit of title-deeds with costs throughout payable out of the estate.

M. C. P.

Appeai allowed.

(2) 19 B. 764; 10 Bom. L. R. 512.
(3) A. W. N. (1881), 22; 2 Ind. Dec. (N. S.) 264.

P. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 514 OF 1915.

December 18, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Greaves.

Maharajadhiraj SIR BEJOY CHAND MOHATAB BAHADUR—PLAINTIFF-APPELLANT

versus

SARAT CHANDRA ADHYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 12—Permanent tenure—Transfer by private sale—Transferor, liability of, for rent—Rent, charge for, whether subsists.

Where the provisions of section 12 of the Bengal Tenancy Act are complied with, the transferor of a permanent tenure ceases to be liable for subsequent rent and any property which he has mortgaged as security for the rent ceases to be subject to the charge for such rent. [p. 910, cols. & 1 2.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Hooghly, dated the 30th September 1915.

Babus *Basant Coomar Bose*, *Bepin Behai Ghose* and *Ajendra Nath Dutt*, for the Appellant.

Babus *Mahendra Nath Roy*, *Manmatha Nath Roy*, *Dhirendra Lal Kastgir* and *Saroj Mohan Mukherjee*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by plaintiff appellant to recover arrear of rent due for the years 1313 to 1316 in respect of a certain tenure known as Lot Tajpur and to enforce a charge upon another property (a 4-annas share in Sandhya Bazar) hypothecated by way of security for the rent.

Both properties have passed out of the hands of the persons who may be spoken of as the original owners and the question for our consideration in this appeal is, whether the hypothecated share of Sandhya Bazar in

the hands of the new owners continues liable for the rent of Lot Tajpur. In both cases the transfers, it should be observed, were by private sales.

The answer to the question propounded depends in the first instance upon the construction of a *kabuliyat* executed on the 12th December 1891 by the original tenants, Udoy Chand and Pran Krishna Mukherjee. The relevant portions of the *kabuliyat* run thus: "If default be made in the payment of rent, you (*i. e*, the landlord) will realise the arrears by instituting suits.....and by the auction sale of the said Lot. If the whole be not realised by the auction sale, then we shall be liable for the balance and shall pay the amount from our own pockets. If we do not do so, you will realise the same by the attachment and sale of our property hypothecated as security and of our other moveable and immoveable properties.....so long as we are not released from the liability to pay the rent of this *mokarari mahal*, we shall not be able to transfer in any manner the property mortgaged as security for the rent of the Lot ...The terms of the *kabuliyat* thus executed by us shall, on our death, be binding equally on our heirs, successors and representatives."

It may be conceded that the words "successors and representatives" include assignees or transferees, but even so I am of opinion that on the true construction of the *kabuliyat*, if the liability of the Mukherjees to pay the rent of Lot Tajpur has ceased, the mortgage or charge on Sandhya has been extinguished.

Now the tenure in question, it is not disputed, is a permanent tenure to which the provisions of the Bengal Tenancy Act are applicable. In a large number of cases decided in this Court, for instance in the cases *Kristo Bulluv Ghose* v. *Kristo Lal Singh* (1), *Chintamoni Dutt* v. *Rash Behari Mondul* (2) and *Rup Chand* v. *Narendra* (3), it has been held that where the provisions of section 12 of the Act have been complied with, the transferor of a permanent tenure ceases to be liable for subsequent rent. In this case the transfer took place in December 1903 and was well known to the landlord, who after the transfer and before the present suit has brought three successive rent suits against the transferees. On the authority of the cases cited I am, therefore, of opinion that the Mukherjees have long ceased to be liable for the rent of Tajpur and that the charge or mortgage on Sandhya has been extinguished.

It has been urged by the appellant that this view of the law makes the taking of security nugatory. That no doubt is so. The demand for security appears to have been based on the provisions of section 5 of the Bengal Putni Taluk Regulation, 1819, there being many Putnis in this Burdwan Zemindari. But the permanent tenure now in question is not a Putni Taluk, the Mukherjees, who were themselves purchasers, were not required to furnish security and the Zemindar was not entitled to make the furnishing of security a condition of recognition. I should, therefore, dismiss the appeal with costs.

It should be here observed that it is conceded the Khan defendants have bought only two-thirds of the mortgaged share and that, therefore, in any view, in this suit the charge could be enforced only to the extent of two-thirds of the claim.

Appeal dismissed.

(1) 16 C. 642; 8 Ind. Dec. (N. S.) 424.
(2) 19 C. 17; 9 Ind. Dec. (N. S.) 457.
(3) 28 Ind. Cas. 683; 19 C. W. N. 112.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 180 OF 1915.

December 18, 1918.

Present:—Mr. Justice Shah, on difference in opinion between Mr. Justice Heaton and Mr. Justice Hayward.

SHANKARLAL TAPIDAS—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

Bombay Summary Settlement Act (VII of 1863)—*Grant of land to mosque—Summary settlement—Grant, continuance of, on payment of quit rent—Land sold to stranger—Government, whether can levy full assessment* —Sanad, *construction of.*

The plaintiff sued to establish a claim to hold certain land partially exempt from land revenue as

endowment property of a mosque. He derived his title from a previous purchaser from a previous manager of the mosque. Originally, the land was granted for the purposes of the Juma Masjid at Amod by the then Muhammadan ruler of the Province. In 1879 the land was brought under the Summary Settlement, when an annual quit rent was imposed and a *sanad* was issued to the manager of the mosque which, after reciting the above fact, provided: "that the said land, subject (in addition to *salami* or other payments which may have been hitherto levied) to the payment to Government of an annual quit rent of Rs. 17-8-0 only, shall be continued for ever by the British Government as the endowment property of the Juma Masjid at Amod without increase of the said quit rent but on condition that the managers thereof shall continue to be loyal and faithful subjects of the British Government." The defendant pleaded that as the land had practically ceased to be the endowment property of the mosque, it had become liable to full assessment to land revenue. The suit was dismissed and the plaintiff appealed to the High Court:

Held, that the settlement in question was governed by the Bombay Summary Settlement Act, VII of 1863; that the terms of the *sanad* pointed to the conclusion that the land need not continue to be the property of the mosque to enable the holder for the time being obtaining the benefit of the exemption from assessment, and that the Government did not get any right under the *sanad* to levy the full assessment even when the property ceased to be the endowment property otherwise than by a lawful alienation. [p. 918, cols. 1 & 2.]

Appeal from the decision of the District Judge, Broach, in Suit No. 5 of 1914.

FACTS appear from the following judgment, dated the 14th August 1908, of

HEATON, J.—The plaintiff, a Hindu, is the holder of certain lands which were once the endowment property of the Juma Masjid at Amod, and he claims to hold these lands at a quit rent much less than the full assessment on the lands. The Collector, presumably because he found that the lands had in fact ceased to be the endowment property of the mosque, levied the full assessment from the plaintiff. The latter being aggrieved sued to recover the excess monies levied and for an injunction restraining the Collector from levying in the future more than the quit rent stated in the Sanad conferring the lands as endowment property. His suit was dismissed and he has appealed to this Court.

The question involved is a very easy one to state, a difficult one to answer. Is the Collector right in levying the full assessment? The land in question is cultivable assessed land. To go back to first principles, the land is liable to pay land revenue, for this is provided by section 45 of the Land Revenue Code. The assessment for land revenue has been fixed and having been fixed "it shall be levied;" for that is the law laid down by section 100 of the Land Revenue Code. There are, of course, exceptions to the general propositions comprised in sections 45 and 10[illegible]; but the only exception which has any application here is that stated in section 52 of the Land Revenue Code. It is provided by section 100 that "in fixing the assessment regard shall be had to the requirements of the proviso to section 52." The proviso to section 52 runs as follows:—"provided that in the case of lands partially exempt from land revenue, or the liability of which to payment of land revenue is subject to special conditions or restrictions, respect shall be had in the fixing of the assesement and the levy of the revenue to all rights legally subsisting, according to the nature of the said rights."

As the result of prolonged argument the conclusion reached was this: that the question now is whether the plaintiff has a legal right to hold the lands subject only to the payment of assessment as stated in the Sanad. If he has, then the case falls within the proviso to section 52 and that legal right must be respected in levying the assessment. It is, of course, for the plaintiff to show that he has this legal right. He seeks to do this in two ways; first, by putting the Sanad before the Court and contending that the Sanad gives the legal right in question to whomsoever thereafter is owner of the lands. Secondly, he seeks to do it in virtue of the Sanad together with proof that he is the lawful owner of the lands and holds them according to the purpose of the Sanad.

Undoubtedly the plaintiff is the holder of the lands and I will assume that he is now the lawful owner, for he claims that he has become the owner and on the evidence adduced we must take it as between the plaintiff and the defendant

that the former has acquired a lawful title, at least by adverse possession if in no other way. We are not here concerned with the question whether a suit could be brought on behalf of the mosque to recover the land.

I will deal with the second part of the proposition, that being the lawful owner of the lands the plaintiff is entitled to hold them at the assessment stated in the Sanad, because he holds them according to or at least not contrary to the purpose of the Sanad. I will not discuss the evidence, it is fairly set out by the District Judge in his judgment. It does not suggest in any way that the plaintiff is the proper and lawful alienee of the endowment lands. If he were, it may be that he would have an irresistible case. As a fact the plaintiff in all probability holds as a spoliator of the endowment or as the successor of such a person. The original alienation must have been in all probability a wrongful alienation or, in other words, a breach of trust and the alienee must have been a spoliator; for alienations of this kind, as is notorious, are commonly improper. This, of course, is not certain, it is only a probability but, in my opinion, it operates as a certainty against the plaintiff in this case, for he has to establish the facts he relies on and the evidence he himself has adduced suggests an improper, not a lawful, alienation of the endowment property away from the mosque. The plaintiff, therefore, fails to show that the alienation by which he has ultimately become the owner of the lands was in accordance with the purpose of the endowment. It is a fact, therefore, in this case that the purpose of the endowment has been defeated. As the plaintiff is a lawful holder of the lands but holds them contrary to the purpose of the endowment, he cannot claim that he holds according to the purpose of the Sanad; for the purpose of the Sanad is in this matter identical with the purpose of the endowment, unless I am wrong in my opinion as to the first line of plaintiff's argument. As he holds contrary to the purpose of the Sanad, he cannot conceivably take the benefit of the Sanad unless that Sanad irrevocably deprives Government of the right to levy the full assessment from whomsoever thereafter may be the owner of the lands.

Thus we are led to the first part of the two headed proposition urged by the plaintiff.

The Sanad runs as follows:

"...By Act VII of 1863 of the Bombay Legislative Council...is hereby declared that the said land, subject (in addition to Salami or other payments which may have hitherto been levied) to the payment to Government of an annual quit rent of Rs. 17-8 0 seventeen and annas eight only, shall be continued for ever by the British Government as the endowment property of the Juma Musjid at Amod, Taluka Amod, Zilla Broach, without increase of the said quit rent, but on the condition that the managers thereof shall continue loyal and faithful subjects of the British Government."

What is stated is that the property is to continue for ever as the endowment property of the Masjid. But in fact the property has ceased to be the endowment property of the Masjid. This is a contingency not expressly provided for. Is it impliedly provided for? The Sanad was issued under Bombay Act VII of 1863 and was, to put it briefly, the outcome of an arrangement between the Government and the manager of the mosque. According to this arrangement the lands were to be continued for ever to the mosque on payment annually of the stated assessment and no further proof of title was to be required from the manager on behalf of the mosque. The purpose of the arrangement was to secure the lands in perpetuity as the endowment of the mosque. No power to alienate is conferred and there is no grant to "heirs and assigns." There could not properly be either in such a case as this, for either would be in my opinion wholly inappropriate. It should, therefore, imply that as soon as the purpose of the arrangement failed, the arrangement was at an end. The point is no doubt one as to which difference of opinion is almost inevitable and It find it very difficult to formulate my reasons convincingly, though my opinion is firmly established. My reasons reduced to their briefest and simplest form are these. The Sanad is

intended to be a plain document for plain unlearned men, it is not an elaborate legal document. Its purpose, as would be thoroughly well understood, was at least this, (1) to secure the lands in perpetuity as a mosque endowment; (2) to fix an assessment in perpetuity; and (3) to secure the holder of the Sanad from any interference at the hands of Government so long as the agreed assessment was paid. What would a plain unlegal man say was to happen when the lands granted as religious endowment ceased to be endowment lands? He would, as I think, say without hesitation that as soon as the lands ceased to be endowment lands, the right to hold them at a reduced assessment would cease also. He would, I think, imply this from the words of the Sanad and the circumstances in which it was given.

It is probable that by treating the Sanad as a legal document to be construed (or it may be camouflaged) by the rules of English real property law, the contrary result would be reached. That, however, is a probability I feel ought not to influence me: we are dealing with Indian not with English property and with an Indian not an English document.

It was argued that the plaintiff could succeed in virtue of section 7 of Act VII of 1863 as his predecessor in-title was the rightful owner at the time of the settlement. That, however, is not proved, and the evidence suggests the extreme improbability of such a thing. It seems indeed obvious to me that the alienee would not be the rightful owner at the date of the settlement for the purpose of that settlement; for his ownership, as he was a Hindu not connected with the mosque would be incompatible with the purpose, of such a settlement.

It was also suggested that the Sanad must be taken to be of the kind contemplated by section 6 of Bombay Act VII of 1863, and that, therefore, it must be taken to have contemplated the right to transfer and also the rights of assigns. But in fact the Sanad did not do this and it seems to me that having regard to the general law as to religious endowments, the Sanad could not properly contemplate and imply unrestricted powers of alienation.

It was again suggested that the words "it shall be lawful for the Governor-in-Council, etc," in section 2 of Bombay Act VII of 1863 mean that the Governor-in-Council *must*, etc. If that be so, then undoubtedly the Sanad must be taken to "guarantee the continuance in perpetuity of the said lands to the said holders, their heirs and assigns upon the said terms;" and the plaintiff would be entitled to succeed. Now as is well known, the English words "it shall be lawful" naturally imply the same thing as the word "may" and not the same thing as the word "must." It is only in particular circumstances that those words are given the "legal twist" which changes their meaning from the normal to the peculiar. I do not think such circumstances exist here.

Therefore, I think we must take the Sanad, as I have said, as a plain document intended for plain men. So taking it, I gather from it an implied provision that the privilege of the lesser assessment will cease when the property ceases to be the endowment property of the mosque, unless of course it can be shown that the alienation was a lawful alienation. This has not been shown.

Therefore, I would dismiss the appeal with costs.

As, however, my learned brother and myself are unfortunately not agreed, our order in the matter must be held over until the decision of the Full Bench in *Bhuta Jayatsing* v. *Lakadu Dhansing* (1) is made known. We are not in agreement in two matters. On the pleadings my learned brother thinks that it must be presumed that the alienation by which the plaintiff's predecessor-in-title became the holder of the lands, was a lawful alienation. I do not think so. The plaintiff in paragraph 4 of his plaint alleged:—

"The plaint property was bought by the ancestors of Patel Pujabhai Ramdas of Amod more than 60 years back and since then continued in their independent possession and use. Pujabhai Ramdas passed a Sanad deed of the property in Samvat 1953, Vaisak Sud 10th, in my favour, and in Samvat 1962, Maha Vad 12th, the same is sold off to me. Since then the property has continued in my independent possession and use."

(1) 50 Ind. Cas. 715; 21 Bom. L. R. 157 (F. B.).

SHANKAR LAL *v.* SECRETARY OF STATE FOR INDIA.

The defendant in paragraph 3 of his written statement replied:—

"The property in suit was Dewasthan land and the plaintiff and his predecessors-in-title have purchased it with knowledge of the nature of the land and the consequent liability of the grantee to apply the income to religious purposes."

I do not read these pleadings as containing an assertion by the plaintiff that he held under a lawful alienation, still less as containing an admission by the defendant that it was so.

The second matter as to which we differ is, whether the Sanad is to be read or not as implying a condition.

Therefore, the points of law to be considered are:—

(1) Is it to be taken as implied by the pleadings in the case that the plaintiff's predecessor-in-title became the holder of the lands by a lawful alienation?

(2) If not, then, as a matter of law, does the Sanad imply the following condition: that if the lands cease to be the endowment property of the mosque otherwise than by a lawful alienation, the Government may levy the full assessment on the lands?

HAYWARD, J.—The plaintiff Bania sued to establish his claim to hold certain land partially exempt from land revenue as endowment property of a mosque. He derived his title from a previous purchaser from a previous manager of the mosque. He did not join the present manager as a party and his title as against the mosque was not disputed by the defendant Secretary of State. But it was pleaded that as the land had practically ceased to be the endowment property of the mosque, it had become liable to full assessment to land revenue as directed by the Collector on behalf of the Secretary of State.

It was *inter alia* argued at the trial that this was "tantamount to a resumption of the grant" and was not justified by the terms of the Sanad granted to the manager of the mosque by the Collector on behalf of the Secretary of State under the Summary Settlement Act, VII of 1863. This argument was rejected by the District Judge, but has been repeated before us in first appeal and would appear to raise the real issue between the parties for determination by this Court.

Now the plaintiff's title has not been disputed in the pleadings as against the mosque. It might indeed be disputed in other proceedings between him and the manager, but it must, in my opinion, be presumed for the purpose of these proceedings to be a good title as against the mosque. The only issue to be decided would, therefore, appear to be whether the transfer of the land by the previous manager of the mosque has rendered it liable to full assessment to land revenue by the Collector on behalf of the Secretary of State. It appears to me that the decision of that issue depends on the true interpretation of the terms of the Sanad granted to the previous manager of the mosque under the Summary Settlement Act, VII of 1863. The relevant terms are: "The said land... shall be continued for ever...without increase of the annual quit rent...as the endowment property of the mosque." The Sanad was granted in 1879 by the Collector on behalf of the Secretary of State. The plain meaning of those terms, in my opinion, is that the land, with its exemption from full assessment to land revenue, was granted to the manager not as his private property but as the public property of the mosque. The property granted was the land with its exemption and the manager was not to deal with it as his private property but was to hold it for the benefit of the public entitled to use the mosque. He was to hold it subject to the rules of Muhammadan Law relating to mosques. It was not intended, in my judgment, to distinguish between the land and its exemption or to render the exemption liable to resumption upon the transfer of the property. If this had been intended, it would not have been left to implication but there would have been express provision. It was not in fact, in my judgment, intended to restrict the lawful powers of the manager to transfer the property for justifying necessity under the Muhammadan Law, nor to protect the property against unlawful transfers by reserving special powers of resumption, over and above the ordinary remedies available to the public entitled to use the mosque, to the Collector on behalf of the Secretary of State.

It appears to me further that this is the true interpretation of the terms of the Sanad, not only according to the plain meaning of the terms used but also according to the authority for its grant given by the

Legislature. It was provided that it should be lawful in respect of lands brought under the Summary Settlement to "guarantee by Sanad the continuance in perpetuity of the said lands to the said holders, their heirs and assigns" by section 2 (1) and that the said lands should be the "transferable property of the said holders, their heirs and assigns without restriction as to...transfer continued in perpetuity subject to a fixed annual payment...at the rate of two annas per each rupee of the assessment" by section 6 of the Summary Settlement Act, VII of 1863. There was, therefore, express prohibition against restriction of the rights of transfer and against the imposition of full assessment on lands brought under the Summary Settlement Act. It was not intended to distinguish lands held on behalf of religious institutions, because the special provisions of section 38 (2) of Regulation XVII of 1827 were repealed by and those of section 8 (3) of the Summary Settlement Act II were not repeated in Act VII of 1863. It would further appear immaterial whether the transfer was effected after or before the grant of the Sanad. If after, the transferee could claim immediately under the Sanad. If before, he could claim the benefits of it as the rightful owner under the provisions of section 7 of the Summary Settlement Act, VII of 1863. It would not be possible to levy full assessment under the general law relating to land revenue, as rights legally subsisting have been specially protected by the proviso to section 52 referred to in section 100 of the Land Revenue Code, 1879. It should finally be observed that the right of resumption in respect of lands granted for religious purposes under the general law relating to land revenue has been reserved not merely by implication but in express words in the Form Appendix K to rule 13 of the rules under section 214 of the Land Revenue Code, 1879, and such express reservation has been given legal sanction under the Crown Grants Act, XV of 1895. It appears to me, therefore, both on the plain meaning of the terms of the Sanad and on the law relating to its grant that no power of resumption has been reserved to the Collector on behalf of the Secretary of State.

If that view should be correct, then there ought to have been a decree for the recovery of Rs. 33-12-0, the excess assessment levied for two years by the Collector—the recovery of the excess levied for the third year having been time-barred—with costs against the Secretary of State; but as that view has the misfortune to differ from that held by my learned brother, the matter must be reserved for decision according to the rule shortly to be laid down by the Full Bench of this Court.

Mr. *S. Y. Abhyankar*, for the Plaintiffs.

Mr. *S. S. Patkar*, Government Pleader, for the Respondent.

JUDGMENT.

SHAH, J.—In consequence of the difference of opinion between Heaton and Hayward, JJ., who heard this appeal, it has been referred to me under section 98 of the Code of Civil Procedure in accordance with the conclusion arrived at by the Full Bench in *Bhuta Jayatsing* v. *Lakadu Dhansing* (1) as to the procedure to be followed in such cases.

The points of law upon which they differ have been stated thus: "(1) Is it to be taken as implied by the pleadings in the case that the plaintiff's predecessor-in-title became the holder of the lands by a lawful alienation? (2) If not, then as a matter of law does the Sanad imply the following condition: that if the lands cease to be the endowment property of the mosque otherwise than by a lawful alienation, the Government may levy the full assessment on the lands?"

As to the first question it is not disputed before me, and both the differing judgments proceed on the hypothesis, that for the purpose of this suit the plaintiff must be taken to have acquired a lawful title to the land in suit, quite apart from the question whether the original alienation in favour of the ancestor of the plaintiff's predecessor-in-title was lawful or not. I am not concerned in this litigation with the question whether the manager of the mosque has now any right to the land in suit against the plaintiff: and I express no opinion whatever on that question. The plaintiff must be taken in this suit to have acquired a lawful title to the land. The question, whether the original alienation in favour of the ancestor of Punjabhai, who mortgaged the land

in 1897 and subsequently sold it in 1906 to the present plaintiff, was lawful or not stands on a different footing. The plaint refers to this alienation in favour of Punjabhai's ancestor more than sixty years ago: and in the written statement it is pleaded that the land in suit is. Devasthan land and the plaintiff and his predecessor-in title have purchased it with knowledge of the nature of the land and the consequent liability of the grantee to apply the income to religious purposes. It is difficult to say that the defendant questioned the validity of the alienation referred to in the plaint: and it is urged for the appellant that the defendant did not care to put the plaintiff to the proof of the propriety and validity of an alienation, which took place many years ago. It is urged that the existence of a local custom in the District of Broach in favour of an alienation of *wakf* property is recognised by Westropp, C. J., in *Abas Alli* v. *Ghulam Muhammad* (2) and that in *Narayan* v. *Chintaman* (3) the learned Chief Justice, while referring to the inalienability of religious endowments, whether Hindu or Muhammadan, recognises certain exceptions, including the exception based on the local custom referred to. Further it cannot be said that according to Muhammadan Law the *wakf* property can *never* be validly alienated. Under these circumstances I think that on the pleadings the alienation in favour of Punjabhai's ancestor may be properly taken to be lawful. This point, however, has no practical importance, having regard to the view which I take of the second question: and I should hesitate to base my decision on such an implication from the pleadings. If the ultimate decision depended in any way on this point, I might have considered the suggestion that in the interests of justice it would be proper to send down an issue on the point, to allow the parties an opportunity of adducing evidence thereon, and to decide the question on proper materials instead of basing an inference in favour of the plaintiff on the pleadings.

Assuming, however, that the alienation in favour of the plaintiff's predecessor-in title was unlawful, as the second question assumes, is the defendant entitled to levy full assessment on the land? The answer to this question depends upon the construction of the Sanad. The Sanad was issued in 1879 to the manager of the mosque. The land in suit was brought under the Summary Settlement authorised by Act VII of 1863. After reciting that fact, the Sanad provides: "that the said land, subject (in addition to Salami or other payments which may have been hitherto levied) to the payment to Government of an annual quit rent of Rs. 17 8-0 only, shall be continued for ever by the British Government as the endowment property of the Juma Masjid at Amod without increase of the said quit rent, but on the condition that the managers thereof shall continue to be loyal and faithfull subjects of the British Government." It is not suggested in the present case that the condition that the managers of the mosque shall continue to be faithful and loyal subjects of the British Government is not fulfilled.

The right to levy the full assessment is claimed for the Government on the ground that the land has ceased to be the property of the mosque. It is contended that the condition that the grant shall continue only so long as the land shall continue to be the property of the mosque is implied by the terms of the Sanad and that the absence of the words 'heirs and assigns' is consistent only with that view. The learned Government Pleader contended that even if the original alienation by the manager in favour of Punjabhai's ancestor were lawful, the Government would still have the right to resume the grant in case the land ceased to be the property of the mosque. For the plaintiff it is urged that the Sanad is in the usual form adopted in the case of a settlement relating to any religious endowment, that the absence of the words 'heirs and assigns' is not inappropriate in such a case, and that according to the provisions and the scheme of the Summary Settlement Act (Bombay Act VII of 1863), which applies to the present settlement, and according to the terms of the Sanad no such condition as is suggested by the defendant can be implied. It is urged that so long as the quit rent is paid and so long as the managers continue to be faithful and loyal subjects, the Government have agreed to continue the land in perpetuity as the

(2) 1 B. H. C. R. 36.
(3) 5 B. 393; 3 Ind. Dec. (N. S.) 259.

endowment property, whether it continues to be the property of the mosque or is transferred validly or invalidly to third parties.

After a careful consideration of the arguments urged on both sides, I am of opinion that no such condition as is stated in the question is implied by the terms of the Sanad, and that the Government have no right to levy the full assessment, as they have done. In the first place the land is expressly brought under the summary settlement authorised by Bombay Act VII of 1863. This indicates to my mind that the nature of the settlement is such as is authorised by section 2 of the Act. The section is general and would apply to all lands, including the endowment lands. The Sanad does not in terms refer to section 2; but the expression summary settlement authorised by Act VII of 1863 can properly refer only to such settlement as is authorised by the section.

It is contended by the Government Pleader that the Sanad may be the result of an inquiry and a decision contemplated by the Act and he refers to sections 14, 19, 20, 21 and 22 of the Act. In the first place, the record of the case does not disclose any basis for the suggestion that there was a decision and that the Sanad was based upon such a decision. Secondly, it is contrary to the terms of the Sanad, as ordinarily the settlement based upon an inquiry and a decision would not be the summary settlement authorised by the Act. It would be a settlement which would represent the terms of the old grant, based upon the proof of such grant.

Further, the words of grant in the Sanad read in their plain and natural sense show that so far as the Government are concerned, the property shall for ever be continued as the endowment property of the mosque. It would not be reasonable to imply such a condition as is now suggested by the Government from these words. If the Government wanted to impose such a condition it should have been stated, instead of leaving it to be implied in this manner. I do not think that it could be implied without unduly straining the words or without reading words in the Sanad which are not there. The infirmity of this contention is exposed, in my opinion, by the fact that it necessarily involves the result that the Government could levy full assessment, even if the property be alienated by the managers of the mosque for a proper purpose in a proper manner. No doubt the Government Pleader has contended that that is the true view. But I feel sure from the judgment of Mr. Justice Heaton that he would disallow such a contention, for he observes that if the plaintiff were a proper and lawful alienee of the endowment lands he would have an irresistible case. Therefore it is that the point of difference has been limited to a case where the property ceases to be endowment property otherwise than by a lawful alienation. I have no hesitation in disallowing the contention that under the terms of the Sanad the Government have the right to resume the grant or to levy full assessment when the property is validly and properly alienated by the managers of the mosque. This affords a reason for not importing such a condition in the Sanad at all even when the property ceases to be the endowment property otherwise than by a lawful alienation.

The omission of the words 'heirs and assigns' does not present any insuperable difficulty to my mind. In the case of endowment lands these words are probably considered unnecessary or inappropriate, when the nature of the settlement is indicated in clear words by reference to Act VII of 1863. But whatever the reason of the omission may be, I do not think that the omission can justify the importing of a condition, which is not expressed and which seems to be inconsistent with the provisions of the Act.

The purpose of the Act is clearly stated in the preamble and section 2 authorises the continuance in perpetuity of the land to the holders, their heirs and assigns, upon certain terms and conditions. Section 6 provides that the property shall be heritable and transferable: it may be that in virtue of the special limitations of the particular holder it may not be heritable or transferable in the ordinary sense; but so far as the Government are concerned, it would be heritable and transferable. Section 7 provides also that any settlement made by the Governor in Council with the holder of any land will be binding upon the rightful owner, his heirs and assigns, whoever such

rightful owner may be. These provisions apply to the summary settlement authorized by the Act, and, in my opinion, they apply even when the settlement is in respect of the endowment lands. The importing of the condition now suggested would be inconsistent with these provisions. This view is also supported by the omission in Act VII of 1863 of the provisions corresponding to section 38, clause 2, of Regulation XVII of 1827, and section 8 of Bombay Act II of 1863. Act VII of 1863, which repealed section 38 of the Regulation of 1827, and Act II of 1863 were passed about the same time. Both the Acts have been framed with similar objects in view and the absence of any provision in Act VII of 1863 corresponding to section 8 of Act II of 1863 is not without significance. In *Krishnarav Ganesh* v. *Rangrav* (4) Westropp, C. J. observes with reference to this omission as follows:—"That Bombay Act VII of 1863 contains no similar provision, may possibly be due to the fact that in some few places in the territories to which it applies, *e. g.*, Broach and Surat, it seems that by local custom contrary to the general law, lands held for Muhammadan religious purposes have been treated as alienable."

The provisions of the Act, which must be taken to govern the settlement in question, and the terms of the Sanad point to the conclusion that the condition that the land must continue to be the property of the mosque in order that the holder for the time being may have the benefit of the exemption from assessment allowed by the Sanad, cannot be implied and that the Government do not get any right under the Sanad to levy the full assessment even when the property ceases to be the endowment property otherwise than by a lawful alienation.

The argument that the Government could not have intended to continue the grant even when the purpose of the grant is defeated has no force in view of the provisions of the Act. In every case the purpose of the grant is defeated in a sense, when a trespasser becomes the holder by adverse possession and deprives the rightful holder of his property. In the case of the endowment property the purpose is more glaringly defeated when a stranger comes in otherwise than by a lawful alienation. The true view seems to me to be that when any land is brought under the summary settlement authorised by Act VII of 1863, the right of the Government to the quit rent fixed in the Sanad in accordance with the provisions of the Act and the right of the lawful holder for the time being to the exemption allowed under the summary settlement are fixed in perpetuity subject, of course, to the conditions expressly mentioned in the Sanad, without any reference to the question whether the land continues to be the property of the original grantee or not. It is for the manager of the religious institution to take care of the endowment property, as it is for an individual to take care of his private property; and the negligence or the misconduct of the manager cannot benefit the Government under the provisions of the Act and the terms of the Sanad.

I, therefore, agree with my brother Hayward on the second question.

The result is that the decree of the lower Court is reversed, and there will be a decree for the plaintiff for Rs. 33-12-0 with costs throughout on the defendant.

Decree reversed.

(4) 4 B. H. C. R. (A. C. J.) 1 at p. 9.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 7 OF 1917.

January 6, 1919.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, Kt.

KAFILUDDIN BISWAS—PLAINTIFF—APPELLANT

versus

SABDAR ALI BISWAS—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 92, proviso 3—Construction of lease—Condition precedent, proof of—Oral evidence, admissibility of.

Having regard to proviso 3 of section 92 of the Evidence Act, it is open to a Court to find that an *ijara patta* granted by a landlord to a tenant was intended to be operative only in the event of the lessee being able to obtain possession of the leasehold property, and that such possession was

a condition precedent to the attaching of any obligation upon the tenant to pay rent.

Appeal against the decree of the District Judge, Nadia, dated the 18th September 1916, reversing that of the Munsif, Chuadanga, dated the 8th March 1916.

Babu *Gagan Chand Bural* (for Moulvi *A. K. Fazlul Huq*), for the Appellant.

Babus *Bepin Behary Ghose*, *Karunamoy Bose*, *Nogendra Nath Chowdhury* and *Rupamoy Chatterjee*, for the Respondent.

JUDGMENT.—This is a suit for rent. The main defence is that the tenant was not put in possession of the properties leased to him and is not, therefore, liable for payment of rent.

The first Court decreed the suit but the decree was reversed by the lower Appellate Court and the suit dismissed. The plaintiff appeals. On his behalf it is urged that the facts found do not justify the dismissal of the suit. This contention cannot prevail.

Having regard to proviso 3 of section 92 of the Evidence Act, it was open to the learned Subordinate Judge to find that the *ijara patta* was intended to be operative only in the event of the lessee being able to obtain possession of the leasehold property and that such possession was a condition precedent to the attaching of any obligation under the lease upon which the present suit is based. This is what he has found and with that finding we cannot interfere.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 272 OF 1917.
May 5, 1919.
Present:—Mr. Justice Piggott and
Mr. Justice Walsh.
CHABLI—DEFENDANT—APPELLANT
versus
PARMAL—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 6—Transfer of expectancy, validity of—Compromise of dispute relating to succession, whether binding.

Section 6 of the Transfer of Property Act does no more than enumerate certain rights which cannot be transferred, and does not impose any statutory prohibition against the formation of contracts relating to certain specified subjects as though they were contrary to public policy and forbidden. [p. 920, col. 1.]

Though an imperfect act of transfer or an act purporting to transfer rights mentioned in section 6 confers no equitable interest on the transferee, an arrangement or contract, supported by good consideration and otherwise binding in equity upon the parties thereto, is not deprived of its binding effect merely because one of the results of it is to put one of the parties in the same position as if he had taken a transfer from the person entitled to an inheritance, if a transfer could be actually effected. [p. 920, col. 2.]

K. died leaving him surviving four sons, *P.*, *H.*, *G.* and *N.*, who divided his property amongst themselves. *H.* died leaving a widow who married *P.* Afterwards *N.* died leaving a widow. A dispute having arisen, *P.* and *G.* came to an arrangement that, in consideration of *P.* being allowed to retain the property of *H.*, he would not claim *N.'s* property on the death of *N.'s* widow. But when the latter died *P.* brought the present suit against *G.'s* son for his share of *N.'s* property. *G.'s* son relied on the arrangement between *P.* and *G.* The District Judge decreed the suit, holding that the arrangement relied upon amounted to an attempt to transfer the chance of an heir-apparent succeeding to an estate and was illegal under section 6 (*a*) of the Transfer of Property Act. On appeal to the High Court:

Held, that the arrangement made by the plaintiff with defendants, having been made upon a *bona fide* dispute, was good as a contract and binding upon the parties to it and their successors. [p. 920, col. 1; p. 922, col. 1.]

Second appeal against the decision of the District Judge, Budaun, dated the 18th December 1916.

Mr. *Ibn-i-Ahmad*, for the Appellant.

Messrs. *Jogindra Nath Mukerji* and *Kamla Kant Varma*, for the Respondent.

JUDGMENT.

WALSH, J.—I agree that this appeal must be allowed. The facts are that one Khamani, who died many years ago, left surviving him four sons Parmal, Hazari, Gokul and Pransukh, who divided his property amongst themselves. Hazari, the 2nd son, died first, leaving surviving him a widow named *Musammat* Mullo, who subsequently was married to the eldest son, Parmal. Afterwards, Pransukh died without issue, leaving a widow *Musammat* Indo. A question having arisen as to the legal effect of the re-marriage of *Musammat* Mullo, the two surviving brothers came to an arrangement by which in consideration of his being allowed to retain the property of Hazari, Parmal, the present plaintiff, agreed to

make no claim against Gokul to the property of Pransukh on the death of the widow *Musammat* Indo. This arrangement was drawn up in a deed dated June 1897 duly executed and registered. This deed has given rise to the question of law we have to decide. *Musammat* Indo died in 1913. Parmal brought this suit against the defendant, the son of Gokul, for the share of Pransukh. The defendant set up the agreement of 1897.

The learned District Judge has found that there was a *bona fide* dispute and that the agreement, if legal, is binding. So far as this is a finding of fact, we are bound by it. As a matter of law, the existence of a *bona fide* dispute has always been held to be good consideration sufficient to support a contract, even though the claim which caused the dispute turns out afterwards to have had no foundation. In other words, a family compromise or arrangement, as it is generally called in this country, is good as a contract and binding upon the parties to it and their successors, if it is founded upon a *bona fide* dispute.

The learned District Judge has decreed the suit on the ground that the contract amounts to an attempt to transfer the chance of an heir-apparent succeeding to an estate, and is, therefore, illegal under section 6 (*a*) of the Transfer of Property Act. On appeal to this Court our brother Rafique referred this question to two Judges, being one upon which judicial decisions in India have not always been consistent.

Apart altogether from authority, I am unable to agree with the view of the Court below. Reading sections 5 and 6 together, it is clear that the latter section does no more than enumerate certain incorporeal, inchoate, or contingent rights which cannot be transferred by an act of conveyance from one person to another. The other rights enumerated in section 6 show that this is so. The section is not one imposing a statutory prohibition against the formation of contracts relating to certain specified subjects, as though, for example, they were contrary to public policy, and, therefore, forbidden. It merely enacts that a transfer or act of conveyance purporting to pass property is ineffectual to pass any interest in these particular rights The result is that they cannot be assigned either at law, or, to adopt the phraseology of English lawyers, at equity by an act of transfer. And it follows that an imperfect act of transfer, or an act purporting to transfer rights mentioned in the section, confers no equitable interest upon the transferee such as was recognized by the English Courts of Equity. But this does not mean, and in my judgment could never have been intended to mean, that an arrangement or contract, supported by good consideration, and otherwise binding in equity upon the parties thereto, will not be held binding in equity upon the parties to it merely because one of the results of it is to put one of the parties in the same position as if he had taken a transfer from the person entitled to an inheritance if a transfer could be actually effected.

Suppose, for example, one of two brothers, either of whom may in certain contingencies become entitled to inherit the share of a third, being minded to leave the country and settle in another part of the world, with invested funds, agrees with the other in consideration of a lakh of rupees, which is duly paid to him, not to claim the share of the third brother if eventually it should fall in to him, but to leave the other brother to establish his own right if he can. Such a contract would, according to English Law, be a good equitable defence or plea, and an absolute answer to any claim to such inheritance made by the one brother against the other. It seems to me that the Courts in India are bound to apply the rules of equity and good conscience to such an arrangement, unless it be against public policy or otherwise expressly forbidden, and that the fact that the formalities of the law of transfer do not allow such an arrangement to be effected by an assignment either in the nature of an act of conveyance or of an equitable assignment, is not sufficient to justify a negation of the obvious equity of the case. The *transaction* is not aimed at by the Transfer of Property Act, only the act of conveyance by an express transfer.

Apart, however, from these considerations, the trend of authority in India appears to me to have been in the direction of supporting these transactions by the application of the rule of equity and good con-

science to binding contracts or family arrangements, which have been wholly performed on one side. In any case, I agree with my brother Piggott that there is abundant authority in this Court to support this defence and that the learned District Judge was bound to follow those decisions. I refer particularly to the expressions used by their Lordships of the Privy Council in *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (1) and to the recent decisions of this Court in *Kantee Chandra* v. *Al-i-Nabi* (2), *Nasirul-Haq* v. *Faiyaz-ul Rahman* (3), *Mohammad Hashmat Ali* v. *Kaniz Fatima* (4) and *Barati Lal* v. *Salik Ram* (5).

The case of *Olati Pulliah Chetti* v. *Varadarajulu Chetti* (6), where an alleged reversioner *admitted* the widow's absolute interest, without expressly relinquishing anything, is a case much in point. It was there held that a compromise cannot be impeached by one of the parties to it on the sole ground that the party whose right is admitted by the compromise had in fact no such right; that a compromise for valuable consideration cannot be repudiated unless it is shown to be illegal or void; and that an *admission* does not affect a transfer or fall within section 6 (*a*) of the Transfer of Property Act as a transfer of a mere *spes successionis*. As was said in an old English case, *Underwood* v. *Lord Courtown* (7): "It only amounts to this, I give you so much for not seeking to disturb me."

I entirely agree with the view taken in the Madras case, and it seems to me that whether or not the case of *Sumsuddin Goolam Husain* v. *Abdul Husain Kalimuddin* (8) was rightly decided, the *dictum* of the Chief Justice cited in the headnote, as to section 6 (*a*) not perpetuating in India the distinction between what are known in England as assignments at law and assignments in equity, is in the nature of a trap, and has led to much misconception. An arrangement of the kind relied upon by the defendant in this case is set up as an equitable defence; it does not purport to be a transfer or equitable assignment.

I agree, therefore, in the order allowing this appeal.

PIGGOTT, J.—The learned District Judge has found that the agreement of June 3rd, 1897, "if legal, is binding on the plaintiff." He quotes authority of the Bombay High Court, *Sumsuddin Goolam Husain* v. *Abdul Husain Kalimuddin* (8), in support of his finding that the agreement in question amounts in effect to the transfer of the chance of succession to an estate, and cannot be enforced against the plaintiff so as to prevent him from claiming property which has devolved upon him under the ordinary Hindu Law of inheritance. I have myself referred to a case in which the same view was taken, on a state of facts much stronger against the plaintiff than those now before us, by the late Chief Justice of the Patna High Court when Judicial Commissioner of Oudh, *vide Bajrang Singh* v. *Bhagwan Bakhsh Singh* (9). If the matter were *res integra* in this Court, I should have preferred to follow that decision, adopting the reasoning of Sir Edward Chamier There is, however, clear authority of this Court the other way, which the lower Appellate Court was bound to follow. I cannot take this case out of the operation of the principle enunciated by the learned Judges who decided the case of *Mohammad Hashmat Ali* v. *Kaniz Fatima* (4). It is true this decision has not been reproduced in the authorised reports; but it has been founded upon and approved in *Barati Lal* v. *Salik Ram* (5). So long as this Court continues to refer to unauthorised reports, it practically lays upon Courts subordinate to it the burden of doing the same. I may say that I should myself have concurred in the decision in *Mohammad Hashmat Ali* v. *Kaniz Fatima* (4), on the ground that in that case all defects, of title were covered by the decree of a competent Court binding on the parties but the case was not decided on this ground. The learned Judges distinctly held that it is competent for a person to contract not to claim an inheritance, in the event of his becoming entitled to it on the

(1) 1 I. A. 157; 13 B. L. R. 312 (P. C.); 3 Sar. P. C. J. 314.
(2) 9 Ind. Cas. 935; 33 A. 414; 8 A. L. J. 193.
(3) 9 Ind. Cas. 530; 33 A. 457; 8 A. L. J. 275.
(4) 27 Ind. Cas. 701; 13 A. L. J. 110.
(5) 31 Ind. Cas. 919; 38 A. 107; 13 A. L. J. 1141.
(6) 31 M. 474; 18 M. L. J. 469.
(7) 2 Sc. and L. 68.
(8) 31 B. 165; 8 Bom. L. R. 781.

death of a living person. There are older authorities of this Court pointing in the same direction to be found in the eighth volume of the Allahabad Law Journal Reports. I think the Court below was bound to follow the authority of this Court, and I, therefore, concur in setting aside the decree of the lower Appellate Court and restoring that of the Court of first instance. The appellant must get his costs throughout, including in this Court fees on the higher scale.

BY THE COURT.—The order of the Court is that the decree of the lower Appellate Court be set aside, and the decree of the first Court restored. The appellant must pay all the costs, including costs in this Court on the higher scale.

Decree set aside.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 202 OF 1917.

March 5, 1919.

Present:—Mr. Justice Greaves and Mr. Justice Newbould.

DWARKANATH CHAKRAVARTI CHOWDHURY—PLAINTIFF—APPELLANT

versus

ATUL CHANDRA CHAKRAVARTI CHOWDHURY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 65—Rent, suit for—Landlord and tenant, relationship of, determination of—Decree, whether rent-decree.

The fact that at the time a suit for rent is brought, the defendants have ceased to be tenants of the plaintiff does not make the decree obtained in the suit any the less a decree for rent, although it cannot be executed as a rent-decree. [p. 923, col. 2.]

A person who has ceased to be the landlord at the time he sues for rent cannot enforce the decree obtained by him as a rent-decree in accordance with the provisions of section 65 of the Bengal Tenancy Act; but his decree may be a decree for rent for other purposes. [p. 924, col. 1.]

Forbes v. *Maharaj Bahadur Singh*, 23 Ind. Cas. 632; 41 C. 926; 25 C. L. J. 434; 18 C. W. N. 747; 27 M. L. J. 4; (1914) M. W. N. 897; 15 M. L. T. 380; 1 L. W. 1059; 12 A. L. J. 653; 41 I. A. 91 (P. C.) explained and relied upon.

Appeal against the decree of the Subordinate Judge, 3rd Court, Mymensingh, dated the 30th April 1917.

Babus *Jogesh Chunder Roy*, *Bepin Behari Ghose* and *Kali Kinkar Chuckerbutty*, for the Appellant.

Babus *Sarat Chandra Roy Chowdhury* and *Krishna Kamal Moitra*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff against a decision of the Subordinate Judge of the 3rd Court of Mymensingh, dated the 30th April 1917. The plaintiff's suit was for rent of a certain tenure formerly held by the defendants but which was sold for arrears of rent on the 8th Falgoon 1320, as appears from the judgment. The lower Court gave the plaintiff a decree for a sum of Rs. 2,191-12-6 and for cesses at the rate of Rs. 286-11-2 per year, or in all for a total sum of Rs. 5,200-14-3.

The plaintiff appeals on two grounds. First of all he says that the Subordinate Judge should not have confined the decree, as he has done, to the security referred to in the plaint, but that he should have passed a personal decree against the defendants; and secondly, it is said that the Subordinate Judge erred in disallowing the plaintiff's claim for the Ashar Kist of 1318 as being barred by limitation.

The necessary facts for the purpose of deciding this appeal are shortly as follows:—The father of one Annada Mohan Roy on the 12th April 1892 by a document of that date demised the tenure to the defendants at a rental of Rs. 2,192. Annada Mohan, on some date which is not material, commenced a suit for rent against the defendants, and on the 23rd February 1909 the suit was compromised on appeal, and it is upon one of the terms of the compromise that one of the questions that arise on this appeal turns. Clause (*b*) of that compromise decree, which was effected in Appeal No. 516 of 1907, provides that the terms of the Mirash Ijara Pattah, dated the 1st Bysakh 1299, in respect of the properties mentioned in Schedule A were to be modified in the following manner, but that save and except such modification all other terms of the Pattah were to remain intact; and sub-clause (1) of clause (*b*), which is the material clause, provides that Annada Mohan or his heirs should have the option of realizing the amount of any decree which he might in future obtain for the rent of the Mirash Ijara either by attachment and sale of the Mirash Ijara or by attachment and

sale of the right, title and interest of the defendants Nos. 1 to 3 or their heirs, representatives or assignees in the property described in Schedule B; but that Annada Mohan Roy and his heirs, representatives or assignees should have no right to levy process of execution against the persons of the defendants Nos. 1, 2 and 3 or their heirs, representatives or assignees, or against any other property belonging to them save and except either of the properties described in the Schedule A or B in execution of any decree for rent in respect of the Mirash Ijara which Annada Mohan or his heirs, representatives or assignees might in future obtain against the defendants Nos. 1 to 3 or their heirs, representatives or assignees. On the 7th February 1910, the plaintiff in the present suit purchased Annada Mohan's interest in the Zemindari, and on the 28th July 1911 he sued for rent in respect of the tenure from the month of Chaitra 1316 to the month of Ashar 1318. On the 23rd July 1912, he obtained a decree and the sale of the tenure or security was directed. On the 12th March 1913, an appeal was presented by the defendants against the decree. The judgment was affirmed with this modification, that it was held that the Ashar Kist of 1318 should not have been allowed inasmuch as the suit was premature in respect of that Kist. On the 18th March 1915, the plaintiff appealed to the High Court but he withdrew his appeal. On the 29th November 1912, the plaintiff sued for the rent from Kartik to Chaitra 1318. He obtained a decree, and on the 21st February 1913, so we are told, the plaintiff purchased the tenure in execution of the decree, and on the 7th April 1916, the present suit was commenced by the plaintiff in respect of the rent which I have already stated, including the Ashar Kist of 1318 which had been disallowed in one of the previous suits. The Subordinate Judge has held that the Ashar Kist was time barred, but he has granted a decree for the amount which I have already stated, but he has limited the execution of the decree to the securities referred to in the compromise in Appeal No. 516 of 1907.

I will deal with the second point first, namely, with regard to the Ashar Kist of 1318. This is clearly barred by limitation, unless the plaintiff is entitled to rely upon the provisions of section 14 of the Limitation Act. We do not think that he is entitled to rely upon this section, because we do not think that he was in the former suit prosecuting his case in a Court which for defect of jurisdiction or other causes of like nature was unable to entertain it. The reason for the Court refusing to entertain the claim for the Ashar Kist was, not that it had not jurisdiction in respect of it, but because the claim was, premature as the plaintiff's claim for this Kist had not matured at the date of that suit. Therefore, we think that the present plaintiff cannot call in aid those former proceedings and say that time did not run against him while these proceedings were being prosecuted. This being so, it is admitted that the decision of the Subordinate Judge was correct upon this point and that the Ashar Kist is barred by limitation.

I now come to the other point. It is said that as the position of landlord and tenant had ceased to exist at the time the suit was instituted and at the time the decree was passed, the decree was not a decree for rent which could be executed as such but was in the nature of a money-decree and that this being so, the clause in the Solenama to which I have already referred was no bar to the present plaintiff obtaining a personal decree against the defendants in respect of the decretal amount. I confess myself that if the matter had been *res integra* I should, as at present advised, have been inclined to hold that the clause in the Solenama was a bar to obtaining a personal decree against the defendants in the present suit, and that the fact that they had ceased to be tenants did not make the decree any less a decree for rent, although it could not be executed as a rent decree. But the question of the construction of the Solenama came up for decision under circumstances which appear to me to be identical *mutatis mutandis* with the circumstances of the present case in R. A. No. 534 of 1913, in respect of which the decree of this Court was passed on the 18th July 1916. In that suit the plaintiff was Annada Mohan Roy and the defendants were Atul Chandra Chakravarty Chowdhuri, Rajendra Nath Chakravarty Chowdhuri and Harendra Narain Chakravarty Chowdhuri and the present appellant was a *pro forma* defendant in the suit,

It was there contended on behalf of the respondents to that appeal that by virtue of the Solenama Annada Mohan Roy could not obtain a personal decree against the contesting defendants. But it was held that inasmuch as by virtue of the decision in *Forbes* v. *Maharaj Bahadur Singh* (1), the decree could not be executed as a rent-decree as Annada Mohan was no longer the Zamindar, consequently the decree must be treated as a money decree which did not fall within the provisions of the Solenama. With all respect to that decision I do not think that the decision in *Forbes* v. *Maharaj Bahadur Singh* (1), to which I have referred, decided any more than that by virtue of the provisions of section 65 of the Bengal Tenancy Act a person who had ceased to be the Zemindar at the time he sued for rent could not enforce his decree as a rent-decree in accordance with the provisions of section 65 of the Bengal Tenancy Act. I do not myself read it as deciding that the decree was not a decree for rent for other purposes. I should have thought myself that the present decree would have fallen within the terms of the provisions of the Solenama. But it seems to me that the decision of the 18th July 1916 applies to the circumstances of this case. If a decree obtained by a landlord who had ceased to be the landlord against his tenants is not a decree for rent within the meaning of the Solenama, then it seems to me that it must follow from that decision that a decree obtained by a landlord against the tenants who had ceased to be tenants cannot be called a decree for rent within the meaning of the Solenama. That being so, I think that we are bound sitting here by the decision of the 18th July 1916 upon the construction of the Solenama itself.

It is urged on behalf of the respondents that that was a decision between different persons to this appeal and that it is, therefore, not binding upon us. It seems to me, however, that it was a decision on a question of law (for a question of the construction of the Solenama must be of the legal effect of the terms and provisions of the Solenama) and that being so, it seems to me that this part of the appeal is concluded by the decision of the 18th July 1916.

One further question was urged before us on behalf of the respondents. It was said that by virtue of the decision, which is printed at page 5 of the respondents' portion of the paper-book, the question is *res judicata*. I do not think that in any sense it can be said that this is so, for at the time that *that* decision was given the position of landlord and tenant still existed, whereas, as already said, at the present time the tenants have ceased to be in possession of the land.

For these reasons we think that the appeal must succeed to this extent, that the appellant is entitled to a personal decree against the defendants. We, therefore, modify the order of the Subordinate Judge to this extent that the decree will be realized first of all by the sale of the security mentioned in the plaint and in default of the realization of the decretal amount or any part thereof from that security, the plaintiff will be at liberty to enforce his decree as a personal decree against the defendants, and if, as is suggested here, the security has already been realized, then the plaintiff will be entitled to at once enforce his decree as a personal decree.

The plaintiff is entitled to his costs of the hearing in this Court. We assess the hearing fee at 100 rupees.

Appeal allowed.

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(1) 23 Ind. Cas. 632; 41 C. 926; 25 C. L. J. 434; 18 C. W. N. 747; 27 M. L. J. 4; (1914) M. W. N. 597; 15 M. L. T. 380; 1 L. W. 1059. 12 A. L. J. 653; 41 I. A. 91 (P. C.).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 358 OF 1917.

January 27, 1919.

Present:—Mr. Justice, Shah on difference in opinion between Mr. Justice Heaton and Mr. Justice Pratt.

VASUDEV VISHNU HASABNIS —DEFENDANT—APPELLANT

versus

GOPAL PARASHRAM KULKARNI —PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts, 181, 182

VASUDEV VISHNU HASABNIS *v.* GOPAL PARASHRAM KULKARNI.

—Mortgage—Redemption, suit for—Decree for redemption—Application for extension of time for payment of money—Limitation.

On the 17th January 1907 the plaintiff obtained a decree in a redemption suit directing him to pay a certain sum of money within six months and recover possession of the property. The decree also provided that in the event of the plaintiff making default, the defendant No. 1 could apply for relief under section 15B of the Dekkhan Agriculturists' Relief Act. Neither party took steps to execute the decree, and in 1915 the rights under the decree were assigned to the present respondent who, as representing the plaintiff, made an application on the 27th September 1915 requesting the Court to allow him to pay the money which the plaintiff was required to pay and to get possession of the property under the decree. The application was allowed by the Courts below, and the defendant appealed to the High Court:

Held, (1) that treating the application as one to extend time for the payment of the mortgage-debt, it was barred under Article 181 of Schedule I to the Limitation Act; [p. 927, col. 1.]

(2) that the right to apply for such extension did not accrue from day to day, and although a Court had power to enlarge the time fixed under the decree, it had no power to enlarge the time fixed by the Limitation Act; [p. 927, col. 2.]

(3) that if the application be treated as one for the recovery of possession of the property, it was an application for the execution of the decree, and as such it was time barred under Article 182 of Schedule I to the Limitation Act. [p. 928, col. 1.]

Appeal from the decision of the District Judge, Satara, in Miscellaneous Appeal No. 7 of 1916, confirming the order passed by the Subordinate Judge at Islampur, in Miscellaneous Application No. 33 of 1915.

This second appeal came on for hearing before Heaton and Pratt, JJ., on the 17th December 1918, who delivered the following

JUDGMENT.

HEATON, J.—The application with which we are here concerned comes within the words of Article 181 of the Schedule to the Limitation Act. The right to apply to pay the mortgage money accrued at the latest on the last day for payment allowed by the decree, and this was 17th July 1907. The present application was presented in 1915, much more than three years later, and so is time-barred. That is how the matter appears to me.

It is suggested that this application was made during the pendency of a suit and being appropriate to what was in progress or pending is not affected by any bar of limitation. The right to apply was in fact a recurring right. As I understand the matter, there was not a pending suit. No doubt the suit might in a sense be regarded as pending so long as only a preliminary decree had been passed and a final decree was still possible. But even before the end of 1910, three years after the date fixed for payment, a final decree had become impossible, an application for a final decree having become time-barred to both parties. Therefore, as it seems to me, there was not a pending suit and the application we have here to deal with was time-barred.

My learned brother is not of this opinion. I concur with him that we may fairly treat the application as one for extension of time and that if it is not time-barred, the order should be as he suggests.

We both agree that if the application is time-barred, the matter should be remanded so that the Court below may consider whether the application should be treated as a suit under section 47, clause (2), of the Civil Procedure Code.

The point of law we refer to a third Judge (section 98) is this:

Is the application or is it not time-barred under Article 181 of the Schedule to the Limitation Act, the application being regarded as one to extend time for the payment of the mortgage-debt?

PRATT, J.—The plaintiff in this suit was the mortgagor and obtained a redemption decree against the defendant, his mortgagee, under section 15B of the Dekkhan Agriculturists' Relief Act on the 17th January 1907. He failed to pay within the time limited by the decree but as the mortgagee made no application for sale of the mortgaged property, the equity of redemption remained with the plaintiff. In 1915 he assigned that equity to the present respondent, who paid the decretal sum into Court and applied for possession.

The Subordinate Judge awarded possession but gave no reasons for his order. In first appeal the District Judge confirmed the order mainly on the ground that it had been decided in the case of *Balaji* v. *Datto* (1) that the Court had power under section 15B to allow payment of instalments at any time irrespective of limitation and that, therefore, it was competent to the

(1) 9 Bom. L. R. 1026.

Court to allow payment at any time in one lump sum.

The reasoning of the District Judge is, of course, unsound for the *dictum* of Chandavarkar, J., in *Balaji* v. *Datto* (1) assumed that there was an execution proceeding pending.

In my opinion, the application should have been treated as one made for enlargement of time to be followed by an order for execution of the decree, as was done in the case of *Ishwar Lingo* v. *Gopal Jivaji* (2).

Mr. Coyaji contends that the application for enlargement of time is itself an application for execution and is, therefore, barred by Article 182, and refers to the case of *Amolak Chand Parak* v. *Sharat Chandra Mukherjee* (3). In that case it was held that an application for an order absolute under section 89 of the Transfer of Property Act was an application to enforce the decree made under section 88 and, therefore, fell within the scope of Article 183. But the learned Chief Justice was careful to point out that under the present Civil Procedure Code, applications for a decree absolute though applications under the Civil Procedure Code, are not applications for execution but are governed by Article 181. Of course it may be contended that applications for an order absolute under section 15B are applications for execution as the decree under section 15B of the Dekkhan Agriculturists' Relief Act is a final decree. In my opinion, the question turns upon the form of the decree. The final order for realization may be embodied in the preliminary order for payment under section 15B (3) or substituted for it under section 15B (4) and then the decree is final. If not, the decree is preliminary. Section 15B is supplemental to the general law and the order for sale in section 15B (2) should now, I think, be construed as equivalent to a decree for sale.

But, however that may be, it seems to me quite clear that applications to enlarge the time limited in the decree are not applications for execution, for their purpose is not to enforce the decree but to modify it. Nor do I think such an application is governed by Article 181 or is subject to the law of limitation. The right to apply for enlargement of time accrues from day to day so long as the equity of redemption remains with the applicant: *Nandram* v. *Babaji* (4).

The lower Court was, therefore, competent to make the order appealed against but as it has not considered whether the time for payment should be enlarged, this should now be done.

The lower Appellate Court should consider, after taking or directing to be taken by the Subordinate Judge such evidence as the parties may adduce, whether there is good cause shown for enlarging the time fixed by the decree; and if so, whether the appellant should be put to terms—and if so, whether the application may under section 47 (2), Civil Procedure Code, be treated as a suit.

I would reverse the decree of the lower Appellate Court and remand the application for disposal in accordance with this judgment.

In consequence of the difference of opinion between the learned Judges, the case came on for hearing before Shah, J.

Mr. *Coyajee* (with him Mr. *S. Y. Abhyankar*), for the Appellant.

Mr. *K. H. Kelkar*, for the Respondent.

JUDGMENT.—In this appeal in consequence of the difference of opinion between the learned Judges who heard the appeal, the following question has been referred to me under section 98 of the Code of Civil Procedure:—

"Is the application or is it not time-barred under Article 181 of the Schedule to the Limitation Act, the application being regarded as one to extend time for the payment of the mortgage-debt?"

The few facts connected with this question are these: On the 17th of January 1907 the plaintiff obtained a decree in a redemption suit in these terms:—"The plaintiff do within six months from this day pay a sum of Rs. 391-13-0 and the defendant No. 1's costs of the suit to the defendant No. 1 and recover possession of the property in suit. In the event of the plaintiff failing to pay the moneys as stated above, the defendant No. 1 may apply for obtaining

(2) 28 B. 102; 5 Bom. L. R. 719.
(3) 11 Ind. 943; 38 C. 913; 16 C. W. N. 49.

(4) 22 B. 771; 11 Ind. Dec. (N. S.) 1098.

relief under section 15B of the Dekkhan Agriculturists' Relief Act....The defendant No. 1 do take in lieu of interest the income of the said land until the mortgaged property in suit is redeemed." Neither party took any steps to execute this decree, which was passed under section 15B of the Dekkhan Agriculturists' Relief Act. In 1915 the rights under the decree were assigned to the present respondent, who as representing the plaintiff made an application on the 27th of September 1915 requesting the Court to allow him to pay the money which the plaintiff was required to pay and to get possession of the property under the decree. The trial Court allowed this application. The lower Appellate Court confirmed that order, and in the appeal here in consequence of the difference of opinion, to which I have adverted, the question stated above has been referred to me.

On a consideration of the arguments urged on either side and the reasons set forth in favour of either view in the differing judgments, I am of opinion that treating the application as one to extend time for the payment of mortgage-debt, it is barred under Article 181 of the Limitation Act.

In 1907 when this decree was passed under the Dekkhan Agriculturists' Relief Act, it was a decree capable of execution. It is not necessary for the purposes of this reference to express any opinion as to whether it was a decree which required to be made absolute by any further application either under the provisions of the Transfer of Property Act then in force, or after the Civil Procedure Code of 1908 came into force under the corresponding provisions of the Code.

Whether it was a decree *nisi* which required to be made absolute or not, it was a decree capable of execution: and any application to execute it would be governed by Article 182. If the application of the 27th September 1915 be treated as an application not merely for the extension of time for the payment of the mortgage-debt but for the recovery of possession of the property, as in terms it purports to be, it is an application for the execution of the decree and as such it is time-barred under Article 182. But treating it as an application for the enlargement of time only, as stated in the question formulated for decision, I do not see how it can be held that there is no period of limitation applicable to it. Article 181 refers to applications for which no period of limitation is provided elsewhere in the First Schedule of the Limitation Act or by section 48 of the Code of Civil Procedure. An application for the extension of time for the payment of the mortgage-debt under a redemption decree, if not treated as an application for the execution of the decree, would clearly fall under Article 181. It is an application for the exercise of powers referred to in the Code, and there is no other period of limitation prescribed for such an application on the assumption that it is not an application for the execution of the decree. The application would be time-barred, if it were not made within three years from the date on which the right to apply accrued. In the present case the right to apply for the extension of time accrued on the date of the decree or at the latest on the expiry of the period of six months fixed for the payment of the debt under the decree. It is urged that the right to apply for the extension of time accrues from day to day so long as the right to redeem subsists, and that in effect there is no period of limitation applicable to an application for the extension of time. It is further urged that such an application is really an application for a modification and not for the execution of the decree. These contentions have been accepted by my brother Pratt. With great deference, I am unable to accept them.

As regards the first contention I do not think that the right to apply can be treated as a right accruing from day to day. The Court has the power to enlarge the time fixed under the decree for the payment of the mortgage-debt; but it has no power to enlarge the time prescribed by the Limitation Act. By treating the right to apply for the extension of time as a right accruing from day to day, the Court would in effect be allowing the plaintiff to do that indirectly which he could not do directly. That is though his application for execution is time-barred, he could get over it by applying merely for extension of time long after the execution is time-barred. In effect the argument involves the result that there is practically no period of limitation governing the execution of an executable decree, so

long as the right to redeem is not extinguished. I am of opinion that an argument involving such a result ought to be negatived.

As to the second contention, that the application is not to execute but to modify the decree, I doubt whether it has any practical importance in this case, as the question for decision apparently proceeds on the assumption that it is not an application for execution of the decree. If it were an application for execution, it would be clearly barred under Article 182. But apart from this consideration, it seems to me to be in substance a part of the execution proceedings. The plaintiff cannot recover possession under the decree without paying the amount within the time fixed by the decree or within such further time as the Court may allow under the provisions of the Code; and an application to extend the time is really an application to take a necessary preliminary step by way of execution when the payment is not made within the time fixed by the decree. For the purposes of limitation it may not be governed by Article 182; that question does not directly arise in this case. But it would be and ought to be governed by Article 181. It seems to me that the provisions of the Limitation Act as well as the provisions of the Code relating to mortgage decrees can be given due effect without leading to any anomalous result by holding that an application to extend time is governed by Article 181.

It will appear from the observations in *Amolak Chand Parak* v. *Sharat Chandra Mukherjee* (3) and the decision in *Datto Atmaram* v. *Shankar Dattatraya* (5) that an application for a a decree absolute under Order XXXIV is governed by Article 181. The contention that there is no period of limitation for an application by the mortgagor to extend time for the payment of the mortgage-debt does not appear to me to be reconcilable with the view taken in the said cases.

It is needless to refer to other cases cited at the Bar. I may mention that there is nothing, in my opinion, in *Nandram* v. *Babaji* (4) and *Ishwar Lingo* v. *Gopal Jivaji* (2) which can be construed as being in conflict with my conclusion. The point, that I have to decide, did not arise in these cases. I, therefore, agree with my brother Heaton that the application is time-barred.

As to the final order to be made, it appears that both the learned Judges agree, as stated in the judgment of Heaton, J., that if the application is time barred, the matter should be remanded so that the Court below may consider whether the application should be treated as a suit under section 47, clause (2), of the Civil Procedure Code. The parties have raised no objection to the proposed order: and there has been no argument before me on the point. Under the circumstances that must be the final order. I express no opinion as to the propriety of such an order. I desire to make it clear that I express no opinion as to whether under the circumstances a second suit for redemption can lie.

The result is that the orders of the lower Courts are set aside and the matter is remanded so that the Court below may consider whether the application should be treated as a suit under section 47, clause (2), of the Civil Procedure Code.

The plaintiff should pay the costs throughout up to date.

Case remanded.

(5) 21 Ind. Cas. 318; 38 B. 32; 15 Bom. L. R. 841.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1306 OF 1916.

January 17, 1919.

Present:—Mr. Justice Teunon and Mr. Justice Greaves.

NIBARAN CHANDRA MIRDHA—PLAINTIFF—APPELLANT

versus

RAM CHARAN MANDOL AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 85 (2)—Under-raiyati lease for more than nine years, whether admissible in evidence—Tenancy, proof of—Possession and payment of rent.

Although an under-*raiyati* lease for more than nine years cannot be adduced in evidence, the under-*raiyat* can prove his tenancy *aliunde*, such as by possession and payment of rent. [p. 929, cols. 1 & 2.]

AMBALAL BAPUBHAI v. NARAYAN TATYABA.

Appeal against the decree of the Additional District Judge, Jessore, dated the 16th March 1916, reversing that of the Munsif, 1st Court, Narail, dated the 15th September 1914.

Babu *Sarat Chandra Khan* (for Babu *Hirendra Nath Ganguly*), for the Appellant.

Babu *Mohini Mohan Chuckerbutty*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff against the decision of the Additional District Judge of Jessore decreeing the appeal of the defendants.

The plaintiff's suit was to recover possession of certain *jamas*. The facts are briefly these:—The *jamas* in question originally belonged to seven co sharers. Upon partition they were allotted to Shama Charan, and his widow Ambika Bewa leased them to the plaintiff in 1309. He held them until 1317 when he was dispossessed by defendants Nos. 1, 2 and 3, who are tenants of defendant No. 5, who is a co-sharer of defendant No. 7. Both the Courts have found that the co-sharers under whom the plaintiff claims are *raiyats* and that, therefore, the lease which the plaintiff put forward which was for a period of more than 9 years cannot be adduced in evidence. The learned Additional District Judge has held that this disposes of the suit, as he says that the plaintiff cannot succeed except by proof of title and that as he is not entitled to give this lease in evidence, he has failed to establish his title.

Now there is no doubt that upon the evidence and upon the findings of both Courts the plaintiff was in possession under Ambika Bewa and that he paid rent to her until he was dispossessed, and it seems to us that although the lease may not be given in evidence, there is no reason why the tenancy cannot be proved *aliunde*, as we think it has been, by possession and payment of rent to Ambika Bewa. We were referred to a decision in *Jarip Khan* v. *Durfa Bewa* (1) as an authority that if a lease cannot be given in evidence, no oral evidence of the tenancy is admissible. But it has been held in *Gonesh Mondol* v. *Thanda Namasundrani* (2) that where a lease cannot be given in evidence in the circumstances already referred to, the tenancy can be proved *aliunde*. It appears, therefore, to us that the decision of the Additional District Judge was wrong and that the plaintiff having established his tenancy by possession and payment of rent to Ambika Bewa, the learned Judge ought to have held that he was entitled to possession of the *jamas* for which he had sued.

Accordingly the appeal succeeds and the decree of the Munsif will be restored with costs in all Courts.

Appeal allowed.

(1) 15 Ind. Cas. 476; 16 C. L. J. 144; 17 C. W. N. 59.

(2) 38 Ind. Cas. 489; 21 C. L. J. 539.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 194 OF 1917.

January 29, 1919.

Present:—Mr. Justice Shah, on difference in opinion between Mr. Justice Heaton and Mr. Justice Pratt.

AMBALAL BAPUBHAI GUJARATI—PLAINTIFF—APPELLANT

versus

NARAYAN TATYABA BHOSALE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Decree for money—Charge on immoveable property—Execution of decree—Property charged, whether can be sold.

A decree was made by consent on the Original Side of the High Court in an account suit. The first part of the decree directed payment by the defendant to the plaintiff of a certain sum of money, and the second part of the decree was as follows:—

"The Court with the like consent doth declare that the plaintiffs have a first charge and a lien on the land, hereditaments and premises, situated at, etc."

The Court to which the decree was transferred for execution held that the property could not be sold in execution in the absence of a direction in the decree as to the enforcement of the charge. The plaintiff appealed to the High Court contesting this view:

Held, that the decree-holder had the right to bring the property charged to sale in execution proceedings, and that the declaration in the decree as to the charge on the property in favour of the decree-holder in order to secure re-payment of the amount of the decree had the effect of protecting him against any transfer of the property by the judgment-debtor, and not of reducing or modifying

the right which the plaintiff had got in virtue of the direction that the defendant should pay the amount. [p. 931, col. 2.]

First appeal from the decision of the First Class Subordinate Judge, Poona, in Darkhast No. 494 of 1916.

The appeal came on for hearing before Heaton and Pratt, JJ., who delivered the following

JUDGMENT.

HEATON, J.—My learned brother and I are agreed that if under the decree the "security property" (as it may be called) can be sold in execution, then the appeal must succeed and sale in execution should be allowed. If it cannot be sold in execution under this decree, then the order of the lower Court is correct and the appeal must be dismissed.

My opinion is that sale of the "security property" can lawfully take place in execution proceedings under this decree and that no further suit is necessary. The case to my mind presents itself in this way: we have first to determine the intention of the parties to this consent decree. The intention to my mind is plain, to this extent that on failure of the debtor to pay the debt the "security" is to be sold. Is it to be sold in the execution proceedings or only after a further suit? On this particular point the decree is silent. However, here also I do not myself feel doubt as to the intention of the parties: I believe they contemplated the simple, cheap and speedy device of a sale in execution and not the complicated, expensive and dilatory procedure of a second suit to be followed later by execution proceedings. The decree is a consent decree, not a decree drawn up by or under the superintendence of the Court, and so I should take the word "decree" to have its ordinary meaning and implication rather than the technical meaning which in certain cases the law has impressed on the word. To a non-legal mind the word "declare" in this decree makes it clear that the property is security for the debt and can be sold for the debt; it does not, to the non-legal mind, import anything as to the processes by which the sale is to be made, except possibly that they would be the ordinary legal processes.

I cannot myself see that it is necessary to give to the word "declare" in this case the very technical import which it must have if we are to refuse to sell the "security property" until a further suit has been brought.

The decree which was made in a Bombay High Court suit is, as I read it, analogous to a mortgage with a power of sale, which allows of a sale without any suit. That I believe to be the idea underlying this decree, a very familiar idea in Bombay.

As we differ on the matter, we state the point of law to be submitted to a third Judge under section 98, Civil Procedure Code, as follows: What is the correct construction of the decree? Does it give the decree-holder the right to bring the property charged to sale in execution proceedings?

PRATT, J.—The appellants seek execution of a decree of this Court of the 27th January 1914. The decree was made in an account suit and the first part directs payment by the defendant respondent to the plaintiffs of a certain sum of money. The second part of the decree is as follows: "The Court with the like consent doth declare that the plaintiffs have a first charge and a lien on the land, hereditaments and premises situate at, etc."

The appellants prayed for execution by sale of the property charged in the decree.

The lower Court rightly held that the second part of the decree was declaratory merely. There can be no doubt that this is so. The decree as to the charge is expressed to be declaratory and there is no order directing the sale of the property charged.

Mr. Coyaji contends, however, that plaintiffs have the right to sell the property charged in fulfilment of their personal remedy under the first part of the decree. The lower Courts have denied this, following the cases of *Aubhoyessury Dabee* v. *Gouri Sunkur Panday* (1), *Matangini Dassee* v. *Ohooneymoney Dassee* (2) and *Hem Ban* v. *Bihari Gir* (3). As to this it is contended that these cases were decided under section 99 of the Transfer of Property Act but that Order XXXIV, rule 14, is more restrictive. It is true that while section 99 prevented the mortgagee selling the mortgaged property under a judgment unconnected with the mortgage-debt, Order

(1) 22 C. 859; 11 Ind. Dec. (N. S.) 568.
(2) 22 C. 903; 11 Ind. Dec. (N. S.) 598.
(3) 28 A. 58; A. W. N. (1905) 189; 2 A. L. J. 479.

XXXIV, rule 14, limits the restriction to a judgment for the mortgage debt. But the case is within this limited restriction. The decree creates the charge as well as the debt and the decree-holder may not, therefore, sell the property charged in satisfaction of the debt which is charged upon it. I do not think the fact that the decree was in a money suit and not on a mortgage makes any difference, for the original claim is now merged in the decree. Irrespective of section 99 of the Transfer of Property Act and Order XXXIV, rule 14 the sale of a bare equity of redemption under a judgment on the covenant was never allowed: *Khairajmal* v. *Daim* (4).

I should, therefore, confirm the decree of the lower Appellate Court and dismiss this appeal with costs.

In consequence of this difference of opinion the case was referred to Shah, J.

Mr. *Coyajee* (with him Mr. *S. R. Bakhle*), for the Appellant.

Mr. *Patwardhan* (with him Mr. *B. K. Mehendale*), for the Respondent.

JUDGMENT.

SHAH, J.—In consequence of the difference of opinion between the learned Judges who heard this appeal, the following question has been referred to me under section 98 of the Code of Civil Procedure:—

"What is the correct construction of the decree? Does it give the decree holder the right to bring the property charged to sale in execution proceedings?"

The decree in question was passed by consent on the Original Side of this Court in a suit in which the plaintiffs claimed to recover a certain sum of money from the defendant on an adjustment. The material terms of the decree are these:—

"This Court by and with such consent doth order that the defendant do pay to the plaintiffs the sum of Rs. 35,739-6-11 for debt and interest and the costs of this suit when taxed and noted in the margin hereof and further simple interest at the rate of 6 per cent. per annum upon the amount of the said judgment from the date hereof until payment, and this Court with the like consent doth declare that the plaintiffs have a first charge and a lien (on certain immoveable property described) to secure re-payment of the amount of this decree and interest thereon... Any of the parties hereto is at liberty to apply to this Court as there may be occasion."

The learned First Class Subordinate Judge of Poona, to whose Court the decree was transferred for execution, held that the property could not be sold in execution in the absence of a direction in the decree as to the enforcement of the charge. This view was contested in the appeal by the plaintiffs, and it is on this question that there has been a difference of opinion. On a consideration of the terms of the decree I am of opinion that the decree-holder has the right to bring the property charged to sale in execution proceedings.

The decree contains a distinct direction that the defendant should pay the sum to the plaintiffs. This gives the plaintiffs the right to attach and sell the property of the judgment debtor under the Code of Civil Procedure: and in the exercise of this right they can seek to realise the decretal amount or the balance thereof by the sale of the property in question. The declaration in the decree as to the charge on the property in favour of the decree-holders in order to secure re-payment of the amount of the decree has the effect of protecting them against any transfer of the property by the judgment-debtor, and not of reducing or modifying the right which the plaintiffs have got in virtue of the direction that the defendant should pay the amount. The fact that liberty is reserved to the parties to apply as occasion may arise does not, in my opinion, indicate any other meaning.

It is not uncommon in the Mufassil in this Presidency to insert such declarations as to charges, particularly in decrees awarding future maintenance to Hindu widows, and no instance has been cited at the Bar in which the person holding a decree for the payment of future maintenance has been forced to a separate suit in order to secure the sale of the property charged for the realisation of the decretal amount. I see no reason to think that in a decree passed on the Original Side of this Court the insertion of such a declaration would be intended or ought to have the effect of

(4) 32 C. 293; 9 C. W. N. 201 (P. C.); 2 A. L. J. 71; 7 Bom. L. R. 1; 1 C. L. J. 534; 8 Sar. P. C. J. 734; 32 I. A. 23.

forcing the plaintiffs to a separate suit or of curtailing their right to bring the property to sale in virtue of the direction to the defendant to pay the amount. It may be that in the present case, if necessary, under the clause reserving liberty to the parties to apply, an express provision directing the sale of the property charged may be added to the decree by an application to the Court which passed the decree. On a construction of the decree, however, I do not think that any such provision is necessary.

It is urged on behalf of the defendant that under rules 14 and 15 of Order XXXIV a separate suit for the sale of the property, as in the case of a mortgage, under section 67 of the Transfer of Property Act is necessary. Under rule 15 the provisions contained in Order XXXIV as to sale of mortgaged property would apply to property subject to a charge within the meaning of section 100 of the Transfer of Property Act, so far as may be. Treating the charge under the decree as equivalent to a mortgage for the purpose of this argument the question is, whether rule 14 would apply to the present case. The rule provides that "where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2." The words "where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage" mean that the decree should relate to the payment of money in satisfaction of a claim arising under the mortgage, *i. e.*, a mortgage independent of the decree. It can have no application where the charge or the mortgage is created by the decree and where the direction as to payment of money is in no sense in respect of a claim arising under the charge or the mortgage. In the present case there was no charge or mortgage prior to the decree, and the claim in the suit did not arise under any charge but was an ordinary money claim. The payment of money in respect of the claim is secured by creating a charge but the obligation to pay exists apart from the charge and is enforceable. Thus rule 14 does not apply; and no separate suit for the sale of the property is necessary as provided by that rule.

Mr. Patwardhan for the defendant has relied upon *Aubhoyessury Dabee* v. *Gouri Sunkur Panday* (1), *Hem Rau* v. *Behari Gir* (3) and *Gobinda Chundra Pal* v. *Kailash Chandra Pal* (5). I do not think, however, that these decisions can help him. The decision in *Aubhoyessury Dabee* v. *Gouri Sankur Panday* (1) is based upon the terms of section 99 of the Transfer of Property Act, which is now replaced by rule 14 of Order XXXIV. The terms of section 99 differ materially from those of rule 14. I am not now concerned with the question whether a separate suit would be necessary to bring the property charged to sale in the present case, if section 99 of the Transfer of Property Act were still in force: in that event the said decision would no doubt be an authority in favour of the defendant's contention. But it cannot be treated as an authority in support of the view that rule 14 is applicable to the present case. The second case is distinguishable on the double ground that there was a prior security in that case and that the decision turned upon the provisions of section 99. In the last case also there was a mortgage prior to the decree. It is significant that in that case the argument as to rule 14 is met by the fact that the decree-holder was a charge-holder at the date of the decree. In the present case the fact is otherwise.

I, therefore, agree with my brother Heaton in holding that the property charged can be sold in execution.

The result is that the order of the lower Court is set aside and the lower Court is directed to proceed with the Darkhast according to law. The defendant to pay the costs of this appeal, other costs to be costs in the Darkhast.

Order set aside.

(5) 41 Ind. Cas. 73; 45 C. 530.

GOLAM SATTAR *v.* PRODYAT KUMAR TAGORE.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 2720 AND 2721 OF 1916.

March 7, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Panton.

GOLAM SATTAR AND ANOTHER—DEFENDANTS Nos. 1 & 2—APPELLANTS

versus

Maharaja SIR PRODYAT KUMAR TAGORE BAHADUR—PLAINTIFF—RESPONDENT.

Putni Regulation (VIII of 1819), s. 14—"On any other ground," meaning of—Sale of putni *in proceeding taken against wrong person, validity of—Sale, whether can be set aside.*

Proceedings under the Putni Regulation taken for the realisation of arrears of *putni* rent are taken against the tenure and not against the persons, but the tenure cannot be sold by taking proceedings against wrong persons. [p. 934, col. 2.]

The sale of a *putni* by taking proceedings against wrong persons is not absolutely void. Such a sale, unless set aside by proper proceedings under the Regulation, confers good title upon the purchaser. [p. 934, col. 2.]

The words "on any other ground" in the second part of section 14 of the Putni Regulation are wide enough to cover the case of proceedings taken against wrong persons. [p. 935, col. 1.]

A *putni* sold under the Putni Regulation was purchased by *K. K.* did not take any steps whatever for registration of his name at the *zemindar's sherista* nor did he furnish security. The *zemindar* again sold the *putni* under the Regulation by taking proceedings against the old *putnidar*:

Held, that the title of the purchaser could not be attacked, unless a suit was brought under the provisions of section 14 of the Putni Regulation for setting aside the sale. [p. 935, col. 2.]

Appeal against the decision of the District Judge, Faridpur, dated the 11th May 1916, modifying that of the Subordinate Judge, Faridpur, dated the 30th June 1914.

Babu *Abinash Chandra Guha*, for the Appellants.

Babus *Haraprasad Chatterjee* and *Parmanand Lahiri*, for the Respondents.

JUDGMENT.—These appeals arise out of two suits for possession of the lands in dispute on establishment of the plaintiff's title thereto.

The plaintiff is the Zemindar of estates Nos. 3025 and 3153, within which the lands in dispute are situate. The plaintiff's father granted a Putni of estate No. 3025 which, in course of time, came into the hands of one Jogendra Kumar Chowdhury. In May 1899 the plaintiff's father caused the Putni to be sold for arrears of rent under Regulation VIII of 1819 and it was purchased by one Kashi Nath Guha. Kashi Nath did not get his name registered in the Zemindar's Sherishta and the Putni was again put up for sale on the 16th November 1899 under Regulation VIII of 1819, when it was purchased in *khas* by the plaintiff's father. The plaintiff's case is that his father obtained *khas* possession of the Putni after his purchase and was in possession of the lands in dispute until the year 1907, when a Settlement and Record of Rights were made in the District, and it was then that the defendants dispossessed the plaintiff from the land.

The Court of first instance dismissed the Suit No. 52 out of which Appeal No. 2720 arises, and partly decreed the Suit No. 48 which gave rise to Appeal No. 2721.

The plaintiff preferred appeals and it was found by the lower Appellate Court that the lands appertained to the plaintiff's estate and that the suits were not barred by limitation. The appeals were allowed and decrees were passed in favour of the plaintiff.

The defendants Nos. 1 and 2 have appealed to this Court.

The suits were instituted within 12 years of the purchase of the Putni at the sale under the Putni Regulation, but it is contended on behalf of the appellants that as the suits were based upon the allegation of possession and dispossession, the lower Appellate Court ought to have found whether the plaintiff was in possession of the land within 12 years of the suit and that there is no such finding.

But the learned District Judge says: "Plaintiff's case is that the lands in dispute appertain to the two estates referred to above and he was in possession of them. When, however, a Record of Rights was being prepared for this District under the orders of Government, under Chapter X of the Bengal Tenancy Act, defendants Nos. 1 and 2 as landlords, caused the other defendants to take illegal possession of these lands as their tenants. Thereupon plaintiff was dispossessed from these lands. He, therefore, claims *khas* possession of them."

Then, in dealing with the question of limitation, the learned Judge came to the conclusion that the defendants came into possession of the disputed lands from the time when the settlement operations commenced or were about to commence in

this District. This took place in the year 1907, which was within 12 years of the suit. The learned Judge, therefore, accepted the plaintiff's case that he was in possession after the purchase of the Putni and that the defendants dispossessed him within 12 years of the suit.

The next contention is that the plaintiff's father did not acquire any title to the Putni by his purchase at the sale under Regulation VIII of 1819. In November 1899 proceedings were taken against Jogendra, the former Putnidar, and not against Kashi Nath, the purchaser. The defendants themselves, it is found, have no title to the land but they have apparently set up the title of Kashi Nath who purchased the Putni at a sale held in May 1899. With regard to this purchase by Kashi Nath, the learned District Judge observes: "There is absolutely no evidence to show that Kashi Nath Guha ever cared to take delivery of the sale certificate prepared in his name from the Collector's office, or if he did so, he went to the Zemindar's office with it to have his name registered, as provided in section 15. The evidence does not in fact show who this Kashi Nath is, or whether he is living or dead. Apparently he found that the purchase made by him was no bargain; and so he did not go to the office of the plaintiff to have his name registered or to give the requisite security."

It is clear, therefore, that Kashi Nath did not take any steps whatever for registration of his name in the Zemindar's Sherista nor did he furnish security; and in fact ever since 1899 up to this date, he has not cared about the Putni.

It is contended, however, on behalf of the appellant that the remedy of the Zemindar was to take proceedings under section 7 of the Putni Regulation by appointing a *suzaval*, that the plaintiff's father did appoint a *suzawal* and that under the circumstances, proceedings under the Putni Regulation could not be taken against the former Putnidar.

It is contended on behalf of the respondent that unless the provisions of section 15 of the Putni Regulation were complied with and security furnished, the Zemindar was not bound to recognise the purchaser as a Putnidar even though he might have purchased at a sale under Regulation VIII of 1819. Reliance is placed upon a passage in the judgment of one of the learned Judges in the case of *Rainarain Mitra* v. *Ananta Lal Mondul* (1), where it was observed that "proceedings under the Putni Regulation taken for the realisation of arrears of Putni rent are not taken against *persons* at all but against the tenure."

No doubt, proceedings under Regulation VIII are taken against the Putni tenure; but we are not prepared to hold that the tenure can be sold by taking proceedings against wrong persons. It is unnecessary, however, to decide the question. Even if the sale held in 1899 could be set aside on the ground that the proceedings were taken against the former Putnidar and not against Kashinath, we think that it is not open to the defendant in the present case to contend that the plaintiff's father did not acquire title to the Putni by his purchase at the sale. As already stated, Kashi Nath himself never cared to take any steps to have the sale set aside within one year or at any time, and the sale became final. The sale took place in November 1899, and the plaintiff's father obtained possession of the Putni and was in possession until dispossessed in 1907. Kashinath himself, therefore, after the lapse of one year could not now get the sale set aside and we think that the defendants, therefore, cannot impeach the title of the plaintiff.

It is contended on behalf of the appellants that it was not necessary for Kashinath to have the sale set aside as proceedings were not taken against him.

Now, the second portion of the first clause of section 14 of the Regulation lays down that "it shall, however, be competent to any party desirous of contesting the right of the Zemindar to make a sale, whether on the ground of there having been no balance due or on any other ground, to sue the Zemindar for the reversal of the same, and upon establishing a sufficient plea to obtain a decree with full costs and damages. The purchaser shall be made a party in such suits, and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss at the charge of the Zemindar or person at whose suit the sale may have been made."

(1) 19 C. 703; 9 Ind. Dec. (N. S.) 911.

The words "on any other ground" in the second part of the section are wide enough to cover the case of proceedings taken against wrong persons.

In *Suresh Chandra Mukhopadhya* v. *Akkori Singh* (2) it appears that a Putni had been sold without notice of sale. This was in contravention of section 14 of Regulation VIII of 1819 and it was contended that the sale was void. The question was raised in a suit which was not brought for setting aside the sale of the entire Putni but which was brought by the Se putnidar of a portion of the lands (let out Putni) for possession of the Mouzahs forming his Se-putni. The plaintiffs, after the sale, had been dispossessed by the defendants who claimed under the purchase at the Putni sale. Sir Comer Petheram, C. J., held that the plaintiffs' only remedy was to bring a suit to set aside the sale of the Putni and observed: "That being the law, the question is whether when the Collector has gone through the form of selling a Putni, and has placed the purchaser in possession, the whole transaction is absolutely void if the Zemindar has not complied with one of the rules, or whether it is one which in that case can be reversed at the instance of any person injured in a suit brought by him against the Zemindar to which the persons interested are necessary parties, and in which complete justice can be done. In my opinion the transaction is voidable only, and, moreover, that it can only be avoided by a suit under the provisions of section 14. The second clause of that section provides that in the cases which that clause deals with, a suit to reverse the sale shall be the *only remedy* for the alleged defaulter, and this shows quite clearly to my mind that the Legislature could not have contemplated that a sale held by the Collector under the Regulation should under any circumstances be void; as, if that were so, a Putnidar, who was in default and whose Putni had been sold without a complete compliance with the rules, could maintain an action to recover possession of it, on the ground that the sale was no sale at all, and that his estate in the land was not affected by it; whereas the section says in so many words that in some cases of the kind, at all events, his only remedy shall be by suit for damages and to set aside the sale. I think that such a sale is good and effectual, unless and until it is reversed in a suit properly framed for the purpose, and that until that is done, the title of any person who claims under it is valid against all persons who claim under the alleged defaulter."

We agree with the observations made in that case, and hold that the defendants cannot attack the title of the plaintiff as Putnidar with respect to the small plots of lands which are in dispute in this case when no suit was brought under the provisions of section 14 of the Putni Regulation.

The result is that these appeals fail and are dismissed with costs.

Appeals dismissed.

(2) 20 C. 746; 10 Ind. Dec. (N. S.) 503.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2341 OF 1917.

May 27, 1919.

Present:—Sir Henry Rattigan, KT, Chief Justice, and Mr. Justice Dandas.

KHAIRA—INSOLVENT—APPELLANT

versus

SALEM RAJ AND OTHERS—RESPONDENTS.

Insolvency proceedings—Sale of insolvent's property—Order confirming sale—Appeal by insolvent—Auction-purchaser, whether necessary party.

The auction-purchasers are necessary parties to an appeal by an insolvent against an order confirming an auction-sale of his property. [p. 936, col. 1.]

Where, therefore, the auction-purchasers were not made parties to such an appeal and it was not until a year afterwards that an application was made to implead them:

Held, (1) that the appeal as against them was time-barred; [p. 936, col. 1.]

(2) that the auction-purchasers not having been made parties in time, the appeal failed as against the other respondents also [p. 936, col. 1.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Ferozepore, dated the 30th January 1917, confirming an auction-sale of a house belonging to the insolvent.

Mr. *B. D. Kureshi*, for the Appellant.

Lala *Fakir Chand*, for the Respondents.

SURENDRA NATH v. AMRITA LAL PAL.

JUDGMENT.—This is an appeal from the order of an Insolvency Court confirming an auction sale of a house belonging to the insolvent.

The appeal is by the insolvent on the ground that his house is not liable to attachment and sale.

But when filing the appeal his Counsel omitted to make the auction-purchasers parties to the appeal, although they were obviously necessary parties and it would be impossible to accept the appeal without calling upon them and hearing them.

It was not until considerably after a year that an application was made to add them as parties, and the appeal is obviously time-barred as against them.

In a similar case, *Mela Ram* v. *Narain Das* (1), the appeal was dismissed, and we see no reason to follow any other course in the present case.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 188 P. R. 1882.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 56 OF 1919 AND APPEAL FROM ORIGINAL DECREE No. 52 OF 1919.

April 23, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Walmsley.

SURENDRA NATH PRAMANIK —APPELLANT

versus

AMRITA LAL PAL CHAUDHURI AND OTHERS —RESPONDENTS.

Probate and Administration Act (V of 1881), ss. 50, 78—Probate—Probate Court, power of, to call for fresh security from executors - Revocation on failure to furnish fresh security—"Just cause," meaning of.

Under the provisions of section 78 of the Probate and Administration Act the Probate Court is bound to take a bond in the case of administrators, but has a discretion in the case of executors [p. 937, col. 1.]

A Probate Court is competent to require a new bond or additional security from the executors where the interest of the estate requires it, and especially where some new situation arises such as an unforeseen increase of assets or the unexpected breakdown of the original surety or sureties. If the order of the Court calling upon the executor to furnish fresh security is not complied with, the Probate may be revoked. [p. 938, cols. 1 & 2.]

Section 50 of the Probate and Administration Act is exhaustive and the explanation of the expression "just cause" is not merely illustrative. [p. 938, col. 1.]

The fourth clause of section 50 is not confined to cases where the circumstances which have made the grant useless and inoperative were in existence at the date of the grant though unknown to the Court and to the parties concerned. The phraseology of the clause is sufficiently general to make it applicable to cases where the circumstances contemplated have arisen since the date of the grant. [p. 938, col. 2.]

The real object which the Probate Court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto. [p. 939, col. 1.]

Appeals against the orders of the District Judge, Nadia, dated the 15th February and 3rd March 1919.

Babu *Samatul Chandra Dutt* (with him Babu *Manmatha Nath Pal*), for the Appellant.

Babu *Brojalal Chakravarti* (with him Babus *Hiralal Chakravarti*, *Mritunjay Chatterjee*, *Pankaj Kumar Ganguly* and *Pramatha Nath Banerji*), for the Respondents.

JUDGMENT.—These appeals are directed against two orders made in a Probate proceeding, one for fresh security to be furnished by the executors, another for cancellation of the Probate on the refusal of the executors to comply with the order for fresh security. The events which led up to these two orders may be briefly recited.

One Manohar Pal Chaudhuri made a testamentary disposition of his properties and died on the 9th September 1909. The executors named in the Will applied for Probate on the 5th December 1909 in the Court of the District Judge of Nadia. The Will was proved in due course, and on the 31st January 1910, the District Judge made the following order:

"Will proved; application for Probate granted; bond for Rs. 16,000 with two sureties to be filed on or before 2nd March 1910."

The petitioners for Probate applied for and obtained an extension of time, and the bond filed on the 8th March was accepted on the 4th April 1910. Probate was thereafter made ready and delivered to the executors on the 6th April 1910. The executors apparently took possession of the estate on the

authority conferred on them by the Probate. On the 15th February 1919 the beneficiaries presented an application to the District Judge, stating that one of the sureties to the bond had become insolvent, that the other had heavily mortgaged his properties, and that for the protection of the estate, which, it was asserted, was maladministered, it was essential that the executors should be called upon to give fresh sureties. The Court, after notice to all parties concerned, held an enquiry, and on the 15th February 1919 recorded that the security given by the executors was no longer sufficient, inasmuch as one of the sureties had become bankrupt and the other had heavily mortgaged his properties. The District Judge accordingly ordered the executors to furnish fresh security for Rs. 16,000 on or before 3rd March 1919. The executors applied to the Judge to review this order, but to no purpose. This was followed by an application for extension of time, which also was refused. On the 3rd March, the Court cancelled the grant and ordered the executors to return the Probate for cancellation without delay. We are invited in these appeals to consider the legality and propriety of the orders made on the 15th February and 3rd March 1919.

As regards the first of these orders, it is plain that the order was made with jurisdiction and was justified by the events which had happened. Section 78 of the Probate and Administration Act provides as follows: "Every person to whom any grant of Letters of Administration is committed, and, if the Judge so direct, any person to whom Probate is granted, shall give a bond to the Judge of the District Court, to enure for the benefit of the Judge for the time being, with one or more surety or sureties, engaging for the due collection, getting in and administering the estate of the deceased, which bond shall be in such form as the Judge from time to time by any general or special order directs." Under this provision, the Court is bound to take a bond in the case of administrators, but has a discretion in the case of executors. In the case before us, the Court, in the exercise of its discretion, took a bond with two sureties before the Probate was committed to the executors. This bond was taken with a view to secure the proper administration of the estate of the deceased. It is consequently essential, if the purpose of the bond is not to be defeated, that it should, unless the Court otherwise directs, remain operative and effective till the administration has terminated. Circumstances, however, have materially changed since the bond was given by the executors; the sureties have become worthless, and the Court is plainly competent to call for fresh security; indeed, it is incumbent upon the Court to take such a step for the protection of the estate. This view is supported by the decision in *Raj Narain Mookerjee* v. *Ful Kumari Debi* (1), where it was ruled that under the Probate and Administration Act a District Court, after once having taken a bond with sureties, has jurisdiction to take a second bond with fresh sureties if the necessity for such action should arise. Our attention has been drawn to the decisions in *Subroya Chetty* v. *Ragammall* (2), *Kandhia Lal* v. *Manki* (3) and *In re Arthur Gerald Norton Knight* (4), which, it is said, dissent from the view taken in *Raj Narain Mookerjee* v. *Ful Kumari Debi* (1). These cases, however, do not touch the point raised before us. They deal with the question of the power of the Probate Court to release a surety to an administration bond from future liability. Upon that subject, there has been some divergence of judicial opinion: *Stark, In the goods of* (5) *Kanai Lal Khan, In the goods of* (6). The question before us is whether, when by reason of change of circumstances, the bond has ceased to serve its purpose wholly or partially, the Court is competent to call for fresh security. The answer must, in our opinion, as well on authority as on principle, be in the affirmative. The bond is taken with a view to ensure the due administration of the estate. The administration is a continuous act, extending, it may be, over many years; it is obviously essential for the fulfilment of the purpose of the bond that it should, unless the Court takes other measures, such as substituted security, remain continuously valid and operative during the whole of this period. We must

(1) 29 C. 68; 6 C. W. N. 7.
(2) 28 M. 161; 14 M. L. J. 482.
(3) 1 Ind. Cas. 143; 31 A. 56; 6 A. L. J. 19; A. W. N. (1908) 288.
(4) 5 Ind. Cas. 311; 33 M. 373; 7 M. L. T. 160.
(5) (1866) L. P. 76; 35 L. J. P. 42; 13 L. T. 682; 14 W. R. 349.
(6) 24 Ind. Cas. 447; 18 C. W. N. 320.

hold that the Court is competent to require a new bond or additional security where the interest of the estate requires it, and specially where some new situation arises, such as an unforeseen increase of assets or the unexpected breakdown of one or both sureties. We have been pressed to take the contrary view on the authority of the decision in *Giribala Dassi* v. *Bijoy Krishna Haldar* (7), where it was ruled that the Probate Court is not competent to call upon an executor (to whom Probate has already been granted) to furnish security at any time after the grant of the Probate. This decision is clearly distinguishable, and we need not accordingly consider whether it is not based on an unduly narrow construction of section 78 of the Probate and Administration Act, and whether it is not capable of the more beneficial interpretation that though Probate has been initially granted without a bond, the Court may, in its direction, subsequently require a bond, provided change in the situation or circumstances of the executor or his conduct of the trust appear to render this a prudent measure. We hold accordingly that in this case the District Judge was competent to call for fresh security and that the order of the 15th February must be confirmed.

As regards the second order, it has been argued that the Court was not competent to revoke the Probate under section 50 of the Probate and Administration Act, even though the executors refused or failed to comply with the order of the Court for fresh security. It is further contended that section 50 of the Probate and Administration Act is exhaustive and that the explanation of the expression "just cause" is not merely illustrative: *Annoda Prosad Chatterjee* v. *Kalikrishna Chatterjee* (8), *Bal Gangadhar Tilak* v. *Sakwarbai* (9). This may be conceded; the question thus arises, whether the fourth clause of the explanation is applicable here. That clause authorises revocation on the ground that the grant has become useless and inoperative through circumstances. No inelastic rule can be formulated to test the applicability of this clause; the matter must be determined with regard to the events which have actually happened in each case. But we may state at once that we are not prepared to accept the view that the clause applies only to cases where the circumstances which have made the grant useless and inoperative were in existence at the date of the grant, though unknown to the Court and to the parties concerned. The phraseology of the clause is sufficiently general to make it applicable to cases where the circumstances contemplated have happened since the date of the grant. This is clear from illustration (*h*), which provides for the case where the person to whom Probate was or Letters of Administration were granted has subsequently become of unsound mind. This appears to have been overlooked in the cases of *Bal Gangadhar Tilak* v. *Sakwarbai* (9) and *Gour Chandra Das* v. *Sarat Sundari Dasya* (10). The view we take is in accord with the decisions, *Patterson, In the goods of* (11), where the administrator was convicted of a criminal offence and sentenced to a term of imprisonment, *Covell, In the goods of* (12), where the administrator disappeared, *Sowerby, In the goods of* (13), *Shaw, In the goods of* (14), *Phillips, In the goods of* (15) and *Newton, In the goods of* (16), where an administrator became a lunatic, *Jenkins, In the goods of* (17), *Edward Houre, In the matter of* (18), *Bradshaw, In the goods of* (19), *Loveday, In the goods of* (20), *Colclough, In the goods of* (21), *Thomas, In the goods of* (22), where the administrator either left the country or absconded or could not be traced or expressed a desire to withdraw. We must consequently take it as settled law that the circumstances which make the grant useless and inoperative and thus justify revocation may have come into existence after the original grant was made. We have next to determine, whether, in the present case, the grant has become useless and inoperative

(7) 31 C. 688; 8 C. W. N. 668.
(8) 24 C. 95; 12 Ind. Dec. (N. S.) 728.
(9) 26 B. 792; 4 Bom. L. R. 637.
(10) 15 Ind. Cas. 44; 40 C. 50; 16 C. W. N. 880.
(11) 2 C. W. N. cccix (209).
(12) (1890) 15 P. D. 8; 59 L. J. P. 7; 61 L. T. 620; 38 W. R. 79.
(13) (1892) 65 L. T. 764.
(14) (1905) P. D. 92; 74 L. J. P. 39; 92 L. T. 428.
(15) (1824) 2 Add. 335; 162 E. R. 316.
(16) (1843) 3 Curt. 428.
(17) (1819) 3 Phil. Ecc. 33; 161 E. R. 1249.
(18) (1833) 2 Sw. & Tr. 261; 5 L. T. (N. S.) 768.
(19) (1888) 13 P. D. 18; 57 L. J. P. 12; 58 L. T. 58; 36 W. R. 848; 52 J. P. 56.
(20) (1900) P. 154; 69 L. J. P. 48; 83 L. T. 692.
(21) (1902) 2 I. R. 499; 6 Ir. L. R. 828.
(22) (1912) P. 177; 107 L. T. 201; 81 L. J. P. 91.

through circumstances. It does seem at first sight difficult to apply the clause to a case where the administration bond has become valueless; but if we bear in mind the purpose of the grant we may, without undue strain on the language, bring the case within the clause. In this connection, the following observations of Sir Francis Jeune in *Loveday, In the goods of* (20) may be usefully borne in mind:

"The real object which the Court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto; and I can see no good reason why the Court should not take fresh action in regard to an estate where it is made clear that its previous grant has turned out abortive or inefficient. If the Court has, in certain circumstances, made a grant in the belief and hope that the person appointed will properly and fully administer the estate, and if it turns out that the person so appointed will not or cannot administer, I do not see why the Court should not revoke an inoperative grant and make a fresh grant." The real object which the Court must always keep in view is the due and proper administration of the estate and the protection of the interests of the parties beneficially entitled thereto. From this standpoint, the case may well be deemed to fall within the scope of the fourth clause of section 50.

The point of view just indicated shows that the order of the District Judge may be sustained on a somewhat different ground. The order for Probate is inseparable from the order for security; indeed, there was in this case only one entire indivisible order, and the grant was not committed to the executors till the security had actually been furnished. As has been explained above, unless the Court otherwise directs, the security must, for the protection of the estate, remain in force till the administration is completed. If the security vanishes, the condition subject to which the grant was made is no longer fulfilled, and in such circumstances the Court has inherent power to withdraw the order for grant so as to prevent an abuse of its process. If this view is not adopted, grave injustice may obviously result. Immediately after the grant has been made; the security may be destroyed, for instance, by earthquake or by the violent action of a river. The Court, as we have seen, is entitled, in such an event, to call upon the executor or administrator to furnish fresh or additional security and must be deemed to possess authority to enforce the order it makes. If the contrary view prevailed, the order of the Court might be defied with impunity and the conclusion would follow that the Court was helpless to prevent an injustice which might be committed by virtue of a grant made by itself. Consequently should section 50 be deemed inapplicable, the order for cancellation might well be regarded as consequential, made by the Court in the exercise of its inherent power to enforce obedience to its direction.

The result, therefore, is that the second order like the first must be confirmed. The appeals are dismissed with costs. We assess the hearing fee at one gold *mohur* in each appeal.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1342 OF 1918.

February 19, 1919.

Present:—Mr. Justice Bakewell and Mr. Justice Phillips.

R. V. SRINIVASA AYYANGAR—PLAINTIFF—APPELLANT

versus

KOTTAPPAKKI JOHNSA ROWTHER—DEFENDANT No. 12—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 119—Exchange—Covenant for return of property exchanged in event of obstruction—Suit based on covenant—Limitation Act (IX of 1908), Sch I, Arts. 113, 143—Vendee from party to exchange, position of.

Where parties to a deed of exchange covenant specifically that, in the event of obstruction to either party's enjoyment of the property exchanged, each should return to the other what is taken, the covenant is in the nature of a condition subsequent, and a suit based on the covenant is governed by Article 143 and not by Article 113 of Schedule I of the Limitation Act. [p. 940, col. 2.]

The defendant in such a suit cannot avail himself of the plea of a *bona fide* purchase from one of the parties to the exchange, as the transferee cannot get a larger estate than the transferor. [p. 940, col. 2; p. 941, col. 1.]

SRINIVASA AYYANGAR v. KOTTAPPAKKI JOHNSA-ROWTHER.

Second appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suit No. 137 of 1917, preferred against the decree of the Court of the District Munsif, Valangiman, in Original Suit No. 173 of 1916.

FACTS.—Plaintiff and another person executed a deed of exchange of their properties, whereby it was specifically provided that if either party was obstructed in the possession and enjoyment of what he took under the exchange each should return what was so taken to the other. Plaintiff (appellant) was obstructed in 1913. The respondent having purchased from the other party the land that he took in exchange, plaintiff sued for its possession on the covenant, more than three years after the obstruction, in 1916. The lower Appellate Court dismissed the suit as time-barred under Article 113 of the Limitation Act.

Mr. *C. S. Vencatachariar*, for the Appellant.—Article 143 of the Limitation Act applies to the case and not Article 113. The latter Article would apply only if there was a conveyance out and out from each to the other and there was a covenant to compensate. But here the enjoyment by each of the parties was subject to the condition of peaceful enjoyment by the other. The exchange is of conditional effect. So Article 143 applies. This Article is taken bodily from the English Real Property Limitation Act. See Goodeve's Law of Real Property, pages 189, 192.

Section 119 of the Transfer of Property Act implies a reservation similar to the present one and embodies the doctrine of English Law: *Balusu Veeraraghavalu* v. *Boppana Manikyam* (1). See also *Sadha* v. *Musammat Bhagwani* (2) *Bhojraj* v. *Gulshan Ali* (3) and *Bibi Sahodra* v. *Rai Jang Bahadur* (4).

Rajagopalan v. *Kasivasi Somasundara Thambiran* (5), *Srinivasa Raghava Dikshadar* v. *Rengosami Aiyangar* (6) and *Veera Pillai* v. *Poonambala Pillai* (7) are inapplicable to this case as they are all cases of covenants.

Mr. *K. Narasimha Iyengar*, for the Respondent.—I am no party to the exchange and I had no notice of the condition alleged.

Section 119 of the Transfer of Property Act does not apply, for here there is a contract to the contrary within the meaning of that section. See *Subramania Ayyar* v. *Saminatha Ayyar* (8), which is followed in S. A. 1663 of 1916. See also Gours' Commentaries on the Transfer of Property Act, section 1545.

Mr. *C. S. Vencatachariar*, in reply.—The mere fact of being a *bona fide* purchaser will not convey a larger right than the vendor has. The vendor's title was subject to a condition which cannot be done away with by a transfer.

JUDGMENT.—It is not disputed that, if the covenant or condition which gives plaintiff a cause of action were a covenant to be implied under section 119 of the Transfer of Property Act, the Article of limitation applicable would be 143. Even if the covenant in the present case amounts to a contract to the contrary within the meaning of section 119, as was held of a similar covenant in Second Appeal No. 663 of 1916, the period of limitation would appear to be the same, for the contract to the contrary in this case merely limits the option provided by section 119 and is in effect a specific contract of the same nature as one of the contracts implied in section 119. We do not think this question was considered in S. A. No. 1663 of 1916, to which one of us was a party, for it appears to have been assumed in that case that if there was a specific contract of any kind, Article 113 would apply. The covenant in this case is in the nature of a condition subsequent and the action is based on a breach of that condition and, therefore, Article 143 is applicable and the suit is within time.

The further contention for the respondent that he cannot be bound as he is a *bona fide* purchaser for value without notice can be met by the fact that the

(1) 35 Ind. Cas 92; 31 M. L. J. 380; 20 M. L. T. 329.
(2) 7 N. W. P. H. C. R. 53.
(3) 4 A. 493; A. W. N. (1882) 125; 2 Ind. Dec. (N. S.) 1127.
(4) 8 C. 224 at p. 228 (P. C.); 8 I. A. 210; 4 Sar. P. C. J. 294; 6 Ind. Jur. 108; 4 Ind. Dec. (N. S.) 143.
(5) 30 M. 316; 17 M. L. J. 149.
(6) 31 M. 452; 18 M. L. J. 477; 5 M. L. T. 211.
(7) 9 M. L. J. 137.
(8) 21 M. 69 7 M. L. J. 319; 7 Ind. Dec. (N. S.) 405.

transferee can obtain no larger estate than his transferor.

The second appeal is accordingly allowed with costs both here and in the lower Appellate Court and the District Munsif's decree restored.

M. C. P.

Appeal allowed.

CALCUTTA HIGH COURT.
ORIGINAL CIVIL SUIT No. 56 OF 1912.
June 20, 1918.
Present:—Justice Sir Asutosh Chaudhuri, KT.
Srimati LAKHIMONI DASSI
versus
DWIJENDRA NATH MUKHERJEE.

Rules and Orders of the Original Side of the Calcutta High Court, Ch. XXXVIII, r. 67, *application under—Limitation—Procedure—Discretion of Court—Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 84, 181.

An application under rule 67 of Chapter XXXVIII of the Rules and Orders of the Original Side of the Calcutta High Court is, as to limitation, not governed by Article 181 of Schedule I to the Limitation Act, but the period within which such application must be made is not unlimited. The granting of such an application is discretionary, and as the rule provides an alternative relief by suit which must be instituted within the time given by Article 84 of Schedule I to the Act in exercising the discretion when a question of lapse of time is raised, it must be considered whether the time allowed by that Article ought not to cover the application. [p. 942, cols. 1 & 2.]

As such an application can only be acceded to in a summary procedure where there is no contest or doubt that the parties applying are capable of giving a full discharge for the amount claimed, the applicants should be referred to a suit if there is any contest between the parties which involves an inquiry. [p. 942, col. 2.]

JUDGMENT.—This is an application under rule 67, Chapter XXXVIII of our Rules, by Messrs. G. C. Chunder and Co., a very well-known firm of Attorneys of this Court.

One Lattulal Mullick was a client of that firm which conducted a suit on his behalf, being Suit No. 56 of 1912. Lattulal died on the 9th February 1913. The bill of costs was taxed on the 4th September 1913. It was after that that Mr. B. K. Bose was taken in as a partner in that firm on 1st January 1914. Mr. G. C. Chunder, the senior member of that firm, died on 3rd July 1914, his son Babu Raj Chunder Chunder, who was also a partner, died on 5th July 1915, and Babu Lakhi Narain Khetri, another partner of the firm, died on 5th August 1917.

The summons for this application was taken out on 10th May 1918 for hearing on 15th May 1918. The present members of the firm are Mr. B. K. Bose and two others, who were not originally members of that firm. When the application came before me, the representatives of Lattulal appeared and contested the application on two grounds, *viz.*, that the application was barred under Article 181 of the present Limitation Act and that the present firm of G. C. Chunder and Co. was not entitled to make the application under rule 67. On the first day of the hearing time was taken by the applicants to meet the case of limitation, so far as I remember, on the ground that there had been an acknowledgment of the debt by the representatives. Further affidavits have now been put in by the applicant firm in which the case presented before me is that the representatives promised to pay and that it was in fact a novation. In support of the contention of the representatives of Lattulal, it was stated that Article 181 of the Limitation Act is now in a form which makes it very general and that it ought not to be restricted to applications under the Civil Procedure Code. As against this contention Mr. Justice Davar's ruling in *Wadia, Gandhy & Co.* v. *Purshotam Sivji* (1) was relied upon. The provisions of Article 181 were first introduced by the Limitation Act of 1877, Article 178, where the words were, "by the Code of Civil Procedure, section 230." The present Civil Procedure Code is an Act of 1908 and the Article now stands with the words "by section 48 of the Civil Procedure Code, 1908." There is practically no difference between the two Articles. It was held under the old

(1) 32 B. 1; 9 Bom. L. R. 508.

Article that the general words must be construed with some limitation, having regard to the words that follow, *viz.*, the words above quoted, and that the applications there dealt with were, therefore, applications *ejusdem generis*. A large number of decisions of this Court and of other Courts support this view, but the case of *Chand Monee Dasya* v. *Santo Monee Dasya* (2) indicates a somewhat different view. It deals with an application under section 173 of the Bengal Tenancy Act, but holds that Article 178 of the Limitation Act, 1877, is applicable. Article 166 of Act IX of 1871 (which was the previous Limitation Act) referred to the execution of orders of Revenue Courts. In the Act of 1877 there is no section corresponding to Article 166, yet it was held that section 178 was applicable in the case above referred to. With the exception of that case practically all the other cases take the same view, but I do not want to discuss the matter at any great length. The question before me is whether Article 181 applies to applications under our rule 67, Chapter XXXVIII. In the Bombay case *Wadia, Gandhy & Co.* v. *Purshotam Siiji* (1) it has been held that that Article does not cover applications of this kind. It follows an earlier Bombay case, *Abba Haji Ishmail* v. *Abba Thara* (3). The decision of Davar, J., is of 1907 and since we have taken our rule from the Bombay Rules, I think it is only right to follow the decisions governing this matter of the Bombay Court, especially, as the same view has been taken there for over 40 years. I, therefore, hold that Article 181 of the Limitation Act does not cover applications of this character, but it is a very different proposition whether unlimited time can be given to a party making an application under that section. If there is no special rule of limitation, discretion has to be exercised in granting applications of this character which are of a summary nature. The rule itself provides an alternative relief *viz.*, relief by suit, and such a suit can only be instituted within the time given in the Limitation Act, Article 84, and it, therefore, seems to me that in exercising discretion with regard to such applications where a question of lapse of time is raised, it must be considered whether the time allowed by Article 84 ought not to cover applications of this character.

The next point is as regards the position of the present firm of G. C. Chunder & Co. It seems to me that an application of this character for payment can only be acceded to in a summary procedure where there is no contest or doubt that the parties applying are capable of giving a full discharge for the amount claimed. Lakhi Narain Khetri is dead and has left executors who represent his estate. It is stated in the affidavits relied upon by the applicants that the representatives of Lakhi Narain are agreeable to join in giving a discharge to the representatives of Lattulal, but it is a matter which clearly involves an enquiry. An order made under this rule has the effect of a decree and if there is any contest between the parties which involves an enquiry, it ought hardly to be dealt with in a summary manner. In addition to that, the case now made is one of novation. In the case decided by Davar, J., relied upon by the applicants, I find the following passage:—

"The rule itself makes a distinct provision for referring the parties to a suit and this course the Judge in Chambers would, I apprehend, adopt if the client set up some special contract or arrangement with the solicitor which the solicitor denied or where, for instance, the client pleaded payment or satisfaction which was not admitted or where, generally speaking, the client disclosed a defence in showing cause which would necessitate the taking of oral evidence."

I do not think that I can go into the question of novation in a summary application of this character and, therefore, I refer the applicants to a suit and cannot accede to the present application. Having regard to the fact that there is a sum of money still due to that firm, I will make no order for costs against them.

Order accordingly.

(2) 24 C. 707; 1 C. W. N. 534; 12 Ind. Dec. (N. S. 1140.

(3) 1 B. 253; 1 Ind. Dec. (N. S.) 168.

VITHU *v.* LEVIDAS.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 157-B OF 1917.

August 3, 1918.

Present:—Mr. Mittra, A. J. C.

VITHU—PLAINTIFF—APPELLANT

versus

DEVIDAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1908), *Sch. I, Arts.* 44, 144—*Hindu Law—Guardianship—Step-mother, whether natural guardian—Sale by step-mother of minor step-son's property—Suit by minor to recover property—Limitation.*

A step-mother is not the natural guardian of her minor step-son under the Hindu Law. [p. 944, col. 2.]

An alienation of a minor step-son's property by a step-mother, therefore, stands on the same footing as an alienation by any *de facto* guardian. [p. 944, col. 2.]

Article 44 of Schedule I of the Limitation Act does not apply to an alienation by an unauthorised guardian and consequently to an alienation by a step-mother of property belonging to her minor step-son. [p. 944, col. 2.]

Thayammal v. *Kuppanna Koundan*, 26 Ind. Cas. 179; 38 M. 1125; 27 M. L. J. 285, followed.

A suit by a Hindu minor after attaining majority to recover possession of property sold by his step-mother during his minority is governed by Article 144 and not by Article 44 of Schedule I of the Limitation Act [p. 944, col. 2.]

Article 44 of Schedule I of the Limitation Act does not merely apply to sales but applies to all transfers of property. [p. 944, col. 2.]

Appeal against the decree of the District Judge, West Berar, in Civil Appeal No. 180 of 1916, dated the 21st February 1917, arising out of Suit No. 294 of 1913, dated the 20th September 1916, of the Court of the Munsif No. 2, Akola.

Dr. *H. S. Gour*, for the Appellant.

Mr. *M. V. Joshi*, for the Respondents.

JUDGMENT.—The plaintiff sues for possession of fields sold in 1907 during his minority by his step-mother *Musammat* Rukhma for Rs. 2,000. It has been found that there was no legal necessity for the sale except to the extent of Rs. 237-9-0. The lower Appellate Court has held that the suit was instituted more than three years after the plaintiff attained majority. The suit has been dismissed as barred by Article 44 of the Limitation Act. The view taken by the lower Appellate Court is that *Musammat* Rukhma was the *de facto* guardian and manager of the plaintiff's estate, though there were separated kinsmen in the male line. It has followed an unreported ruling of this Court in *Somwarpuri Guru Chandanpuri* v. *Gopalsingh* (1), in which my learned predecessor Sir Henry Stanyon dissented from *Husen* v. *Rajaram* (2). In the reported ruling the step-mother conveyed the property when the minor's mother was alive, but no such distinction was made in the judgment. It was laid down that "an alienation of the property of a minor by a person who is that minor's guardian *de facto* is not merely voidable but absolutely void, and the minor need not sue to have it set aside before he can obtain possession of the property." The decision was based upon the following *dictum* of their Lordships of the Privy Council in *Mata Din* v. *Ahmad Ali* (3):—

"It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a '*de facto*' guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."

The case before the Privy Council, as pointed out by Sir Henry Stanyon, A. J. C., was one governed by the Muhammadan Law of guardianship. Stanyon, A. J. C., also says "that, strictly speaking, there is no such thing as a *de jure* guardian under the Hindu Law. By custom the father and mother are recognised as guardians." The learned Judge then points out that an alienation by a *de facto* guardian, if for legal necessity or for the benefit of the minor, would be binding.

I admit there is considerable force in the argument set forth in the unreported ruling, but I find that the High Courts have even in cases of Hindu Law followed the *dictum* of Lord Robson in *Mata Din* v. *Ahmad Ali* (3). These cases appeared after the decision of *Somwarpuri Guru Chandanpuri* v. *Gopalsingh* (1).

The question which I have now to consider is the position of a step-mother in relation to her minor step son. According to Mayne, the father and next to

(1) 49 Ind. Cas. 246.
(2) 28 Ind. Cas. 813; 10 N. L. R. 133.
(3) 13 Ind. Cas. 976; 34 A. 213; 23 M. L. J. 6; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 43; 39 I. A. 49 (P. C.).

him the mother is the natural guardian of a Hindu minor: in default of parents his nearest male kin should be appointed. In *Thayammal* v. *Kuppanna Koundan* (4) Sadasiva Aiyar, J., says:—

"I hold that under Hindu Law, nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties. Recourse must be had to the Court (representing the rights of the King which are paramount to even the rights of the parents) where there is no natural guardian alive."

The case before him was, however, not that of a step-mother. In *Rambaee* v. *Umurchand Deochund* (5) a step-mother was held to be the natural guardian on the authority of the following verse from Manu:

"If among all the wives of the same husband, one bring forth a male child, Manu has declared them all, by means of that son, to be mothers of male issue."

This view, though in accordance with the opinion of the Shastri, is dissented from in *Maharanee Ram Bunsee Koonwaree* v. *Maharanee Soobh Koonwaree* (6), so far as regards the interpretation of the text of Manu, Loch and Macpherson, JJ., point out that the step-mother does not stand as a mother for all purposes. Although the argument that under no circumstances can she inherit from a step son is inapplicable to Bombay and Berar, the observation of the learned Judges that the text of Manu does not make the step-mother a mother so that she may inherit as mother is true also of Bombay and Berar. She inherits as wife and widow of the father from the step-son, that is, as a *gotraja sapinda*, and she comes in Bombay after the paternal grandmother (Mayne's Hindu Law, 8th Edition, paragraph 566).

Reliance is placed on behalf of the respondents on *Jago* v *Oodal* (7). That case is no authority for holding that the step-mother is a natural guardian. It merely lays down that an alienation by her may bind the step-son's estate, if it is justified by necessity, or is for his benefit.

In *Kristo Kissor Neoghy* v. *Kadermoye Dossee* (8), it was laid down that the claims of relatives to the guardianship of a minor stand upon a different footing from those of parents, and it is pointed out that all relatives mentioned in Macnaghten's Principles and Precedents of Hindu Law, Chapter VII, have not an absolute right to take upon themselves the guardianship of a minor without any permission or authority from the ruling power.

Upon a consideration of the authorities I have come to the conclusion that the step mother is not a natural guardian under the Hindu Law.

The alienation by a step mother, therefore, stands on the same footing as that of any other *de facto* guardian. She is an "unauthorized guardian", to quote the words of their Lordships of the Privy Council, and not a guardian within the meaning of Article 44, and to an alienation by such a guardian the Article does not apply: *Thayammal* v. *Kuppanna Koundan* (4). I may point out that Article 44 of the present Limitation Act applies not merely to sales but to all transfers of property, and the restricted construction placed on the meaning of the word "guardian" by the Madras High Court appears to me to be sound.

For the appellant the case of *Balappa Dundappa Todkal* v. *Chanbasappa Shivalingappa* (9) is relied upon. This case fully supports the appellant's contention but goes further than it is necessary for me to hold, for, according to the Bombay view, even an alienation by a mother would not be governed by Article 44 or Article 91 of the Limitation Act. The attention of the learned Judges was, however, not drawn to certain observations made by the Privy Council in the case of *Gnanasambanda Pandara Sanadhi* v. *Velu Pandaram* (10). At page 279 Sir Richard

(4) 26 Ind. Cas. 179; 38 M. 1125; 27 M. L. J. 285.
(5) 2 Borradaile's S. A. R. 163.
(6) 7 W. R. 321.
(7) 4 N. L. R. 20.
(8) 2 C. L. R. 583.
(9) 33 Ind. Cas. 444; 17 Bom. L. R. 1134.
(10) 23 M. 271; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29; 2 Bom. L. R. 597; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591 (P. C.).

Couch says in respect of an alienation made by the mother of a minor:—

"Chookalinga attained majority in 1880 and had by Article 44 of the Act three years for suing to set aside the sale by his guardian. He did not do so and by section 28 of the Limitation Act his right became extinguished."

Sham Chandra v. *Godadhar Mandal* (11) cited for the respondents was decided before the Privy Council case of *Mata Din* v. *Ahmad Ali* (3). The actual decision in the case, however, supports the view taken by me, though there are *dicta* in favour of the respondents.

As regards the application of Article 91 there has not been much argument before me. Ordinarily, it applies to an instrument executed by a party or his predecessor-in-interest. Hence it has been held by this Court in *Asaram* v. *Ratansingh* (12) that a minor member of a joint Hindu family is not bound to set aside a sale effected by the managing member, and Article 91 does not apply to a suit for recovery of possession of his share by the minor on attaining majority. Such a sale may, in certain cases, be binding on him just as a sale by a *de facto* guardian. But in neither case is the minor bound to sue to set aside such a sale.

There was no necessity for the sale. Out of the total consideration of Rs. 2,000 only Rs. 237-9-0 was found to have been required for necessary purposes. The suit is governed by Article 144 and is within time.

The decrees of the Courts below are set aside and in lieu thereof it is decreed that the defendants do put the plaintiff in possession of the property mentioned in the plaint upon the plaintiff paying Rs. 237-9-0 to the defendants. The plaintiff will get his costs in all the three Courts.

Decrees set aside.

(11) 9 Ind. Cas. 377; 13 C. L. J. 277.
(12) 32 Ind. Cas. 242; 12 N. L. R. 12.

CALCUTTA HIGH COURT.

CIVIL RULE No. 530 OF 1918.

January 28, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

GOBINDA KUMAR SUR—PETITIONER

versus

RAM CHANDRA BHATTACHARJEE AND OTHERS—OPPOSITE PARTY.

Negotiable instruments—Hundi *payable after one month, inadmissible in evidence—Suit for recovery of original consideration, maintainability of—Limitation, commencement of - Pleadings—Facts admitted whether need be proved.*

A suit based upon two *hundis* payable in 30 days from the date of execution was brought more than three years from the date of the *hundis* but within three years from the expiry of the month within which the *hundis* were payable. The *hundis* were not properly stamped and were, therefore, inadmissible in evidence:

Held, that, assuming the plaintiff could maintain the suit for the original consideration, the suit, not having been brought within three years from the date of payment of the original consideration, must be held to be barred by limitation. [p. 947, col. 1.]

The circumstances under which a creditor may sue on the original consideration when the bill or note given by the debtor to the creditor for the payment of the money at a future time becomes inadmissible in evidence considered. [p. 946, col. 2.]

A fact admitted in the pleadings need not be proved. [p. 947, col. 1.]

Rule against the decision of the Judge of the Court of Small Causes at Dacca, dated the 27th June 1918.

Babus *Gunada Charan Sen*, *Peary Mohan Chatterjee* and *Khitish Chandra Neogy*, for the Petitioner.

Babu *Rajendra Chandra Guha*, for the Opposite Party.

JUDGMENT.—The question raised in this case is whether the suit is barred by limitation.

The suit was based upon two *hundis* payable in 30 days from the date of execution, and was brought more than three years from the date of the *hundis* but within three years from the expiry of the one month within which the *hundis* were payable. The *hundis* were not properly stamped and were, therefore, inadmissible in evidence.

The Court below held that although the *hundis* were inadmissible in evidence, the plaintiff was entitled to sue on the original consideration and further that the plaintiff was entitled to prove by oral evidence the

conditions under which the money was repayable by the debtor.

As regards the first point, the Court below relied upon the case of *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (1).

The law to be applied in such cases is clearly laid down in the case of *Sheikh Akbar* v. *Sheikh Khan* (2), where Sir Richard Garth, C. J., said: "When a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. In such cases the bill or note is said to be taken by the creditor *on account of the debt*, and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration."

"But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when, in consideration of *A* depositing money with *B*, *B* contracts by a promissory note to repay it with interest at six months' date, here there is no cause of action for money lent, or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties, and if for want of a proper stamp, or some other reason the note is not admissible in evidence, the creditor must lose his money."

The principle laid down by Garth, C. J. has been followed in the case of *Ram Bahadur* v. *Dasuri Ram* (3).

The case of *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (1) relied upon by the Court below was considered by the Allahabad High Court in the case of *Parsotam Narain* v. *Taley Singh* (4), where Mr. Justice Aikman pointed out that the decision of Sir Richard Garth was misunderstood in the case of *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (1).

It is unnecessary, however, to discuss this question further; because, assuming that the plaintiff could maintain the suit for the original consideration, the suit, not having been brought within three years from the date of payment of the original consideration, must be held to have been barred by limitation.

The Court below has held that "the plaintiff is entitled to prove by oral evidence the conditions under which the money was lent to, and repayable by the debtor. I would, therefore, hold that the plaintiff's cause of action has arisen after 30 days from the dates, of the bills and that the suit having been brought within three years of such dates, the claim is not barred."

This question was also considered by Sir Richard Garth in *Sheikh Akbar* v. *Sheikh Khan* (2), cited above. The learned Chief Justice observed as follows:

"It is further contended on behalf of the plaintiff that, as by the promissory note the plaintiff gave the defendants two months' time to pay the Rs. 225, limitation ought not to run till the expiration of that time. But the obvious answer to this is, that the promissory note is not proved, and that it cannot be used for extending the time for payment of the Rs. 225 any more than for any other purpose."

A similar view was taken by Mr. Justice Mookerjee in the case of *Ram Bahadur* v. *Dasuri Ram* (3) cited above. There the question to be considered was whether the terms of the contract for payment of interest could be proved by oral evidence in a case where the contract upon which the suit was based was inadmissible in evidence. The learned Judge said: "The terms of the contract for payment of interest were reduced to writing. The written instrument was excluded from evidence by reason of the provisions of section 10B of the Court of Wards Act, 1879. It is clear, therefore, that under section 91 of the Indian Evidence Act, oral evidence was not admissible to prove the terms of the contract for the payment of interest. The learned Vakil for the respondent has ingeniously suggested that as the instrument itself must be held inadmissible, there is no

(1) 23 C. 851; 12 Ind. Dec. (N. S.) 565.
(2) 7 C. 256; 8 C. L. R. 528; 3 Ind. Dec. (N. S.) 713.
(3) 19 Ind. Cas. 840; 17 C. L. J. 399.
(4) 26 A. 178; A. W. N. (1903) 217.

proof that the terms of the contract for payment of interest were reduced to writing. This argument is obviously fallacious. The written instrument may be looked at for the purpose of showing that the terms of the contract for payment of interest had been reduced to writing within the meaning of section 91 of the Indian Evidence Act, or oral evidence may be given to show that the contract as a matter of fact was reduced to writing."

It is contended before us by the learned Pleader for the opposite party that under section 35 of the Stamp Act, a document which is inadmissible cannot be used for any purpose whatsoever and that in that view no evidence can be adduced to show that the terms of the contract were reduced to writing so as to attract the provisions of section 91 of the Evidence Act.

But, in the present case, it was unnecessary to adduce any evidence on the point; because the plaintiff himself in the plaint admitted that the terms of the contract, namely, that the defendant was to pay the money under the *hundi* within a month of the date of execution, had been reduced to writing; and a fact admitted in the pleadings need not be proved. It was, therefore, unnecessary to adduce any evidence to show that the terms of the contract had been reduced to writing.

It being admitted that the terms of the contract were reduced to writing and as no oral evidence was admissible to prove the said terms, the suit ought to have been brought within three years of the date of the transaction, if it could be maintained on the original consideration: and not having been so brought, the suit is barred by limitation.

The decision of the lower Court must, therefore, be set aside and the suit dismissed with costs.

We assess the hearing fee in this Court at one gold *mohur*.

The Rule is made absolute.

Rule made absolute:
Suit dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 416 OF 1915.

July 8, 1918.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Shah.

GULAB RAIJI—DEFENDANT—APPELLANT

versus

BAI TEJBAI—PLAINTIFF—RESPONDENT.

Bombay Bhagdari and Narvadari Act (*V of* 1862), *s.* 3—*Sale of different portions of recognised sub-division of* bhag *by different owners in favour of single vendee, validity of.*

The defendant purchased from the plaintiff certain *bhagdari* lands, and at the same time purchased certain other such lands from another person. The whole of the lands so purchased comprised a recognised sub-division of a *bhag*. The plaintiff brought a suit to recover the land she had sold, on the ground that the sale was illegal and void as being of an unrecognised sub-division of a *bhag*:

Held, that the effect of the two sales being to bring together various dismembered portions of a recognised sub-division of a *bhag* into the hands of one owner, the transactions did not violate the terms of section 3 of the Bhagdari Act and were not illegal or void. [p. 948, col. 1.]

Second appeal from the decision of the District Judge, Broach, in Appeal No. 58 of 1914, reversing the decree passed by the Additional Subordinate Judge at Broach, in Suit No. 203 of 1913.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *Dhirajlal K. Thakore* (whith him Mr. *Ratanlal Ranchhoddas*), for the Respondent.

JUDGMENT.

SCOTT, C. J.—The suit was filed by the plaintiff-respondent to recover possession of certain Bhagdari lands comprised in a sale made by her to the defendant on the 25th January 1910, on the ground that the sale being of an unrecognised portion of a *peta bhag* was illegal and void under the provisions of the Bhagdari Act. The sale by the plaintiff took place at the same time as the sale by a woman named Tejbai to the defendant of other portions of the *peta bhag* to which the plaintiff's sale related, and they have been held to be one alienation though evidenced by the two documents. They related, taken together, to the whole of Survey Nos. 34, 77, 113, 119 and a portion, namely, 2 acres and 20 *gunthas* of Survey No. 157, and the Survey Numbers enumerated comprised the whole of the *peta bhag* or recognised sub-division of a *bhag*. The remaining portion of Survey

KALI CHARAN *v.* KIRANBALA DEBI.

No. 157 was actually in possession of the defendant, the transferee under the two sale deeds. It has been held by the learned Judge of the lower Appellate Court that the possession of the defendant was as owner acquired by adverse possession of 2 acres and 2 *gunthas* comprising the balance of Survey No 157. The effect of the two sale-deeds, therefore, on the 25th January 1910 was, provided the sale-deeds were not invalid, to vest in the defendant the whole of the *peta bhag* or recognised sub-division. It is conceded that if by a more elaborate conveyancing procedure care had been taken to vest in a third party the interests of the plaintiff, the defendant and Tejbai by one document, and the third party had then re-transferred to the defendant, no objection could have been taken that the transactions violated the provisions of the Bhagdari Act. For section 5 of that Act provides that nothing in the Act contained shall be construed as prohibiting the alienation of any *bhag* or share, or recognised sub-division of any *bhag* or share, if such alienation be in other respects warranted by law, the object and intention of the Act being to prevent dismemberment of *bhags* or shares or recognised sub-divisions thereof in Bhagdari villages. It is obvious that the effect of the transactions has not been to effect dismemberment of *bhags* or shares. It has had the effect of bringing together the various severed portions of a recognised sub-division into the hands of one owner. The substance of the transaction is what must be looked at, and if the substance is regarded, it appears to me clear that there has been no alienation such as is prohibited by the terms of section 3 of the Act. I would, therefore, reverse the decree of the lower Appellate Court and dismiss the suit with costs throughout upon the plaintiff.

SHAH, J.—I am of the same opinion.

Decree reversed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 261 OF 1917.

March 18, 1919.

Present:—Justice Sir Asutosh Chaudhuri, KT., and Mr. Justice Newbould.

KALI CHARAN SINGHA AND OTHERS —PLAINTIFFS—APPELLANTS

versus

KIRANBALA DEBI AND OTHERS— DEFENDANTS—RESPONDENTS.

Partition, partial, whether permissible.

Ordinarily, there cannot be a partial partition, but the rule is elastic and has in several cases been departed from. If there is no inconvenience, there can be a partition of a joint dwelling house without partition of other joint properties. [p. 949, col. 1.]

A testator cannot legally restrain the partition of a *catcharibari* and thus create a perpetuity. [p. 949, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Murshidabad, dated the 25th June 1917.

Mr. *Gibbons* (Advocate-General), Dr. *Dwarka Nath Mitter*, Babus *Sarat Kumar Mitra*, *Pyari Mohan Chatterjee* and *Jyotish Chandra Hazra*, for the Appellants.

Babus *Mahendra Nath Ray*, *Upendra Narain Bagchi* and *Jyotindra Narain Bagchi*, for the Respondents.

JUDGMENT.

CHAUDHURI, J.—I think that the plaintiffs in this case can sue for partition of the dwelling house. No doubt ordinarily according to the cases of this Court there cannot be a partial partition, but the rule is elastic and has in several cases been departed from. It has not been shown that it is inconvenient to partition the dwelling house separately. On the other hand, it seems to be capable of being partitioned without affecting the other properties at all or the interests of the parties. The parties are making separate collections with regard to the Mehals to which they are entitled. There is a question with regard to this house about a right of residence in it claimed by defendant No. 2. Admittedly she has a right of residence in that property and what portion should be allotted to her has to be tried and determined in her presence, in consequence of which she has been made a party to this suit. She is not interested in any other property belonging to the co-sharers. Their shares

are admitted—namely, the plaintiff No. 1 is entitled to ⅓rd, plaintiffs Nos. 2 and 3 to 1/6th each and defendant No. 1 to ⅓rd. Defendant No. 2 is entitled to reside in the portion which was occupied by the testator's wife. Subject to such right the house should be partitioned between the parties. The plaintiffs are quite agreeable that in partitioning the property the portion which has been occupied by defendant No. 2 may be allotted to their share. There is no difficulty in doing that. It is a question of valuation more than anything else.

The plaintiffs do not seek to partition the Thakurbari and Natmandir. The only other question is as regards the Catcharibari. The respondents' learned Vakil does not even contend that the learned Judge was right in holding that it is incapable of partition. It is certainly capable of partition and, therefore, the Catcharibari shall be partitioned according to the shares declared. The testator could not legally restrain such partition and create a perpetuity in the manner he sought.

The appeal is decreed and partition will be effected in accordance with the directions given above.

The appellants are entitled to their costs in this Court and in the Court below. We assess the hearing fee in this Court at Rs. 300.

NEWBOULD, J.—I agree.

Appeal decreed.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 4 OF 1918.

June 23, 1919.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Adami.

MAHABIR SAHU AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM SARAN SAHU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Riparian owners, rights of—Right to use water of atural streamlet for irrigation, extent of.

The right of a riparian owner to use the water of a streamlet either for the purpose of irrigation or for the purpose of manufacture is an extraordinary use of the water and is subject to the condition that the use shall not interfere with the lawful use of the water by other proprietors. [p. 951, col. 2.]

Letters Patent Appeal from a decision of Justice Sir Ali Imam, in Second Civil Appeal No. 205 of 1917, dated the 18th January 1918, reported as 44 Ind. Cas. 19, affirming the decree of the Subordinate Judge, Ranchi, dated the 22nd November 1916.

Mr. *Reyasut Hasan*, for the Appellants.

Mr. *Siva Nandan Rai*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal from a decision of a single Judge of this Court affirming a decree of the Subordinate Judge of Ranchi. The questions in dispute relate to the right of the defendants to use the water of a small stream which passes alongside or through their lands and then flows on into the land of the plaintiffs. It appears that some 40 or 50 years ago the plaintiffs' ancestors erected a dam across the bed of this stream which has at no time of the year a very great flow of water, and it appears that during the dry weather it is either entirely dried up or there is only a very small trickle. The object of erecting this dam across the river was that the water might accumulate and so be diverted for purposes of irrigating the plaintiffs' land, of which they have about 100 *bighas* under rice cultivation. A few years before the institution of the present suit it appears that the defendants, whose land adjoins this stream a little higher up, had been erecting, or endeavouring to erect, dams across the stream for the purpose of diverting the water on to their own tenement in order to irrigate their own rice fields. The plaintiffs were aggrieved by this on the ground that it did not allow sufficient water to flow down into their part of the stream, with the consequence that during the year immediately before the prosecution of the suit their fields were not properly irrigated and their crops suffered. They, therefore, instituted the present suit against the defendants claiming a declaration that they had acquired a right, which they called a right of easement, to irrigate their lands in Mauza Nuru, which is the Mauza in which their lands are situate, by diverting the water of the stream by means of a Chohka and that the defendants have no right to interfere with or diminish the quantity of water flowing through the said

stream. They also claimed an injunction restraining the defendants from putting dams across the stream and from obstructing the flow of water through the stream into the plaintiffs' village. They further claimed an injunction restraining the defendants from diverting the flow of water into the fields of their Mauza. They asked that the defendants should be ordered to demolish the dams which they had erected and they further claimed damages.

The matter came before the Munsif, who granted a decree in favour of the plaintiffs but with considerable modifications. His decree declared that the plaintiffs have as much right to irrigate their lands as the defendants and that the defendants should not take or obstruct more than a twentieth part of the water of this rivulet for irrigating their lands at any time when these fields stand in need of irrigation. They were also restrained from taking any more than the said quantity of water. That, of course, was not the declaration or the injunction which the plaintiffs were asking for, and it did not satisfy them because their case was that, having acquired a right of using the water for purposes of irrigation by prescription over a period of more than 40 years, the defendants by using the water for the same purpose were interfering with the rights which they had acquired, and that, although the riparian owners would have the ordinary rights of user of the water for domestic purposes such as washing and drinking and watering their cattle, they had not extraordinary rights such as diverting the flow of water for the purposes of irrigation so as to interfere either with the ordinary rights of the lower riparian owners or with the rights which they had acquired by prescription. And, as there was only sufficient water in the stream at any time to satisfy the needs of the plaintiffs for the purposes of irrigation, the defendants could not, in any event, use the water to any extent whatever for irrigating their own lands without interfering with the rights of the plaintiffs.

The matter was, therefore, taken on appeal to the Subordinate Judge. The Subordinate Judge in a very careful judgment, in which he reviewed the authorities, seems to me to have come to a correct decision. He found as a fact that the plaintiffs have acquired a prescriptive right to the use of the water of this stream for purposes of irrigation. He finds as a fact that the defendants, although within the last few years they have endeavoured to divert the water for irrigating their own lands, have acquired no such prescriptive right to the use of the water for the purposes of irrigation. He also finds that the stream is a small one and very little water remains in it. The water is barely sufficient for the purpose of irrigating the plaintiffs' land. Therefore, any water taken from this stream by the defendants has the effect of diminishing the quantity of water required for irrigating the plaintiffs' land. These are the findings of fact which the Subordinate Judge has come to, and by these findings this Court is bound. Having arrived at these conclusions, the learned Subordinate Judge set aside the decree of the Munsif and in lieu thereof he granted the following declaration:—

"That the plaintiffs have acquired a right to irrigate their land of Mauza Nuru by diverting water from the streamlet which rises in Ulgara hills, passes through villages Choriya and Saradih and flows into village Nuru. It is further declared that defendants have no right to use the water of this streamlet for the purpose of irrigation; and further they have no right to place mud dams across this streamlet and thereby diminish the quantity of water which flowed down the stream to plaintiffs' village. The defendants are perpetually restrained from constructing dams across the streamlet and also from interfering with plaintiffs' right. The defendants are directed to remove the dams and ditch and channel existing in the bed of the stream within three months from the date hereof. In default the plaintiffs shall be entitled to have them demolished and filled up by Court in execution of decree. The plaintiffs shall also get Rs. 50 for damages in this case from the defendants", and then the Subordinate Judge awards the appellants before him costs.

From that decree an appeal was preferred to this Court which came before a single Judge who, after hearing the arguments of both parties, dismissed the appeal, coming to the conclusion that, on the facts found in this case, the decree of the learned

Subordinate Judge was right. I ought to say that in the appeal before the learned Judge of this Court the only part of the decree which the appellants complained about was that part which declared that the defendants had no right to use the water of the streamlet for the purposes of irrigation. They did not contend that they had any right to dam up the stream and so divert the water on to their own lands, but they did contend that they had a natural right to the use of this water to some extent at all events for the purpose of irrigating their lands, and they claimed that this part of the declaration should be set aside or modified. The learned Judge, however, came to a different conclusion and, taking the findings of the Subordinate Judge that the streamlet was so small and the supply of water so little that it was barely sufficient for the purpose of irrigating the plaintiffs' land, held that that part of the declaration which was complained of was in the circumstances perfectly right according to law. He said: "It is evident, therefore, that there is no such abundance of water coming through this streamlet as to irrigate the lands of the defendants without the lands of the plaintiffs suffering from want of water, and, as the right of the plaintiffs is established by prescription to the exclusive use of this water for the purpose of irrigating their 100 *bighas* of land, the ordinary incidents of riparian rights cannot be applied to their case."

From that decision the present appeal has been preferred to this Bench under clause 10 of the Letters Patent and the same arguments have been put before us as were apparently urged before the learned Judge. It has further been contended that, although the appellants had a grievance under the decree of the Subordinate Judge, they have got a still further grievance under the judgment of the learned Judge of this Court because of the words which I have just read from the concluding part of his judgment, where he speaks of the plaintiffs having acquired a prescriptive right to the exclusive use of the water for the purpose of irrigating their lands and the ordinary incidents of riparian rights not being applicable to the case. It has been contended before us that the right to irrigate is one of the ordinary rights of all the riparian owners and that the defendants in this case would be entitled to use the water for irrigation, at all events in a reasonable manner. It seems to me that the answer to this argument is that it is not accurate to describe the use of water for the purposes of irrigation as an ordinary right of a riparian owner. The difference between the ordinary uses of water running past a person's land and what may be called the extraordinary use of it has been laid down from time to time in judgments both in this country and in England, and the matter was very clearly dealt with by Lord Kingsdown in the case of *Miner* v. *Gilmour* (1), where that learned Judge in delivering the judgment of the Board said:—

"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in a case of deficiency upon proprietors lower down the stream.

"But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him.

"Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation.

"But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

The right of the riparian owner to use the water either for the purpose of irrigation or for the purpose of manufacture, which is here described by Lord Kingsdown as extraordinary user of the water, is subject, as pointed out, to the condition that the use in that manner shall not interfere with the lawful use of the water by the other proprietors, and it has, I think, been fairly clearly established at the

(1) (1859) 12 Moore P. C. 131 at p. 156; 3 L. T. 93; 7 W. R. 328; 124 R. R. 3; 14 E. R. 861.

present day that the condition under which the water may be used for this extraordinary purpose includes the restriction that the water which is taken and used must be restored substantially undiminished in volume and unchanged in character, so that the question which has to be considered in each of these cases where an extraordinary use is made of the water, as in the present case, for the purpose of irrigation is, whether the water used for this purpose does in fact substantially diminish the volume of water flowing in the stream so as to interfere with the rights of the lower riparian owners. It may be that in a large river a very considerable volume of water might be used and never returned again to the river by the riparian owner who is irrigating his lands by taking water from the river, and yet there would be no substantial diminution of the flow of water so as to interfere with the rights of the lower riparian owners. It may be again, in a case where there is a small stream, that the use of water for the purposes of irrigation by one riparian owner might or might not interfere with the rights of those lower down the stream. It would be a question of fact in each case. But in the present case we have got to recollect what the actual findings are, and we have got to recollect further that the plaintiffs—respondents in this case—have acquired in addition to the ordinary rights of using the water for domestic purposes a further right of using the water for purposes of irrigation. The finding is that the stream is a small one and that the water in it is barely sufficient for the purpose of irrigating the plaintiffs' land, and, therefore, any user by the defendants for the purpose of irrigation must necessarily diminish the volume of water so as to deprive the plaintiffs of their right of irrigation which they have undoubtedly acquired. Therefore, it seems to me that the plaintiffs have established their case and were entitled to the injunction claimed, but I wish to point out, in case of any misapprehension, that where the learned Judge in the judgment now under appeal use the words "that as the right of the plaintiffs is established by prescription to the exclusive use of this water for the purposes of irrigating their 100 *bighas* of land, the ordinary incidents of riparian rights cannot be applied to their case," I do not think he was meaning any more than this, that, in considering the interference with the rights of the plaintiffs, by the defendants using the water to irrigate their lands, one had to consider not only the ordinary incidents attaching to the rights of riparian owners but this further fact that the plaintiffs in this case had acquired an absolute right to dam up the river and irrigate their land and use the water for that purpose, and, in speaking of the exclusive use of this water, he does not mean that the plaintiffs were entitled to use this water and prevent the defendants from using it for any purpose whatsoever. The defendants can obviously use the water for all ordinary purposes, which have been described as domestic purposes such as washing, drinking, and water for cattle, but as the defendants have not acquired any prescriptive right to use the water for purposes of irrigation and as they have no right at all to use the water for the purposes of irrigation if thereby they interfere with the rights of the plaintiffs, I think that all the learned Judge meant by the expression "exclusive use of the water" was that the plaintiffs were the only persons as between them and the defendants who are entitled to use the water for the purposes of irrigation, and not that they alone had any right to use the water so as even to exclude the defendants from using it for ordinary domestic purposes. With these observations it seems to me that the decree appealed from in this case was right and that this appeal ought to be dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2192 OF 1917.

March 19, 1919.

Present:—Justice Sir Ernest Fletcher, KT., and Mr. Justice Cuming.

Srimati HEMAPROVA MOZUMDAR—DEFENDANT—APPELLANT

versus

DEBENDRA NATH BASU AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 108 (j)—Landlord and tenant—Lands granted for purpose of erecting houses—Transfer of osat raiyati *holding—Landlord, consent of, whether necessary—Custom—*Noakhali.

In Noakhali and its neighbourhood with regard to lands granted for the purpose of erecting houses on, there is a local usage or custom prohibiting the transfer of an *osat raiyati* holding without the consent of the landlord.

Appeal against the decree of the District Judge, Noakhali, dated the 31st August 1917, affirming that of the Munsif, 1st Court, Sudharam, dated the 31st of August 1916.

FACTS appear from the judgment.

Babu *Manmatha Nath Mookherjee*, for the Appellant.—This appeal is on behalf of the defendant, and it arises out of a suit for declaration of plaintiff's title to and recovery of possession of an *osat raiyati* holding. The suit has been decreed by both the Courts below though on different grounds.

My submission is that in the *kabuliyat* of Mr. Foranet there is no restriction as against transfer, and further it is stated therein that although the lease was granted for homestead purposes, the interest under the lease is made expressly heritable, and so the parties cannot travel beyond the express terms of the contract and set up a custom of non-transferability. It is not sufficient for the plaintiff to show that *osat raiyati* holdings are not transferable by custom in the locality; where by the express terms of a *kabuliyat* the tenancy is made heritable but there is nothing in the contract restricting the power of transferability, the tenancy should be taken as transferable and the parties cannot fall back upon local usage. Usage can be resorted to where there is no contract.

Babu *Dhirendra Lal Kastgir* (with him Babu *Tarakeswar Nath Mitter*), for the Respondents, not called upon.

JUDGMENT.

FLETCHER, J.—The only matter urged in this appeal is this:—The plaintiff brought the suit for *khas* possession of certain land—not within but on the borders of the Noakhali Municipality. What has been found is this: The property is what is locally known as *osat raiyati* interest. That *osat raiyati* interest was granted to a gentleman named Foranet—which seems to be a French extraction—for the purpose of erecting a house. It was granted to him and was made heritable. The document was registered. But the document is silent as to whether the persons acquiring the *osat raiyati* interest obtained or did not obtain the right of transfer and, therefore, apart from local usage, having regard to the fact that the contract said nothing about transfer, under section 108 (*j*) of the Transfer of Property Act, the lessee would have the right of transferring, either absolutely or by way of mortgage, the interest created by this instrument granting the *osat raiyati* interest. The learned Judge has found that in Noakhali and in the neighbourhood with regard to the lands granted for the purpose of erecting houses on, there is a local usage or custom prohibiting transfer by a person holding an *osat raiyati* interest without the consent of the landlords. Therefore, the interest is not capable of being transferred except by and subject to the consent of the landlord. That is the point that has been urged in this appeal and it is said that the custom cannot be supported. There is nothing unreasonable in that and if it is proved to be the local law and if it has been adopted by everybody and adhered to, that is no reason why it should not be given effect to. The learned Judge held that it clearly was the local law that these *osat raiyati* interests could not be transferred without the consent of the landlord. In that view of the case the present appeal fails and must be dismissed with costs.

CUMING, J.—I agree.

Appeal dismissed.

HANMANT APPARAO v. RAMABAI HANMANT.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 764 OF 1916.

January 30, 1919.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Hayward.

HANMANT APPARAO DESHPANDE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMABAI HANMANT MEGHASHYAM—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 49—Unregistered document affecting moveable and immoveable property—Admissibility in respect of moveable property.

The fact that a document relating to immoveable and moveable property is not registered, would not prevent the party entitled from suing on that document in respect of the moveable property. [p. 955, col. 1.]

Appeal from the decision of the District Judge, Bijapur, in Appeal No. 115 of 1914, confirming the decree passed by the Subordinate Judge, Bijapur, in Civil Suit No. 208 of 1913.

Mr. *K. H. Kelkar*, for the Appellants.

Mr. *Nilkanth Atmaram*, for the Respondent

JUDGMENT.—The question in this appeal is whether the appellants are entitled to a fourth share of a cash allowance belonging to the descendants of Atmaram, Malhar and Meghashyam, the sons of Tukopant. The three branches of Tukopant's family were entitled each to one-third share of the Vatan property, and the plaintiffs' ancestor sued in 1864 to recover his proportionate share of the Vatan. In the course of the suit an agreement, Exhibit 44, was passed by the defendant to the plaintiffs in which the plaintiffs' father's right to a third share in certain lands was recognised, and also his right to a quarter share in the cash allowance of Rs. 63.

The learned Judge holds that the share in the cash allowance was paid according to the agreement from 1865 to 1880, but it does not appear to have been paid after that date. The question of limitation did not arise in the lower Appellate Court, as that had been decided in favour of the plaintiffs by the trial Judge, who held that Article 131 of the Limitation Act applied and that time only ran from the date of demand and refusal in the case of a periodically recurring right such as a share in the cash allowance. The point of limitation was not pressed in the lower Appellate Court. The learned Judge, however, held that according to the Registration Act of 1864, which was in force when the agreement, Exhibit 44, was passed, the document could not be received in evidence as it related to immoveable property. He does not consider whether the provisions regarding the cash allowance were separable from the provisions regarding the immoveable property, and whether the cash allowance would fall within the term "immoveable property" in the Registration Act of 1864. But being of opinion that the document was compulsorily registrable, he held that it could not be used as evidence of the plaintiffs' claim, and accordingly dismissed the plaintiffs' suit.

The agreement has been set out by the learned Judge of the trial Court in his judgment. It provides that lands which are admittedly of the plaintiffs' father's share should be enjoyed by him, but with regard to the cash allowance one-fourth share being kept for remuneration for looking after Vatan business and for charity, according to custom, the plaintiffs' father should have one share with Ganesh, Meghashyam and Atmaram. The third clause provides that the one-third share in the one-third income of their branch of the Inam garden land should be given to the plaintiffs' father, and that the plaintiffs' father should receive his share of any miscellaneous income that might be received. The fifth clause is, "there is a debt of a Savkar on account of mortgage of the Vatan effected previously by the Gumasta. Out of it, some has been paid, and there is a balance that will have to be paid to the Savkar hereafter. You should pay that to me according to your third share." The learned Judge of the lower Appellate Court reads it as meaning that the plaintiffs' father is to be liable for payment of his share of the balance which will have to be paid in future. The correctness of that interpretation is borne out by the opinion of the High Court Translator to whom we have referred the document. There was, therefore, at the time of the agreement no claim by the maker, Ganesh, against the plaintiffs' father for any debt already matured which the plaintiffs' father was bound to pay by way of contribution. The plaintiffs' father's liability in that respect lay in the future. There is, therefore, no reason to hold that under the agreement the payment of his share of what might have to be paid

to the Savkar in the future would be a condition precedent to the receipt by him of his share of the cash allowance, and we have the opinion of the lower Appellate Court that in fact the share of the cash allowance was received from 1865 to 1880.

Then we have to consider whether the provision regarding cash allowance can fairly be separated from the provisions regarding the Vatan land, so that the document may be looked at for the purpose of this claim to the share in respect of the cash allowance. In that connection we must first consider whether a cash allowance should be treated as immoveable property within the meaning of the Registration Act of 1864. Now the allowance is an allowance by Government to a Deshpande family, presumably as remuneration for public services, and it appears to fall within the category, referred to by Sir Charles Sargent in *Desai Motilal Mangal* v. *Desai Parashotam Nandlal* (1), of remuneration for a public office not incapable of being held by a person who is not a Hindu, and that being so, according to the judgment of Sir Charles Sargent, based upon the authority of the Privy Council judgment in *Maharana Fattehsangji* v. *Desai Kallianraiji* (2), the rule of Hindu Law by which remuneration for hereditary offices was regarded as immoveable property would not apply. We have the authority of the Madras High Court in a case, which so far as we can ascertain has never been questioned, namely, *Thandavan* v. *Valliamma* (3), that the fact that a partition document relating to both immoveable and moveable property had not been registered did not prevent the party entitled from suing on that document in respect of the moveable property. For these reasons we are unable to agree with the judgment of the learned Judge that the plaintiffs' case must fail because Exhibit 44 has not been registered. The defendant cannot rely upon section 54 of the Contract Act, since there was no reciprocal promise which required to be performed before the plaintiffs' father could claim payment of the cash allowance, and she cannot rely upon the Limitation Act, because the point of demand and refusal has not been supported by any evidence in the trial Court, and has been abandoned in the lower Appellate Court. The appeal must, therefore, be allowed and the decree reversed. There will be a declaration that the plaintiffs are entitled to receive Rs. 15-12-0 a year as their one-fourth share of the cash allowance, and a decree for Rs. 47-4-0 as the allowance for three years before suit. There will be a decree for the plaintiffs for the costs of suit throughout.

Appeal allowed.

(1) 18 B. 92 at p. 95 9 Ind. Dec. (N. S.) 570.

(2) 1 I. A. 34 at p. 50; 13 B. L. R. 254 (P. C.); 21 W. R. 178; 10 B. H. C. R. 281; 3 Sar. P. C J. 306.

(3) 15 M. 336; 2 M. L. J. 130; 5 Ind. Dec. (N. S.) 86.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1861 OF 1917.

February 4, 1919.

Present:—Mr. Justice Teunon and Mr. Justice Walmsley.

ANANDA CHANDRA DAS—PLAINTIFF—APPELLANT

versus

KALI DAS BEPARI—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 20—Mistake of fact—Compromise entered into under mistake, whether can be set aside.

Plaintiff and defendant entered into a compromise in respect of a litigation which both of them believed to be pending, although, as a matter of fact, at that time the litigation had ended in a decision in favour of the plaintiff. Neither party took advantage of the other in respect of the transaction:

Held, that the case fell within the terms of section 20 of the Contract Act and that the plaintiff was entitled to a declaration that his rights under the decree were not affected by the compromise. [p. 956, cols. 1 & 2.]

Appeal against the decree of the District Judge, Noakhali, dated the 17th May 1917, reversing that of the Munsif, 2nd Court at Lakhipur, dated the 27th March 1916.

Babu *Jatindra Mohan Ghose*, for the Appellant.

Babu *Mukunda Behary Mullick*, for the Respondent.

JUDGMENT.

TEUNON, J.—This appeal arises out of a suit brought for the purpose of setting aside a *kabuliyat* executed by the plaintiff, who is the appellant before us, and a *patta* granted to him by the defendant-respondent. The defendant [is] an under-*raiyat* of what may

be described as the first decree, while the plaintiff is a sub-tenant under him, or a sole under-*raiyat* of the second degree. It appears that in the year 1911 they were engaged in litigation, in which the present defendant sought to eject the plaintiff from his holding. The present plaintiff's answer in that suit was that he had a permanent interest in his holding and could not be ejected. This litigation went through many Courts, its final stage being a Letters Patent Appeal preferred to this Court by the present plaintiff The litigation ended on the 31st March 1914, when this Court made a decree in favour of the present plaintiff declaring that his contention was well-founded and that his lease, as a matter of fact, conferred on him a permanent interest. This decision, as we have said, was arrived at on the 31st March 1914. On the 6th April following, while both parties were under the impression that the litigation in this Court was still pending and were both ignorant of the fact that the litigation had already terminated in a decision in favour of the present plaintiff, the parties, to put an end to the litigation which both parties believed to be still pending, entered into a compromise in pursuance of which the present plaintiff executed the *kabuliyat* now in question and accepted the *patta* now in question, by which in lieu of his previous lease he gave up a certain portion of the lands comprised in his holding and accepted a temporary lease to endure for a term of nine years.

The question in this appeal is, whether the compromise entered into in ignorance of the fact that the litigation had already terminated, and the documents executed in pursuance of that compromise, are still to be held to be operative. It is not suggested that either party took advantage of the other. The finding of fact is that both parties were in ignorance of the essential fact that the litigation which they sought to terminate had already ended in a decision in favour of the present plaintiff.

We are of opinion that this is a case which comes clearly within the terms of section 20 of the Contract Act, and in that view we are supported by the opinions expressed by the learned Judges who decided the case of *Bibee Solomon* v. *Abdool Azeez* (1).

(1) 6 C. 687; 8 C. L. R. 169; 3 Ind. Dec. (N. S.) 446.

In this view we think that the plaintiff-appellant is entitled to the declaration which he sought, namely that the *patta* and *kabuliyat* now in question are inoperative, and we accordingly decree this appeal.

Having regard to the plaintiff's allegation of coercion and undue influence, which have been found to be false, we make no order as to costs. The parties will bear their own costs throughout this litigation.

WALMSLEY, J.—I agree.

Appeal alloured.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2800 OF 1918.

June 4, 1919.

Present :—Mr. Justice Bevan-Petman.

KHANDU LAL—DEFENDANT—APPELLANT

versus

FAZAL—PLAINTIFF—RESPONDENT.

Mortgage—Lekha mukhi *mortgage, meaning of*—*Redemption, suit for*—*Limitation Act* (*IX of* 1908), *Sch. I, Art.* 148—*Starting point of limitation*—*Burden of proof*—*Civil Procedure Code* (*Act V of* 1908), *O. VII, r.* 6, *scope of.*

A *lekha mukhi* mortgage is a usufructuary mortgage by which the land is made over to the mortgagee who has to look to its produce for the payment of the mortgage-debt, the mortgagor undertaking no personal liability and the mortgagee not being entitled to sue for the debt. [p. 957, col. 2.]

The starting point for limitation in respect of a suit for redemption of a *lekha mukhi* mortgage is the same as in the case of ordinary usufructuary mortgages [p. 957, col. 2.]

A suit for redemption of such a mortgage is governed by Article 148 of Schedule I to the Limitation Act and, therefore, the period for limitation is 60 years from the date of the mortgage. [p 957, col. 2]

Order VII, rule 6, of the Civil Procedure Code applies to cases in which the suit as laid in the plaint is *prima facie* barred by limitation [p. 958, col. 1.]

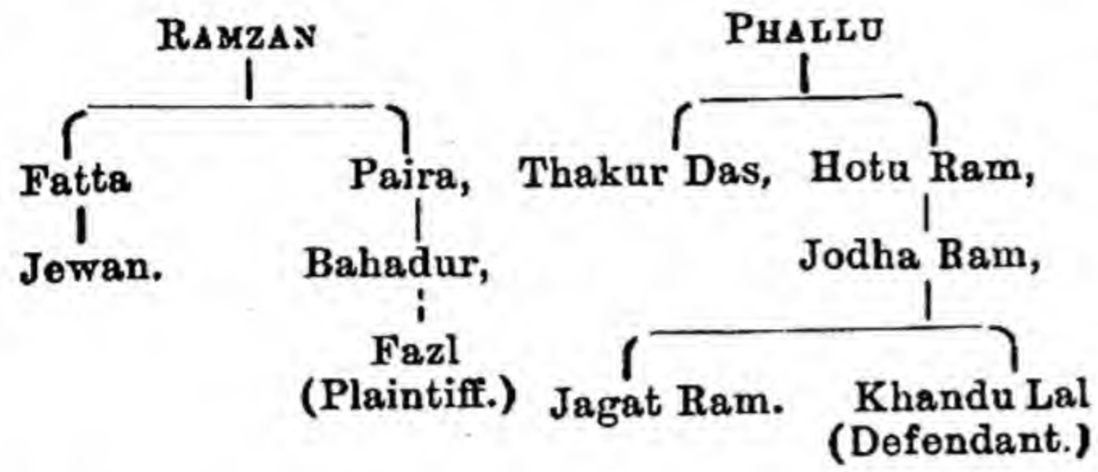
In a suit for redemption the burden of proving that the suit is within limitation lies on the plaintiff. [p. 959, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Multan, dated the 6th July 1918, reversing that of the Munsif, 2nd Class, Multan, dated the 14th February 1918 and remanding the case for retrial.

Lala *Moti Sagar*, R. S, for the Appellant.

Mr. *M. L. Puri*, for the Respondent,

JUDGMENT.—For a proper understanding of this case it is necessary to set out the two following pedigrees:—



In 1915 Fazal instituted a suit for the redemption of land on the allegation that Jewan had mortgaged it by a form of mortgage known as *lekha mukhi* in 1884, that he was Jewan's heir and that the mortgage-money had been fully realised by the mortgagee from the produce. He also claimed Rs. 100 on the allegation that produce to that value had been realised in excess and relied on the taking of produce periodically as saving limitation. The defendant pleaded *inter alia* that the suit was barred by limitation because the mortgage, which it was admitted was a *lekha mukhi* one, had been made in 1848. The first Court held that the suit was barred by limitation and that none of the grounds alleged from time to time during the course of the trial saved limitation. The lower Appellate Court held that the mortgage had been made more than sixty years before the date of suit but that the starting point of limitation in a *lekha mukhi* mortgage was not the same as in the case of an ordinary usufructuary mortgage and that in the case of the former the right of redemption cannot be said to accrue until the value of the produce of the land mortgaged amounts, after deducting legitimate expenditure, to the mortgage-debt and interest. It also held that limitation was saved by virtue of an acknowledgment in a Will.

For the appellant it is contended that the lower Appellate Court has misunderstood what a *lekha mukhi* mortgage is. This appears to be the case. The respondent supports the view taken by the Court by reference to Ghose's Law of Mortgage, Volume 1, 4th Edition, page 103, where reliance is placed on Tupper's Customary Law, Volume III, page 219. But this last authority has been misread. It refers to *Ranja* v. *Musammat Piaree* (1) and proceeds to give an extract from an Assessment Report of Mr. Steedman, in which reference is made to the owner's share of produce being handed over to the mortgagee, but that refers to the handing over by a tenant and not that possession is retained by the mortgagor. In *Gahi Mal* v. *Shera* (2) a *lekha mukhi* mortgage has been explained as being a usufructuary one by which the land is made over to the mortgagee, who has to look to its produce for the payment of the mortgage-debt, the mortgagor undertaking no personal liability and the mortgagee not being entitled to sue for the debt. The matter is also dealt with in Rattigan's Customary Law, 8th Edition, page 151. Counsel for the respondent supports the construction by the lower Appellate Court of a *lekha mukhi* mortgage and contends that the starting point for limitation in such a mortgage is the date when the debt is fully realized from the produce. But in that case, I think, the mortgage would have become automatically redeemed. There appears to be no reason to take a different starting point for limitation than in the case of ordinary usufructuary mortgages. No date was specified for redemption and consequently the mortgage became liable to be redeemed immediately after it was made. This principle of law is so well established that it cannot be contested. In the present case Article 148 of the Limitation Act would apply and, therefore, the period for limitation is 60 years from the date of the mortgage.

Further points contended on behalf of the appellant are that the alleged acknowledgment in the Will relied on by the lower Appellate Court as saving limitation is not an acknowledgment within the meaning of section 19 of the Limitation Act and that the plaintiff was not entitled to rely on the Will because he had not done so in the plaint, that in the plaint the plaintiff had relied only on the realization of produce.

(1) 99 P. R. 1869.
(2) 99 P. R. 1881.

KHANDU LAL v. FAZAL.

It is pointed out that even after the statement of defence the plaintiff had not relied on the Will in his replication and that the first time the Will was referred to was in the course of arguments after the case was closed, that then the first Court adjourned the case and sent for a record in which a copy of the Will was stated to be attached, and this copy not being to the plaintiff's satisfaction because it was obviously dead against him, another record of a case was sent for which also contained a copy and then an opportunity was given to the plaintiff to prove what the original Will was, in opposition to the copies on those records, by a witness shown to be wholly hostile to the defendant. In my opinion the action of the first Court was not proper. The plaintiff should not have been permitted except under exceptional circumstances, which are not shown to exist, to re open the case at the stage at which the case had reached, on a point which had never been pleaded and as to which there was no evidence on the record.

In support of his contention that the plaintiff, not having relied on the Will in the plaint, is barred from doing so, the appellant relies on Order VII, rule 6, of the Code of Civil Procedure and on *Gobinda Mal* v. *Santa* (3) and *Jogeshwar Roy* v. *Raj Narain Mitter* (4), but in my opinion the rule relied on relates to a case in which the suit as laid in the plaint is *prima facie* barred by limitation, and in the present case the suit for redemption was based on a mortgage alleged to be of 1884 and *prima facie* not time-barred. The fact that a ground for saving limitation was set out in the plaint is immaterial. The decisions relied on by the appellant do not help him and, on the contrary, the judgment in the Punjab case (3) appears to be against him.

Counsel for the respondent does not attempt to rely on the ground stated in the plaint for saving limitation, namely, the taking of produce, and has ultimately confined himself solely to the Will. But I am of opinion that the finding of the lower Appellate Court in respect of the Will cannot be upheld. It has ignored most important evidence, as the following facts will show. About the year 1826 Ramzan transferred half his land to Phalia in consideration of the latter paying the expenses of sinking a well. In 1848, the well having fallen in, the remaining half, then belonging to Fatta and Paira, the sons of Ramzan, was mortgaged to Thakur Das and Jodha Ram, descendants of Phallu, to raise money to sink a new well. The result was that the $\frac{1}{8}$th share of Fatta and $\frac{1}{8}$th share of Paira were mortgaged to Thakur Das and similar shares were mortgaged to Jodha Ram. In 1883 Jewan, the son of Fatta, redeemed his $\frac{1}{8}$th share mortgaged to Thakur Das and the mutation was effected in 1887. In 1891 the $\frac{1}{8}$th share of Paira mortgaged to Thakur Das and the other $\frac{1}{8}$th share of his mortgaged to Jodha Ram were sold to Jodha Ram. Thus by 1892 Jodha Ram had become owner of $\frac{1}{4}$th of the property by purchase and he had a $\frac{1}{4}$th share by inheritance from Phallu who had purchased half in 1826. Consequently, only $\frac{1}{8}$th belonging to Fatta remained to be redeemed and for this the present suit was instituted. The Will of Jodha Ram is of 1892 and he, therefore, rightly mentions two $\frac{1}{4}$th shares, one *milkiyat kadim* (inherited) and the other $\frac{1}{4}$th *bai garifta* (purchased). The lower Appellate Court has misread the words *do ruba*, meaning two quarters, as *do marabba*, which have quite another meaning. This misreading has, I think, completely misled the lower Appellate Court. It is not alleged, or suggested, that the words *do ruba* have been tampered with. The correctness of the copies in respect of the matter discussed is obvious from the facts set out above. The suggestion that the word in the original Will was *marhoona* is, I think, untenable. There was in 1892 no mortgage relating to $\frac{1}{4}$th of the property and the present claim, as explained, relates to $\frac{1}{8}$th. There are, no doubt, some alterations in the second copy but there is little doubt that if they are not genuine alterations made by the copyist, they are the result of attempts on the part of the plaintiff and not the defendant to raise doubts in his own interests. The theory of a forgery of the second copy must assume

(3) 26 Ind. Cas. 441; 83 P. R. 1914; 232 P. L. R. 1915.

(4) 31 C. 195; 8 C. W. N. 168.

that the clear copy filed in a Court earlier than the other was also a forgery, but it bears the Court's endorsement of 1912 and it is incredible that a similar one would not have been filed in the subsequent suit. The Court has failed to consider the words immediately below those alleged to be forged, which explain what each quarter refers to and again in the body of the Will words have been ignored which refer to a $\frac{1}{4}$th purchased and not mortgaged. The sale-deed of 1891 is on the record and was not referred to.

The lower Appellate Court at the end of its judgment holds "my conclusion as regards the evidence of the Will is that I am not satisfied that the copies produced by the defendant are accurate. I find that the defendant has not shown that the suit is barred by limitation," but it was the plaintiff who produced the copies and the Court is clearly wrong as to the burden of proof, which was on the plaintiff, who had to prove that his suit was within limitation, and this rightly appears to have been the opinion of the Court earlier in its judgment when it excused the placing of the burden of proof on the defendant by the first Court in view of the plaintiff having relied in his plaint on the revenue entries of 1884 but which entries both Courts held to be incorrect. For the above reasons I hold that the Will contains no acknowledgment whereby limitation is saved.

The plaintiff-respondent tried in this Court to go behind the finding of fact that the mortgage was made more than 60 years before suit and relied on a ruling of the Punjab Chief Court, *Juma* v. *Mubarak Khan* (5), for the proposition that, inasmuch as in the first Regular Settlement of 1859 the mortgage is mentioned whilst in the Summary Settlement of 1855 it is not referred to, a presumption must follow that the mortgage was made between those dates, unless there is conclusive evidence to the contrary, and the only evidence relied on in the present case is the History of Wells compiled in 1879, which, it is argued, is not conclusive, because it is not a statement of parties, may be based on hearsay, is not supported by any entries in revenue papers, was not a necessary document to be prepared and does not carry any presumption, and it is further contended that there is no evidence, because the entry only amounts to a statement that a mortgage existed in 1879. But these allegations are erroneous. The History of Well is maintained under rules framed under powers conferred by the Land Revenue Act, the entry purports to be a statement of Fatta and Paira themselves and shows that the mortgage was made to meet the cost of the construction of the new well which was sunk in 1848 and, finally, the entry in the Regular Settlement of 1859 also shows that the mortgage was for the purpose of constructing the well. Anything more conclusive it would be difficult to find. I hold that no second appeal lies from the finding that the mortgage was made more than 60 years before suit and that in any case it is amply so proved.

For the above reasons I hold that the suit is time-barred. I accept the appeal, set aside the decree of the lower Appellate Court and restore that of the first Court with costs in favour of the appellant throughout.

Appeal accepted.

(5) 15 Ind. Cas. 62; 97 P. R. 1912; 133 P. L. R. 1912; 106 P. W. R. 1912.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1045 OF 1916.

January 30, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

SAGORE MANDAL—JUDGMENT-DEBTOR—APPELLANT

versus

MOFIJUDDIN SARDAR—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 144—Restitution—Auction-sale—Decree-holder purchaser—Decree set aside—Judgment-debtor, whether entitled to restitution.

Where a decree-holder himself purchases land in execution of his decree, he must lose the benefit of the purchase on the reversal of the decree under which the sale took place. An assignee from such a decree-holder or a person with whom the land is settled by such decree-holder purchaser is in no better position. [p. 960, cols. 1 & 2.]

SAGORE MANDAL v. MOFIJUDDIN SARDAR.

A landlord in execution of a rent-decree purchased the demised land and settled it with a third person, on the rent-decree being reversed the tenant judgment-debtor claimed restitution under section 144, Civil Procedure Code, without, however, making the person with whom the land had been settled by the landlord decree-holder a party to the proceeding:

Held, that the tenant judgment-debtor was entitled to restitution and to mesne profits for the period during which he had been kept out of possession, although the person with whom the land was settled by the landlord decree-holder had not been made a party, as no objection on the ground of non-joinder was taken at the proper time in the Court of first instance. [p. 960, col. 2.]

Appeal against the decree of the Subordinate Judge, Khulna, dated the 18th December 1915, affirming that of the Officiating Munsif, 2nd Court, Bagerhat, dated the 30th March 1914.

Babu *Jatindra Nath Sen*, for the Appellant.

Moulvi *A. K. Fazlul Huq*, for the Respondent.

JUDGMENT.—This appeal arises out of an application under section 144, Civil Procedure Code. The respondent before us as plaintiff claimed rent against the appellant at the rate of Rs. 125-4-0 a year. The appellant, who was the defendant in the rent suit, pleaded that the rent was Rs. 73-12-0 a year. The decree was passed according to the rate admitted by the defendant. On appeal the suit was decreed at the rate of Rs. 125-4-0 a year. The defendant preferred a second appeal to this Court. This Court set aside the decree of the Court below and remanded the appeal for a fresh hearing. On rehearing the rent suit was decreed at the rate of Rs. 73-12-0 a year. Before this final decree was passed and after the Court below made a decree in the rent suit at the rate of Rs. 125-4-0, the respondent (the decree-holder) executed his decree, put up the holding in arrears to sale and himself purchased the same. The present application is for restitution of the property on the ground that the decree under which the sale took place has been finally set aside.

The purchaser at the sale being the decree-holder himself, he must lose the benefit of the purchase on the reversal of the decree under which the sale took place [see the cases of *Zain-ul-Abdin* v. *Asghar Ali Khan* (1) and *Chandan Singh* v. *Ramdeni Singh* (2)]. The latter case is cited by the lower Appellate Court in its judgment and the learned Subordinate Judge says as follows: "I would have set side the sale and allowed the appellant possession following the aforesaid ruling, if the holding had not been in the meantime settled with a third party who is not a party on the record." But the person deriving title from the purchaser at a sale stands in no better position than the person from whom he derives his title. In the case of *Satis Chandra Ghose* v. *Rameswari Dasi* (3) it was observed that the Court as a matter of policy has a tender regard for honest purchasers at sales held in execution of its decrees though the decrees may be subsequently set aside, where those purchasers were not parties to the suit and the decree had not been passed without jurisdiction. But the same measure of protection is not extended to purchasers who are themselves the decree-holders; nor can purchasers from such decree-holders claim that the Court owes them any duty or to be within the policy which prompts the extension of protection to strangers, since they have bought from one whose title is liable to be defeated; and the decision of the Judicial Committee in the case of *Zain-ul-Abdin* v. *Asghar Ali Khan* (1) was relied upon. The case of *Satis Chandra Ghose* v. *Rameswari Dasi* (3) was followed in the case of *Abdul Rahaman* v. *Sarafat Ali* (4) and it was held that the assignee from the decree-holder, who has purchased property in execution of his own decree, is in no better position than his assignor. In the present case it is said that the property has been settled with a tenant. Such settlement cannot stand on a higher footing than the assignment of the property itself, as held in the case cited above.

It is contended, however, that the tenant is not a party to the suit and, therefore, no order should be made for restitution. But no objection on this ground was taken in the petition of objection filed by the respondent in the Court of first instance.

(1) 15 I. A. 12; 10 A. 166; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112 (P. C.).

(2) 31 C. 499.

(3) 31 Ind. Cas. 834; 22 C. L. J. 409; 20 C. W. N. 665.

(4) 31 Ind. Cas. 893; 20 C. W. N. 637; 22 C. L. J 412.

Order I, rule 13, lays down that all objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived. In these circumstances, we think that the objection must be taken to be waived by the respondent.

The appellant is, therefore, entitled to restitution of the property. He is also entitled to claim mesne profits for the period he was out of possession as against the respondent. The orders of the Court below are set aside and the appellant will get possession of the land described in the schedule annexed to the petition restored to him as against the decree holder respondent and will also be entitled to mesne profits as against the said respondent, the amount whereof will be ascertained by the Court of first instance; and for that purpose the case will be remanded to that Court. We make no order as to costs in any Court.

Appeal allowed.

PATNA HIGH COURT.

LETTERS PATENT APPEALS NOS. 30 TO 45 OF 1918.

June 20, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Adami.

MR. E. MILNE—PLAINTIFF—APPELLANT

versus

JAGMOHAN GARERI AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Small Causes Courts Act (IX of 1887), Sch. II, Art. 8—Murtafa, *suit for recovery of, whether cognizable by Small Cause Court—Jurisdiction.*

A suit to recover *murtafa* (a tax or rent leviable in the nature of house-rent) for the occupation of houses is cognizable by a Small Cause Court. [p. 962, col. 2.]

Appeals from a decision of Mr. Justice Roe.

Mr. *Sushil Madhab Mallik*, for the Appellant.

Mr. *A. K. Roy*, for the Respondents.

JUDGMENT.

MILLER, C. J.—In this case the plaintiff brought a suit before the Munsif at Arrah claiming from a large number of defendants various sums for what is described as *murtafa* or house and shop-rent according to the plaint. When the case came before the learned Munsif, the defendants amongst other defences contended that the ordinary Courts had no jurisdiction to try the case because the claim was for a sum under Rs. 500 and, therefore, the case was properly triable by a Small Cause Court. The question then arose whether within the meaning of Schedule II, Article 8, of the Small Causes Courts Act what was really claimed in this suit was house-rent or not, because although the Small Cause Court would have jurisdiction to try cases up to the amount claimed here, still if it was a suit for recovery of rent other than house rent, then the jurisdiction of the Small Cause Court was ousted and the case was properly brought before the Munsif. The Munsif came to the conclusion that he had no jurisdiction to try the case because according to such evidence as was before him, it seemed to him clear that the claim was in fact one for house-rent. His reasons for arriving at that conclusion were that the claim was so described in the plaint and, secondly, that the plaintiff's own Patwari in giving evidence said that the rent was realised on the houses of the tenants and that this applied whether the tenants actually built their own houses or whether they did not. The Munsif, having come to the conclusion that he had no jurisdiction to try the suits, instead of returning the plaints to the plaintiff, went on, in the event of his finding on this question being disagreed with by a higher Court, to determine the case on the merits, and eventually on the merits he dismissed the suit against all the defendants.

The matter then went on appeal to the Subordinate Judge and he dealt with this question of jurisdiction in a very summary manner. All he said about it was this: "It is clear that *murtafa* rent is rent for homestead lands which defendants occupy in plaintiff's Zamindari. Such suits are not cognizable by Small Cause Courts, unless there is an officer specially empowered to try suits for homestead rents under Small Cause Court procedure, *vide* Article 8, Schedule VI, of the Small Causes

Courts Act. Under the circumstances I hold that the lower Court had jurisdiction to try these suits." That was all he said about it. Then he deals with the case on the merits and he allows the claim against a number of the defendants, either on the ground that they had not appeared and the plaintiff had made out a *prima facie* case or on the ground that the survey *khatian* showed that the plaintiff was entitled to recover this rent, whatever the nature of it might be. In other cases where the survey Khatians were not in favour of the plaintiff, he dismissed his claim against some of the defendants.

The plaintiff appealed to this Court and when the matter came before the learned Judge, he came to the conclusion that on the first point raised by the defendants, *viz.*, that of jurisdiction, the Munsif was right and that, therefore, neither the Munsif nor the Subordinate Judge had any jurisdiction to try the case. His reasons for arriving at that conclusion were that looking at the plaint and looking at the evidence in the case, because that is all there was to go on, it was quite clear either that what was claimed was in fact house-rent or else some sort of tax leviable by the landlord on the tenants, which was neither house nor land tax but a sort of poll tax or something of that sort which he either lawfully or unlawfully demanded from them. But in the event of an appeal and his decision being overruled on that point, the learned Judge considered the merits and he came to the conclusion on the merits that the plaintiff ought not to succeed.

It seems to me that the learned Judge of this Court was quite right in holding as he did that the Munsif's Court had no jurisdiction to try the case. The claim is framed as one for house-rent, and the evidence in the case seems to show that this is a tax or rent leviable in the nature of house-rent and that it is imposed upon the tenants in respect to the houses which they actually occupy. They are small houses or shops occupying a small plot of land and the tenants no doubt from time to time change and new tenants come in. What exactly were the terms of the agreement between any of the individual tenants in his case and the landlord we have no evidence to show, but the only evidence there is before the Court seems to me clearly to indicate that the tax or rent demanded is either a house rent or, as the learned Judge described it, a tax. In either case the proper Court in which to institute this suit was the Small Cause Court. Therefore, we think that this appeal must be dismissed. It is unfortunate that this case should have gone through no less than three Courts before coming here, and it is unfortunate also for the defendants that they have succeeded in all three Courts on the merits but they themselves raised this question and even if they did not, it seems to me that it would have been impossible if the question were raised, to decide otherwise than that the Court had no jurisdiction. Therefore, the appeal will be dismissed with costs here and in all the Courts below. This judgment will govern Letters Patent Appeals Nos. 30 to 45 which, although they are separate suits, have all been tried together and are before us now together and have been the subject of the present judgment. The hearing fee in respect of the whole 16 cases is assessed at double the ordinary amount. The cross-objection is dismissed

ADAMI, J.—I agree.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 82 OF 1918.

March 20, 1919.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Walmsley.

BIPIN CHANDRA BARUA—OPPOSITE PARTY—APPELLANT

versus

JAGAT CHANDRA NATH—PETITIONER—RESPONDENT.

Landlord and tenant—Occupancy holding, whether can be sold in execution of money-decree—Landlord, consent of, effect of.

An occupancy holding, or any part of it cannot be sold in execution of a decree for money obtained against the *raiyat* when the *raiyat* objects, even if the landlords consent to the sale. [p. 963, col. 2.]

Narayani v. *Nabin Chandra Chowdhari*, 36 Ind. Cas. 803; 21 C. W. N. 400; 25 C. L. J. 351; 44 C. 720 and *MacPherson* v. *Debi Bhushan Lal*, 42 Ind. Cas. 36; 2 P. L. J. 530, followed.

SRINIVASA RAGHAVA IYENGAR v. RENGANATHA IYENGAR.

Appeal against the order of the District Judge, Chittagong, dated the 28th June 1917, reversing that of the 3rd Court, Patiya, dated the 19th February 1917.

FACTS appear from the judgment.

Babu *Chandra Sekhar Sen*, for the Appellant, submitted that the view of law taken by the Courts below, that even though the landlord gave his consent the holding could not be transferred if the tenant objected to the sale, was not correct. The rulings relied upon by the lower Courts, *viz.*, *Badarennessa Chowdhurani* v. *Alam Gazi* (1) and *Narayani* v. *Nabin Chandra Chowdhari* (2), were not correctly decided. The Full Bench in *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (3) did not take the view taken in *Badarennessa Chowdhurani* v. *Alam Gazi* (1) and *Narayani* v. *Nabin Chandra Chowdhari* (2). The consent of the landlord was sufficient to validate the sale. The question then was this—Did the learned Judges who decided the cases in *Badarennessa Chowdhurani* v. *Alam Gazi* (1) and *Narayani* v. *Nabin Chandra Chowdhari* (2) come to a correct conclusion? If not, those cases should not be relied upon.

Babu *Khitish Chandra Sen* (with him Babu *Dhirendra Nath Ganguly*), for the Respondent, submitted that since the Full Bench case in *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (3) the Courts had uniformly held that a non-transferable occupancy holding could not be sold if the tenant objected to the sale: *Badarennessa Chowdhurani* v. *Alam Gazi* (1), *Narayani* v. *Nabin Chandra Chowdhari* (2), *MacPherson* v. *Debi Bhushan Lal* (4) and *Ram Sundar Karmokar* v. *Lochan* (5).

Babu *Chandra Sekhar Sen* briefly replied.

JUDGMENT.—This is an appeal by the decree-holder arising out of execution proceedings. The question is whether the holding, which is found to be a non-transferable one, was saleable in execution of a money-decree where the landlord had given his consent to the sale but the tenant had objected. The point is covered by the decision of this Court in *Narayani* v. *Nabin Chandra Chowdhari* (2), where it was distinctly laid down that an occupancy holding or any part of it could not be sold in execution of a decree for money obtained against the *raiyat* when the *raiyat* objected even if the landlords gave their consent to the sale. Their Lordships who decided that case were of opinion that their decision necessarily followed upon the Full Bench decision in *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (3). We find that the case first above cited has been followed in this Court in *Ram Sundar Karmokar* v. *Lochan* (5) and also by the Patna High Court in *MacPherson* v. *Debi Bhushan Lal* (4). The learned Pleader for the appellant cannot bring to our notice any case in which the decision in *Narayani* v. *Nabin Chandra Chowdhari* (2) has been dissented from or even doubted. We are not prepared to dissent from it. The appeal must accordingly be dismissed with costs, hearing fee two good *mohurs*.

Appeal dismissed.

(1) 29 Ind. Cas. 877; 19 C. W. N. 814; 21 C. L. J. 650.
(2) 36 Ind. Cas. 803; 21 C. W. N. 400; 25 C. L. J. 351; 44 C. 720.
(3) 27 Ind. Cas. 61; 18 C. W. N. 971; 42 C. 172; 20 C. L. J. 52 (F. B.).
(4) 42 Ind. Cas. 36; 2 P. L. J. 530.
(5) 38 Ind. Cas. 942.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2510 OF 1917.

November 27, 1918.

Present:—Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

SRINIVASA RAGHAVA IYENGAR—PLAINTIFF—APPELLANT

versus

K. R. RENGANATHA IYENGAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 2 (d) Security-bond, execution of, for debt due on promissory note—Forbearance to sue for period not specified, whether good consideration—Charge on immoveable property, whether mortgage—Suit on security-bond, maintainability of—Transfer of Property Act (IV of 1882), ss. 40, 58, 100.

A forbearance to sue a debtor on his promissory note is a good consideration for the latter executing a security-bond for payment of the debt, and the creditor can maintain a suit on the security-bond. [p. 965, col. 1.]

It is not necessary that there should be an agreement for forbearance for any definite or particular time: it is enough if an implied request by the debtor for forbearance for a time can be inferred. [p. 965, cols. 1 & 2.]

SRINIVASA RAGHAVA *v.* RENGANATHA IYENGAR.

Manna Lal v. *Bank of Bengal*, 1 A. 309; 1 Ind. Dec. (N. S.) 211 and *Muthukaruppa Mudali* v. *Kathappudayan*, 25 Ind. Cas. 726; 27 M. L. J. 249; 16 M. L. T. 194; (1914) M. W. N. 706, distinguished.

Per *Spencer, J., Quære*—Whether a security-bond which amounts to a charge on immoveable property is a mortgage involving a transfer of interest in the property.

Per *Sadasiva Aiyar, J.*—Even where there is no personal covenant to pay, a document creating a charge on specific immoveable property is a mortgage and not a mere charge liable to be defeated by a subsequent mortgage-deed or sale-deed, though executed in favour of a *bona fide* transferee for consideration without notice. [p. 966, col. 2.]

Royzuddi Sheik v. *Kali Nath Mookerjee*, 33 C. 985; 4 C. L. J. 219, not approved.

Distinction between a charge and a mortgage pointed out. [p. 966, cols. 1 & 2.]

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 790 of 1915, preferred against the decree of the Court of the Subordinate Judge, Kumbakonam, in Original Suit No. 47 of 1915.

FACTS appear from the judgment.

Messrs. *T. R. Venkatarama Sastri* and *S. Parthasarathi Aiyar*, for the Appellant.—Forbearance to sue is good consideration under section 2 of the Contract Act For two years the plaintiff refrained from suing on the promissory note in his favour and it was open to the lower Courts to have inferred from the surrounding circumstances that the security-bond was given so that plaintiff might not sue.

The charge on specific immoveable property transferred an interest in the property to the plaintiff and the security-bond may be treated as a mortgage-deed.

Messrs *K. Bhashyam Aiyangar* and *K. Narasimha Aiyangar*, for the Respondents.—The security-bond is not a mortgage-deed and the 2nd defendant, who *bona fide* purchased the property, is not bound by the charge. The lower Courts were right in refusing to recognise forbearance to sue as adequate consideration. No time was specified for exercising the forbearance. See *Manna Lal* v. *Bank of Bengal* (1).

JUDGMENT.

SPENCER, J.—The 1st defendant in this suit executed a promissory note for Rs. 2,500 on 4th December 1913 in favour of one Aramudachari, and two days later gave a security-bond to the same individual for the same debt. The plaintiff obtained an assignment of both instruments and sued upon them. The 2nd defendant is a subsequent purchaser; and the 3rd defendant is the Official Receiver of Tanjore, who was made a party in consequence of the 1st defendant's insolvency. The plaintiff has succeeded in obtaining a personal decree against 1st defendant for what was due upon the promissory note, but his claim to be allowed to enforce his charge upon the 1st defendant's immoveable properties has been refused by both the lower Courts on the ground that there was no consideration for the security-bond (Exhibit C), and upon this point he has lodged this second appeal.

The consideration for Exhibit C is stated in paragraph 4 of the plaint to be the forbearance of the payee under the promissory note (Exhibit A) to press the 1st defendant for payment, when he became aware after the execution of Exhibit A of the great extent of 1st defendant's indebtedness and his concession of some time before filing a suit. Both the Subordinate Judge and the District Judge, in considering the issue relating to consideration for the security bond, in my opinion, misdirected themselves on the question of law involved in this issue.

The Subordinate Judge followed *Manna Lal* v. *Bank of Bengal* (1), which he thought to be exactly in point. The District Judge seems to think that forbearance to sue must be forbearance for some particular time in order to constitute valuable consideration, as he rejects the evidence of the payee Aramudachari himself (P. W. No. 2) on account of his failure to specify the length of time he gave the first defendant when he executed Exhibit C, although it does not appear from his deposition that any question was put to the witness on this point. *Manna Lal* v. *Bank of Bengal* (1) has been followed by this Court in *Muthukaruppa Mudali* v. *Kathappudayan* (2), but both those cases are distinguishable from the present case on the facts. In the former case the *hundi* debt had not matured when the acceptor of the *hundis* pledged his own house and shops as security for due payment and thus there was obviously no considera-

(1) 1 A. 309; 1 Ind. Dec. (N. S.) 211.

(2) 25 Ind. Cas. 726; 27 M. L. J. 249; 16 M. L. T. 194; (1914) M. W. N. 706.

tion for the pledge. In the latter case it was held that a mere recommendation by *A* of a borrower *B* was not good consideration for a contract based on a subsequent promise to the lender *C* to pay advances made to *B*.

Both in England and in India it is settled law that past consideration may be good consideration if there has been a precedent request [*vide Lampleigh* v. *Braithwait* (3) and *Sindha Shri Ganpatsingji* v. *Abraham* alias *Vajir Mahomed Akuji* (4) and Pollock and Mulla's Contract Act, 3rd Edition, page 22] and forbearance from suing comes under the expression "does or abstains from doing" under section (2) (*d*) of the Indian Contract Act, which defines 'consideration'.

In the present case forbearance from suing has been set up in the plaint, there is evidence to support the plea, and there is the fact that the 1st defendant was not actually sued upon the promissory note from the date of its execution, 4th December 1913, till this suit was brought on 12th July 1915. Even in the absence of evidence it was open to the lower Courts to have presumed from the circumstances of the case that the security bond would not have been given unless the creditor had expressed his dissatisfaction with the promissory note payable on demand.

In *Alliance Bank* v. *Broom* (5) the Vice Chancellor observed: "It appears to me that, when the plaintiffs demanded payment of their debt, and, in consequence of that application the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did in effect give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time, but, at all events, some extent of forbearance." This case was followed in *Fullerton* v. *Provincial Bank of Ireland* (6), in which Lord Macnaghten said:—"In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it." Similar observations occur in the judgment of Vaughan Williams and Fletcher Moulton, L. Js., and of Parker, J., in *Glegg* v. *Bromley* (7).

On these principles it is clear that the learned District Judge's decision being based on a refusal to recognise an act of forbearance on the part of the creditor, which was not for a definite period, cannot be supported.

On the appellant's behalf reliance is also placed on the words of section 58 of the Transfer of Property Act defining mortgage as a transfer of interest, "for the purpose of securing the payment of money *advanced or to be advanced by way of loan, an existing or future debt*", and it is argued that Exhibit C is a mortgage. The document describes itself as a security bond, and I think it amounts to a charge on immoveable property, but in the view I have taken it becomes unnecessary to decide whether it is a mortgage involving thereby a transfer of interest in property, or a mere charge.

The 2nd defendant claimed to be a *bona fide* purchaser for value without notice, and the fourth issue relates to the questions raised by this claim. Assuming that he had no notice of the charge created in favour of Aramudachari, although he must have known of it before his sale-deed was registered on 13th June 1914, as it is mentioned in the security bond (Exhibit II) given to him on 31st March and it has been found that he and Aramudachari are next-door neighbours, still this would not help him to avoid Exhibit C for if Aramudachari took a *bona fide* charge on the same property for good consideration on 6th December 1913, the subsequent sale to 2nd defendant on 2nd March 1914 must be subject to that charge.

I would allow this appeal and would give the plaintiff a decree for sale of the property which is the subject of the charge with costs throughout and I would direct 2nd defendant to bear his own costs in all the Courts. Time for sale is 8 months from this date

(3) (1616) 1 Smith L. C. 13th Ed. 136; 12th Ed. 159.
(4) 20 B. 755; 10 Ind. Dec. (N. S.) 1074.
(5) (1864) 2 Drew & Sm. 289; 62 E. R. 631; 5 N. R. 69; 34 L. J. Ch. 256; 10 Jur. (N. S.) 1121; 11 L. T. 332; 13 W. R. 127; 143 R. R. 120.
(6) (1903) A. C. 309; 72 L. J. P. C. 79; 89 L. T. 79; 52 W. R. 238.
(7) (1912) 3 K. B. 474 81 L. J. K. B. 1081; 106 L. T. 825.

SADASIVA AIYAR, J.—I entirely agree throughout. The decree we pass for sale is, of course, intended to award to the plaintiff a relief additional to the relief he has obtained against the 1st defendant personally. As the 1st defendant has not opposed the plaintiff's claim, he will not be liable personally for the plaintiff's costs here and in the lower Appellate Court.

The question whether the security-bond created a simple mortgage or a mere charge is a difficult one which it is unnecessary to decide, as pointed out by my learned brother, see *Jwahir Mal* v. *Indomati* (8), where two learned Judges differed as to the construction of the bond in question therein. The language of the bond in that case was, however, weaker than that of the security-bond before us.

As regards section 40 of Act IV of 1882, an obligor who executes a bond creating a charge on specific immoveable property does, in my opinion, transfer an interest therein and the obligee is entitled to an interest in the property and not merely to the benefit of an obligation annexed to the obligor's ownership of immoveable property within the meaning of section 40, Act IV of 1882. The obligation contemplated in that section is a personal obligation correlative to a personal right in the obligee such as a right to obtain a mortgage deed or a sale-deed (which deed it is that transfers the interest contracted to be transferred). The subsequent purchaser from a man who has already created a valid charge is as much bound by it as the creator himself on the same principle that the subsequent purchaser for valuable consideration from a simple mortgagor is bound by the mortgage, the question of actual notice to him being immaterial [see *Oooling* v. *Saravana* (9)].

As regards the distinction between a mortgage and a charge, it seems to me that every mortgage document creates also a charge but conversely, a charge may not amount to a mortgage in all cases. That in some cases a document creating a charge may be a mortgage document is implied in the language of section 100 of the Transfer of Property Act itself, defining a charge. Where it is created *by law* and not by act of parties, it is, of course, not a mortgage, as the definition of a mortgage under section 58 contemplates the creation of the mortgage by the intentional act of a private person called the mortgagor who transfers the mortgage interest in favour of the mortgagee.

The distinction between a charge and a simple mortgage is oftentimes very difficult to appreciate. Where no personal covenant to pay the borrowed money is found in the deed which creates the charge, it is probably not a simple mortgage according to the trend of the decisions. Where, however, the charge is created over *specific* immoveable property, I am inclined to hold that though it may not be a simple mortgage owing to the absence of a personal covenant to pay, it is still a mortgage, though of the anomalous kind mentioned in section 98 of the Act (Act IV of 1882). Where the immoveable property is not described in a definite manner, then the transaction may create merely a charge and not a mortgage, as section 100 of Act IV of 1882 uses the general expression "immoveable property" and not the expression "specific immoveable property" found in section 58 of Act IV of 1882.

The result, as I said before, is that section 40 of Act IV of 1882 does not apply and the principle of the decision in *Oooling* v. *Saravana* (9) does not apply to the document we have to construe in the present case. I am inclined to think, with great respect, that the decision in *Roysuddi Sheikh* v. *Kali Nath Mookerjee* (10) takes a too narrow view of the effect of a document creating a charge on specific immoveable property and I hold that even where there is no personal covenant to pay, the document, creating such a charge, is a mortgage and not a mere charge liable to be defeated by a subsequent mortgage-deed or sale deed, though executed in favour of a *bona fide* transferee for consideration without notice.

Appeal accepted.

(8) 22 Ind. Cas. 973; 36 A. 201; 12 A. L. J. 290.
(9) 12 M. 69; 4 Ind. Dec. (N. S.) 397.
(10) 33 C. 985; 4 C. L. J. 219.

KHAMASA BEWA *v.* PROMOTHO NATH ROY.

CALCUTTA HIGH COURT.
CIVIL RULE No. 572 OF 1918.
February 24, 1919.
Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Panton.

KHAMASA BEWA, MOTHER AND HEIR OF LATE NATU SHEIK—DEFENDANT—PETITIONER

versus

PROMOTHO NATH ROY CHOWDHURY AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 96—Appeal—Suit of small cause nature tried as ordinary suit—Decree, whether appealable.

Where a suit in the nature of a small cause is instituted in a Court the presiding officer of which is not invested with Small Cause Court jurisdiction and is decided as an ordinary suit by the successor of the first officer who is invested with such jurisdiction, the nature of the suit is not altered, and an appeal from the decree to the District Judge is competent. [p. 968, col. 2.]

Rule against the order of the Additional District Judge, Mymensingh.

FACTS appear from the judgment.

Babu *Gopal Chundra Das*, for the Petitioner.—Here the suit was of the nature of small causes, and no first appeal lay to the District Judge. The character of the suit was not changed simply because it was tried in the ordinary manner. It is true that the suit was instituted in a Court, the presiding officer whereof was then not invested with Small Cause Court powers, but the permanent incumbent was a Judge having Small Cause Court powers and he was then on leave. Simply because at the time of the institution of the suit the Officiating Judge was not exercising Small Cause Court powers and the suit was registered as a regular suit, it cannot be said that the nature of the suit is changed. Refers to *India Chandra Mukherjee* v. *Srish Chandra Banerjee* (1), *Shankarbhai* v. *Somabhai* (2).

Babus *Jogesh Chandra Roy* (with him Babu *Mokundi Math Roy*), for the Opposite Party.—When the suit was instituted, the Judge was not invested with Small Cause Court powers. When the case was heard on remand, the Judge did not exercise Small Cause Court powers. The petitioner did not object to the competency of the appeal at the time the remand order was made by the District Judge, and she acquiesced in the remand order.

Again, the suit was instituted in a Court not having Small Cause Court powers and under the present circumstances of the case, it must be held that the powers of the Court remained the same throughout all stages of the trial of this suit. In support of my contention I rely on a case reported as *Mahima Chandra Sirdar* v. *Kali Mandol* (3).

The case reported as *Indra Chandra Mukherjee* v. *Srish Chandra Banerjee* (1) will not help my learned friend. In that case the suit was instituted before a Judge exercising Small Cause Court powers, which is not the case here.

Refers to section 32 (2), Provincial Small Causes Courts Act—sections 96, 102, Civil Procedure Code.

As regards the objection that the first appeal was incompetent, I submit under the Civil Procedure Code I have a right of first appeal. Section 102, Civil Procedure Code, only speaks of second appeal and not of first appeal. If there could be no right of first appeal that would have been expressly mentioned in the Code, and there is no provision in the Code to that effect.

Babu *Gopal Chandra Das*, in reply.—Section 32 (2), Provincial Small Causes Courts Act, cannot apply in this case. Here your Lordships are to see whether the officer in whose Court the suit was instituted was an officiating or a permanent officer. The character of the suit was not taken away. Refers to *Narayan Raoji Ranade* v. *Gangaram Ratanchand* (4).

JUDGMENT.—The plaintiffs-opposite party instituted a suit for recovery of the price of trees cut down and appropriated by the defendant. The suit was instituted in the Court of the Munsif of Pingna in the District of Mymensingh. At the time of the institution of the suit, the presiding officer of the Court was not vested with the powers of a Small Cause Court. The suit was registered as an ordinary money suit and proceeded with as such. At the time

(1) 21 Ind. Cas. 120; 40 C. 537.
(2) 25 B. 417; 3 Bom. L. R. 129.
(3) 12 C. W. N. 167.
(4) 3 Ind. Cas. 816; 33 B. 664; 11 Bom. L. R. 817

of the trial the Munsif was transferred and his successor-in office had Small Cause Court powers. He, however, tried the suit under the ordinary procedure. The suit was decreed by the Munsif in favour of the plaintiff No. 2. The plaintiff No. 1 appealed to the District Judge. On appeal the learned District Judge sent the case back for trial on certain issues. When the case came back to the Court of first instance on remand, the Munsif who had tried the suit was transferred and his successor, who had to deal with the issues sent down by the District Judge, had no Small Cause Court powers. On receipt of the findings from the Court of first instance, the learned District Judge held that both the plaintiffs were entitled to a decree. As against that decree, the defendant preferred a second appeal to this Court and also obtained this Rule.

We are informed that the second appeal has been dismissed; because there is no second appeal in a case of the nature triable by a Small Cause Court when the value of the suit does not exceed Rs. 500.

In this Rule it is contended that the suit being of the nature of small causes, no appeal lay to the District Judge. We are referred to the case of *Indra Chandra Mukherjee* v. *Srish Chandra Banerjee* (1) in which it was held [following the case of *Shankarbhai* v. *Somabhai* (2)] that where a judicial officer invested with Small Cause Court jurisdiction tries a suit which he might have tried under the summary procedure in the ordinary manner, the character of the suit is not thereby altered and the decree is not appealable.

It is unnecessary to consider the proposition laid down in those cases, because the present case is distinguishable from them. In the present case, as already stated, the suit was instituted in a Court the presiding officer of which at the time of the institution of the suit had not Small Cause Court powers, whereas in the case of *Indra Chandra Mukherjee* v. *Srish Chandra Banerjee* (1) and the Bombay case the suit appears to have been instituted and tried before a Judge who had Small Cause Court powers.

The present case is covered by the decision in *Mahima Chandra Sirdar* v. *Kali Mandol* (3). There a suit for recovery of a sum of Rs. 70 was instituted in the Court of a Munsif exercising Small Cause Court powers up to Rs. 50 and subsequently during the pendency of the suit the Munsif was transferred and the substantive Munsif, who succeeded him, had powers of a Small Cause Court up to Rs. 100. It was held by Rampini, C. J., and Sharfuddin, J., that the suit should be tried as if the powers of the Court remained the same as they were when the suit was instituted.

A different view appears to have been taken in *Narayan Raoji Ranade* v. *Gangaram Ratanchand* (4).

We prefer to follow, however, the case of *Mahima Chandra Sirdar* v. *Kali Mandol* (3) decided in our Court.

The Rule is accordingly discharged. No order as to costs.

Rule discharged.

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 11 OF 1918.

January 28, 1919.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Hayward.

ALI MAHOMED EID - DEFENDANT—APPELLANT

versus

FATIMA MAHOMED EBRAHIM—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 61—Maintenance of child, arrears of, suit to recover—Limitation.

A suit by a divorced wife of a Muhammadan for the maintenance expenses of her minor daughter falls within the scope of Article 61 of Schedule I to the Limitation Act, but the plaintiff is not entitled to recover anything prior to three years before the suit. [p. 969, col. 1.]

Civil reference made by the Political Resident at Aden.

Mr. *Ratanlal Ranchhoddas*, for the Appellant.

JUDGMENT.

SCOTT, C. J.—This is a claim by a divorced wife of a Muhammadan who has married again, for the maintenance expenses of her minor daughter by the first husband. The Courts at Aden have awarded the sum of

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Rs. 20 a month calculated according to the cost of living at Aden for maintenance for a period from the 20th April 1913 to the 20 h October 1917. The latter date is the date up to which the plaintiff continued to have custody of her daughter. The earlier date is the date upon which the defendant's mother-in-law died, who had under an agreement with the defendant undertaken to support the daughter. Between the two dates covered by the Court's decree the only custodian of the child was her natural mother. It is laid down in *Emperor* v. *Ayshabai* (1) that "according to the Muhammadan Law a mother is entitled to the custody of her children even where she has been divorced by her husband, but that does not relieve the father from the obligation of maintaining the children. The law intends that the mother ought to have the custody of the girls until they reach the age of puberty because till then they require her nurture and care; the law does not impose upon the mother the obligation of maintaining the children because she keeps them in her custody, as she is entitled to do."

The only question raised on behalf of the defendant, apart from the question of the monthly quantum of maintenance, a matter upon which we cannot differ from the Aden Court, is the question whether maintenance is payable for the whole time covered by the decree, or whether it must be limited according to the provisions of Article 61 of the Limitation Act. That Article provides a limitation where the suit is for money payable to the plaintiff for money paid for the defendant. We are of opinion that the payments claimed by the plaintiff fall within the scope of that Article. It has been held in England that where a person paid the funeral expenses of his deceased daughter during her husband's absence, the husband was liable upon a count for money paid by the plaintiff for the defendant: see *Jenkins* v. *Tucker* (2) and *Ambrose* v. *Kerrison* (3). As the Article provides that the suit must be brought within the three years from the date when the money is paid, the plaintiff is not entitled to recover any payments made prior to three years before suit.

(1) 6 Bom. L. R. 536 at p. 538; 1 Cr. L. J. 599.
(2) (1788) 1 H. Black 90; 126 E. R. 55.
(3) (1851) 10 C. B. 776; 20 L. J. C. P. 135; 138 E. R. 307; 84 R. R 775.

The suit was filed on the 15th November 1917, and the plaintiff is entitled to recover Rs. 20 a month for three years prior to the date of the suit. Under section 13 of the Aden Act, the costs will be costs in the suit.

Order accordingly.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 590 OF 1917.

April 30, 1919.

Present: —Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, KT.

JATINDRA NARAIN ACHARJEA CHOUDHURY—PLAINTIFF—APPELLANT

versus

MALU HAJI—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 50 (2), 105, 105 A, 106, 107, cl. (2)—Record of Rights—Application under s. 105 for settlement of rent—Settlement Officer, whether can decide question of status of tenant and can make note correcting entry as regards status —Scope and object of s. 105—"Issues" in s. 105A, meaning of.

On an application made by a landlord under section 105 of the Bengal Tenancy Act for settlement of rent, the Assistant Settlement Officer decided the question of status of the tenant and dismissed the application by the following order: "Rent is held to be at a fixed lump rental, and as such note should be made in the Record of Rights as *mokta mokarari* in place of the status of occupancy recorded for him:"

Held, that although no formal issue was framed as to the tenant's status, it was obligatory upon the Settlement Officer to try and decide the question of status of the tenant, as the question was one of the kind described in clause *e)* of section 105 A. [p. 971, col. 1.]

The word "issue" in section 105 A, Bengal Tenancy Act, cannot mean merely an issue framed and recorded according to law. The object of section 105 A, Bengal Tenancy Act, is to give the defendant in proceedings under section 105 the right to raise questions which should properly form the subject-matter of proceedings under section 106. Therefore, although in such a case the tenant does not apply under section 106 to have the entry corrected, the Settlement Officer should order a correction of the entry to be made in the Record of Rights. [p. 971, col. 1.]

Appeal against the decree of the Special Judge, Mymensingh, dated the 9th January 1917, affirming that of the Revenue Officer, Mymensingh, dated the 23rd August 1916.

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FACTS appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babu *Ananda Churn Karkoon*), for the Appellant.—Under section 105 A, sub section (*e*), Bengal Tenancy Act, the Settlement Officer can decide the question of the status of the tenant. But in order that such a question may be decided, the tenant must plead in his written statement that his status was quite different from that recorded in the Record of Rights. In the present case the tenant did not raise any such plea. In the Record of Rights he was recorded as an occupancy *raiyat*. He did not institute any suit under section 106 for the correction of that entry, nor did he allege in his written statement in the present case that that entry was wrong. The only thing that he has done is that in paragraph 10 of the written statement he alleges that as he has been paying the same rent for more than 20 years, his rent is not liable to enhancement. This has nothing to do with the question of the status of the tenant. Moreover, the Settlement Officer ought not to have decided the question of status without framing any issue on that point. The only issue that was framed on this point was: "Do the defendants pay their rents at lump rentals?" This is not sufficient. Lastly, the Settlement Officer had no jurisdiction on the landlord's application under section 105 to direct that the entry in the Record of Rights as to the tenant's status should be changed. Correction of an entry in favour of the tenant in the Record of Rights cannot be made on an application by the landlord for settlement of rent.

Babu *Birendra Coomar De*, for the Respondent.—The written statement of the tenant shows that his main objection is that he is a *raiyat* holding at a fixed lump rental for more than 20 years and, therefore, his rent cannot be enhanced. The Courts below rightly decided the question of status of the tenant and they were bound to decide the issue as to status. See section 105 A, clause (*e*), of the Bengal Tenancy Act. As regards the question whether the Settlement Officer can make the note correcting the entry in the Record of Rights, see sections 105A, 107, clause (2).

JUDGMENT.—This appeal is by the landlord who made an application under section 105 of the Bengal Tenancy Act for a settlement of rent after the final publication of the Record of Rights.

The respondent who holds the land described in Khatian No. 43 said among other things that he held the land at a lump rental, and that he had been paying the same rent for upwards of twenty years and that he was, therefore, entitled to have his rent regarded as fixed.

The Courts below are agreed in finding that the respondent's allegations were proved, namely that he did hold the land at a lump rental, and that he had paid the same rent for upwards of twenty years immediately before the institution of the proceedings, and he was, therefore, entitled to the benefit of the presumption given by section 50 (2) of the Tenancy Act.

The appellant admits that he cannot challenge these findings in second appeal and he limits his appeal to the ordering portion of the judgment of the first Court, which was confirmed by the lower Appellate Court.

The Assistant Settlement Officer passed this order—"Rent in respect to Khatian No. 43 is held to be at a fixed lump rental, and as such note should be made in the Record of Rights as Mokta Mokarari in place of the status of occupancy recorded for him."

It is urged on behalf of the landlord that the Court erred, *first*, in deciding the question of defendant's status, and, *secondly*, in ordering a note to be made in the Record of Rights.

With regard to the matter of defendant's status it was pointed out that the tenant had not made any application for correction of the entry under section 106 of the Act, that he had not explicitly stated that he was a *raiyat* holding at fixed rates and not an occupancy *raiyat*, and that no formal issue as to his status had been framed.

As for the defendants' written statement, paragraph 10 sets out his case quite clearly, for the closing words are: "according to the provisions of the law it (the rent) is not liable to increase and cannot be (increased): it is not subject to variation; according to law it is 'fixed' (using the English word) and it is not liable to increase." The only criticism that can be levelled at this written statement is that he does not

say "I am not merely a Sthitiban *raiyat* as I am described in the record, but I am a *raiyat* holding at a fixed rent." But in substance the reiterated statement that the rent is not liable to increase amounts to that.

It is true that no formal issue was framed as to the status of the tenant, but it is clear from the evidence which was tendered that both sides were aware of the fact that the question of status had been raised and that the Court could not deal with the landlord's application without adjudicating on that question. The question was of the kind described in clause (*e*) of section 105 A of the Tenancy Act, and it was obligatory on the Settlement Officer to try and decide it. The argument that, because there was no formal issue framed as to the tenant's status, there was no "such issue" for the Court to decide, is unsound, because it rests upon the assumption that the word issue in section 105A cannot mean more than an issue framed and recorded according to law. The words of section 105A, however, are: "Where any of the following issues arise" and in the language of the Civil Procedure Code: "Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other."

The third ground taken, namely, that the tenant had not applied under section 106 of the Tenancy Act to have the entry corrected is of no avail to the appellant, because it is clear that the object of section 105A is to give the defendant in proceedings under section 105 the right to raise questions which should properly form the subject-matter of proceedings under section 106.

The second branch of the landlord's argument is that in any case the Courts below were wrong in ordering a note to be made in the Record of Rights; but to this contention clause (2) of section 107 gives an overwhelming answer.

The appeal fails and must be dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2240 OF 1918.

May 19, 1919.

Present:—Sir Henry Rattigan, KT., Chief Justice.

GHULAM MUHAMMAD *alias* MOTI—APPELLANT

versus

KARTA RAM AND OTHERS—RESPONDENTS.

Insolvency proceedings—Receiver in possession of property—Release of property, application for, dismissal of—Appeal, maintainability of, without impleading Receiver.

The appellant was declared an insolvent under the Provincial Insolvency Act, and a Receiver was appointed who took charge of all the property belonging to the insolvent, including two houses. One of the houses was released for the residence of the Receiver and the other was ordered to be sold, whereupon the insolvent applied for the release of this house also as it was required for his residence. The application was disallowed and the insolvent appealed to the High Court without impleading the Official Receiver as a party:

Held, that the appeal must fail, inasmuch as the Official Receiver being in possession of the property of the insolvent was a necessary party to the appeal.

Miscellaneous first appeal from the order of the District Judge, Ludhiana, dated the 10th May 1918, rejecting the application.

FACTS.—Ghulam Muhammad, the appellant, was declared an insolvent by the Insolvency Court of Ludhiana and a Receiver of his property was appointed. The Receiver took possession of all the property of the insolvent. The insolvent had two houses. The Court released one for the residence of the Receiver and ordered the other to be sold. The insolvent filed an objection that this house was necessary for his residence and should be released. The District Judge disallowed the objection, whereupon the insolvent appealed to the High Court to have that house released.

Lala *Shamair Chand*, for the Respondents, took a preliminary objection that the Receiver was a necessary party and that as he had not been made a party and limitation had expired, the appeal could not proceed. He also contended that the sanction of the District Judge or the High Court had not been obtained under section 46 of the Insolvency Act, and the appeal, therefore, could not be entertained

JUDGMENT.—This appeal must fail, as the Official Receiver who is in possession of the property was a necessary party to

it and has not been impleaded as a respondent. So far as he is concerned, any appeal would be barred by limitation as against him and unless he is tc be affected by this appeal, any o der passed by this Court would be infructuous. I notice also that the permission of this Court for the filing of this appeal was neither asked for nor granted [section 46 (3) of the Provincial Insolvency Act].

Appeal dismissed. No order as to costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2834 OF 1916.

January 24, 1919.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

JAGADISH BHATTACHARJEE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAMA SUNDARI DASYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution of decree—Sale—Death of judgment-debtor after attachment but before sale—Legal representatives not brought on record—Sale, validity of—Attachment, whether subsists after dismissal of execution application—Application to set aside sale—Objection not taken in application, whether can be taken in subsequent suit.

Where a judgment-debtor dies after the attachment of his property and the property is sold without bringing his legal representatives on the record, the sale is not invalid. [p. 974, col. 1; p. 975, col. 1.]

An attachment once made in the pursuance of an application for execution of a decree does not necessarily fall with the dismissal of the application for default of prosecution but may continue in full force thereafter, and a sale held under an attachment that made in the course of proceedings upon a previous application for execution is valid. [p. 974, col. 2; p. 975, col. 1.]

An objection which can be, but is not, made a ground of attack in a proceeding to set aside an execution sale cannot be raised in a subsequent suit for setting aside the sale on the ground of irregularity. [p. 974, col. 2; p. 975, col. 1.]

Appeal against the decree of the Subordinate Judge, Mymensingh, dated the 26th August 1916, confirming that of the Munsif, Netrakona, dated the 3rd March 1915.

FACTS appear from the judgment.

Babu *Dwarka Nath Chuckerbutty* (with him Babu *Gopal Chandra Das*), for the Appellants.—This appeal is on behalf of the plaintiffs and it arises out of a suit to recover their father's shares sold in execution of a decree for arrears of rent.

The father of the plaintiffs died after the decree was passed but before the sale. I contend that the sale was inoperative as the plaintiffs were not made parties to the execution proceedings and, therefore, their interest could not pass by the sale.

A decree executed against a dead man cannot be operative and passes no title. Plaintiffs are inhabitants of one District (Pabna) and the Zemindar belonged to a different District (Mymensingh). The judgment-debtor, the father of the plaintiffs, died on 22nd March 1901. On 1st July 1901 execution proceedings were started against the dead man and the sale took place on 22nd September 1901. The plaintiff No. 1 alone applied to set aside the *ex parte* decree and it was rejected. The property worth about Rs. 5,000 was purchased by the predecessor of the defendant No 1 for Rs. 50 only. Plaintiff No. 1 alone filed an application to set aside the sale under section 311 of the old Code (Order XXI, rule 90 of the present Code) on 5th June 1908 and it was rejected on 5th December 1908. The present suit was brought in 1913.

It was only one of the judgment-debtors who made the application, and, therefore, the principle of *res judicata* cannot be applied in the case of all other plaintiffs under the Dayabhaga Law. A Dayabhaga brother cannot represent other brothers unless authorised to do so.

The first execution was started on 21st November 1901, but it was dismissed on 7th July 1901 without any note as to the reason.

As the execution proceedings under which the sale took place were started against a dead man, the purchaser has to show that they were good in law.

[RICHARDSON, J.—Do you say that owing to this the proceedings should be declared void?]

Yes. All the proceedings against a dead man are void. *Khiarajmal* v. *Daim* (1) referred to.

If the judgment debtor was dead on the day of attachment, the sale was void.

(1) 32 C. 296. 1 C. L J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734. 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.).

[HUDA, J.—If such a sale takes place, that should be set aside.]

Groves v. *Administrator-General of Madras* (2) referred to.

[RICHARDSON, J.—*Groves* v. *Administrator-General of Madras* (2) says that the sale is not a nullity but an irregularity.]

Khiarajmal v. *Daim* (1) referred to.

[HUDA, J.—The case in *Khiarajmal* v. *Daim* (1) is in your favour in so far as it says that those who are not made parties are not bound.]

Arjun Das v. *Gunendra Nath Basu* (3) referred to.

[RICHARDSON, J.—That case says that it is a mere irregularity.]

Section 50 of the new Civil Procedure Code has introduced a change in the law. 'Fully satisfied' has been substituted for 'fully executed.'

As regards the construction of the sale certificate my submission is that the entire Taluk was not sold. What was really sold was only a share of the Taluk corresponding to the share of the decree holder in the Zemindari. Otherwise what was the object of mentioning the share of the rent payable to the decree-holder?

Babu *Gunada Charan Sen* (with him Babus *Birendra Kumar De* and *Jatindra Nath Sanyal*), for the Respondents.—The attachment under the first execution took place during the lifetime of the plaintiff's father. When a previous execution is dismissed, it does not necessarily follow that the attachment comes to an end: *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (4), *Peari Lal Singh* v. *Chandi Charan Singh* (5), *Maharajah Dheeraj Mahatab Chund Bahadoor* v. *Surno Moyee Dossee* (6), *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (4), *Bepin Behari Bera* v. *Shashi Bhushan Datta* (7), *Imtiaz Ali* v. *Bishambhardas* (8), *Rangasami Chetti* v. *Peraisami Mudali* (9) referred to.

In *Arjun Das* v. *Gunendra Nath Basu* (3), the execution proceedings were instituted after the death of the judgment debtor.

In *Bepin Behari Bera* v. *Shashi Bhushan Datta* (7) it is held that it is a mere irregularity and does not necessarily invalidate the sale (page 632* referred to). Also see *Sheo Prasad* v. *Hira Lal* (10), *Malharjun* v. *Narhari* (11).

Death of the judgment-debtor after attachment but before sale does not invalidate the sale held without bringing the heirs on record. It is an irregularity but not an illegality: *Net Lall Sahoo* v. *Sheikh Kareem Bux* (12), *Khairajmal* v. *Daim* (1), *Bepin Behari Bera* v. *Shashi Bhusaan Datta* (7), *Peari Lal Singh* v. *Chandi Charan Singh* (5), *Sheo Prasad* v. *Hira Lal* (10).

As to what passes at a sale, it can be gathered from the conduct of the parties if there be any ambiguity in the sale certificate: *Alagaraya Gounder* v. *Minakshi Naidu* (13).

On this point we have got the concurrent findings of both the Courts below.

Babu *Gopal Chandra Das* briefly replied.

JUDGMENT.

RICHARDSON, J.—The three plaintiffs in the present suit, the appellants before us, are the sons of one Jadu Nath Nayaratna, deceased. The suit relates to an $8\frac{1}{4}$-anna share of a Sikmi Taluk, Ram Nath Ukil, which share belonged to Jadunath. One of the co sharer landlords, Ishan Chandra Lahiri, brought a suit for arrears of rent in respect of his share in the superior interest against Jadu Nath and his co sharers in the Taluk. In that suit an *ex parte* decree was made on the 20th September 1900. Jadunath died on the 22nd March 1901. In execution of the *ex parte* decree the Taluk (or a portion thereof) was sold by the Court on the 9th October 1901. The purchaser was one Naba Krist Nandi, the husband of the defendant No. 1. The sale was confirmed and the sale certificate was issued on the 29th November 1901.

The plaintiffs brought the present suit

(2) 22 M. 119; 8 M. L. J. 288, 8 Ind. Dec. (N. S.) 84.
(3) 27 Ind. Cas. 294; 18 C. W. N. 1266; 20 C. L. J. 341.
(4) 33 C. 666; 3 C. L. J. 93 *notes*.
(5) 5 C. L. J. 80; 11 C. W. N. 163.
(6) 15 W. R. 222; 12 B. L. R. 414 *note*.
(7) 22 Ind. Cas. 95; 18 C. L. J. 628; 18 C. W. N. 766.
(8) 10 Ind. Cas. 247; 8 A. L. J. 619.
(9) 17 M. 58; 3 M. L. J. 211; 6 Ind. Dec. (N. S.) 40.
(10) 12 A. 440 (F. B.); A. W. N. (1890) 103; 6 Ind. Dec. (N. S.) 1026.
(11) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).
(12) 23 C. 686; 12 Ind. Dec. (N. S.) 456.
(13) 12 Ind. Cas. 389; 37 M. 22; 24 M. L. J. 652; 10 M. L. T. 298; (1911) 2 M. W. N. 328.

*Page of 18 C. L. J.—*Ed.*

to recover their father's share in the Taluk. The contention on which they now rely is that the sale of the 9th October 1901 was inoperative, because at the date of the sale, Jadu Nath was dead and his legal representatives, the plaintiffs, had not been brought on the record. In the alternative the plaintiffs assert that if anything at all passed to the auction-purchaser by virtue of the sale, all that was sold was a portion of the Taluk corresponding to the decree-holder's interest in the Zemindary.

As to the first contention, it is not disputed that Jadu Nath died before the date of the sale. The application for execution which led to the sale was made on the 8th July 1901. That was also after Jadu Nath's death. But it appears that there had been a previous application for execution, presented on the 21st August 1900 and followed by attachment of the property. That application was dismissed on the 7th January 1901, apparently for default of prosecution.

Now, under the old Civil Procedure Code of 1882, it was held that an attachment once made did not necessarily fall with the dismissal of the application for execution [*Peari Lal Singh* v. *Chandi Charan Singh* (5) and *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (4)]. Under the old Code again if a judgment-debtor died before sale but after attachment, the sale was not necessarily invalid merely because the legal representative of the judgment-debtor had not been brought on the record. The omission was regarded, at most, as an irregularity which might lay the sale open to attack under the provisions of section 311 of that Code [*Sheo Prasad* v. *Hira Lal* (10), *Aba* v. *Dhondu Bai* (14) and *Net Lall Sahoo* v. *Sheikh Kareem Bux* (12)].

Now, we have it that on the 5th June 1908 the plaintiff No. 1 in the present suit applied to have the sale set aside. The application was rejected by an order dated the 5th December 1908, which is Exhibit C on the present record. It is noteworthy that in that case exception was not taken to the sale on the ground of Jadunath's death subsequent to the decree. The objection put forward was that Jadunath had died before the decree was made and the same allegation is made even in the plaint in the present suit. It never seems to have occurred to any one in 1908 or when the plaint in the present suit was filed that if Jadunath was alive at the date of the decree the sale could be successfully impugned.

I make these observations to explain the reasoning of the learned Subordinate Judge. The Subordinate Judge says that there is no evidence to show that Jadunath died before attachment, and that is so in reference to the attachment, made in the first execution proceeding. There is also nothing to show that the property was re attached after the second application for execution. The precise terms of the order dismissing the first application for execution are not before us. But, as I have pointed out, there is no difficulty in supposing that the attachment effected in pursuance of that application did not fall with the dismissal of the application, but continued and was in full force when the second application was made and when the sale was held on the 9th October 1901. If that be so, the omission to bring the plaintiffs on the record was under the old law, at most, an irregularity and, the sale not being void, I agree with the Subordinate Judge that it is now too late, under the Law of Limitation, to bring forward such an objection.

Further than that I am disposed to think that the Subordinate Judge is right in holding that the question is *res judicata*. The objection in question might have been but was not made a ground of attack in the proceedings taken in 1908 to set aside the sale. The plaintiffs cannot be heard now to insist upon any irregularity which they did not insist upon then. It is said that the application to set aside the sale was made by the plaintiff No. 1. It has, however, been found by the Courts below that the plaintiff No. 1 acted as a representative of plaintiffs Nos. 2 and 3, and that is a finding of fact with which we are not, in second appeal, at liberty to interfere.

There remains only the question of the true construction of the sale certificate. On that question I agree in the conclusion arrived at by the Court below.

For these reasons I would dismiss the appeal with costs.

(14) 19 B. 276; 10 Ind. Dec. (N. S) 187.

RASH MOHAN LAL *v.* RAM MOHAN LAL.

SHAMSUL HUDA, J.—I agree with my learned brother in dismissing this appeal. The main question for consideration is whether the sale that took place on the 21st September 1900 was effective in passing to the purchaser the right, title and interest of the judgment debtor. I have no doubt that that question must be answered in the affirmative. It is unnecessary to deal with all the cases that have been relied upon by either side. The case of *Bepin Behari Bera* v. *Shashi Bhushan Datta* (7) is sufficient to establish the proposition that the death of a judgment-debtor after attachment without bringing his legal representative on the record does not affect the validity of a sale under such attachment. The question as to whether the sale took place under an attachment previous to the death of the judgment-debtor, is a question of fact and having regard to the circumstances of the case, I think the Court below was right in arriving at the conclusion that the sale in the present case took place under an attachment that was made in the course of the proceedings upon the first application for execution on the 21st November 1900. Admittedly there was no attachment after the second application for execution, and the natural inference to be drawn from these facts is that the attachment upon the first application for execution was subsisting and the sale took place under it. The sale was, therefore, a good and valid sale and passed a good title to the purchaser. Having come to this conclusion it seems unnecessary to decide the question of *res judicata* or the further question that has been raised before us, *viz*, whether the plaintiff No. 1 represented his brothers in the application for setting aside the sale.

The only other question that remains to be considered is the question of the property that was sold in execution of the decree. The decree-holder was a fractional Zemindar of the Mehal. He had brought his suit for his share of the rent and what is described as having been sold in the sale certificate is the Mahal in the name of Nanda Kishore Ukil in village Garkanda within Zemindari No. 136, in Purgana Susang. After describing the Mehal as the property sold, the sale certificate proceeds to say that this Mehal was possessed by the judgment-debtor under the decree-holder at a rental of 1 annas 8 *gandas* odd. Having regard to the circumstances already referred to by my learned brother, I hold that what was sold was the entire Taluk held by the judgment-debtors and that the further description as regards the rent payable to the decree-holder had not the effect of limiting the sale to only a share of the Taluk equal to the share of the decree-holder in the Zemindari.

The appeal is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 104 OF 1918.

May 15, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

RASH MOHAN LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM MOHAN LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to His Majesty in Council—Subject-matter of suit, value of, less than Rs. 10,000*—Value, increase in, during pendency of suit, effect of.*

The value of the subject-matter of a suit was stated in the plaint to be Rs. 7,950. After decision of the suit and of an appeal by the High Court, an application was made for leave to appeal to His Majesty in Council, on the ground that at the date of the application the value of the property had increased and was now close on Rs. 12,000:

Held, that the fact that the value of the property had increased since the decision of the appeal would not be sufficient to bring the case within the provisions of section 110 of the Civil Procedure Code, which required that the value of the subject-matter of the suit in the Court of first instance must be Rs 0,000 or upwards and the value of the subject-matter in dispute on appeal to His Majesty in Council must be the same or upwards. [p. 976, col. 1.]

Application for leave to appeal to His Majesty in Council against a judgment of Mr. Justice Chapman and Mr. Justice Roe, dated the 8th April 1918, confirming that of the Subordinate Judge, Cuttack, dated the 20th December 1916.

DEBENDRA NARAYAN SINGH *v.* NARENDRA NARAYAN SINGH.

Messrs. *Asghar* and *Gajendra Prasad Das* for the Appellants.

Mr. *Atul Krishna Rai*, for the Respondents.

JUDGMENT.—This application must be dismissed. The plaintiffs seek leave to appeal to His Majesty in Council from a decree of this Court, dated the 8th April 1918, affirming a decision of the Subordinate Judge of Cuttack.

The suit was valued by the plaintiffs in the Court of first instance at a sum of Rs. 7,950. They contend now that the value of the property in respect to which the suit was brought has increased and that its present market value is close upon Rs. 12,000, and we are asked to send the case down to the Subordinate Judge to report upon the amount or value of the subject-matter of the suit. The plaintiffs do not contend that at the time when the suit was instituted the value of the subject-matter of the suit was more than that stated in the plaint, namely, Rs. 7,850. Their only contention is that at the present moment the value is in excess of Rs. 10,000. It seems to us quite clear that even if the petitioners could succeed in proving that the market value of the property in suit has gone up, that would not be sufficient to bring the case within the provisions of section 110 of the Civil Procedure Code. According to that section two conditions must be complied with before the Court can grant a certificate. The first is that the amount or value of the subject-matter of the suit in the Court of first instance must be Rs. 10,000 or upwards, and the second is that the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards. It is admitted in this case that it cannot be proved, whatever enquiry may take place, that the case comes within the first of these conditions. Therefore, it seems quite useless to send the case back to the Subordinate Judge for enquiry and this application must be dismissed with costs. Hearing fee three gold *mohurs*.

Application dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 303 OF 1917.

April 23, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Walmsley.

DEBENDRA NARAYAN SINGH—PLAINTIFF—APPELLANT

versus

NARENDRA NARAYAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Joint property—Co-owners, right of enjoyment of—Ouster—Joint owner in exclusive possession of part of joint property, liability of.

Each joint owner has a right to the possession of all the property held in common, equal to the right of each of his companions-in-interest and superior to that of all other persons. He has the same right to the use and enjoyment of the common property that he has to his sole property, except in so far as it is limited by the equal right of his co-sharers. In order to give rise to a cause of action against a co-sharer who is in sole possession of a joint property, it must be proved that his act has amounted to ouster or disseisin. [p. 977, col. 2; p. 978, col. 1.]

It is not easy to frame a formula which would cover all cases of ouster, but it may generally be stated that where there is an actual turning out or keeping excluded the party entitled to possession; there is an ouster. Any resistance preventing a co-sharer from obtaining effective possession is an ouster. Such resistance must be clearly and affirmatively shown and cannot be presumed from equivocal facts which may or may not have been designed to operate as an exclusion. [p. 978, col. 1.]

Where after the plaintiff had locked up certain granaries, warehouses and store rooms, his co-sharers, the defendants, put on additional locks but were ready to remove them as soon as the plaintiff would do so:

Held, that there had been no ouster of the plaintiff by the defendants. [p. 978, col. 2.]

A tenant-in-common cannot be held liable to his co-tenants for damages for use and occupation of the joint property unless there has been waste or ouster. Where one tenant-in-common occupies a part of the joint property without the assertion of a hostile or exclusive title and without a claim by his co-tenants to be admitted into possession, he is under no obligation even to account. [p. 978, col. 2.]

Appeal against the decree of the Subordinate Judge, Nadia, dated the 28th April 1917.

Babus *Jogesh Chunder Roy*, *Upendra Narayan Bagchi* and *Nagendra Nath Sen*, for the Appellant.

Babus *Bipin Behari Ghose*, *Panchanan Ghose* and *Gopendra Nath Das*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of damages and of possession of immoveable properties and of a money-lending business. The father of the plaintiff died on the 5th

DEBENDRA NARAYAN SINGH v. NARENDRA NARAYAN SINGH.

November 1899. He had made a testamentary disposition of his properties (now in suit) on the 4th March 1881. On the 27th April 1901 his widow, the mother of the plaintiff, obtained a Probate of the Will and took possession of the estate as executrix. Differences arose, however, amongst the members of the family, and in 1903 the plaintiff instituted a suit for construction of the Will and for administration of the estate, joining as defendants his brother and his nephews (the sons of a deceased brother). On the 13th March 1906 a consent decree was made in that litigation which had been brought up to this Court by way of appeal. Under that decree, the plaintiff became entitled to recover a sum of Rs. 15,000 from the estate and for that purpose to be placed in possession for a period of five years. The decree further directed that, upon the expiry of this period, the estate would be held in equal shares by the plaintiff, his brother, and the sons of his deceased brother. The plaintiff took possession on the 29th October 1906. On the 11th March 1909 the brother of the plaintiff commenced a suit for recovery of possession of his one-third share, on the allegation that the plaintiff had already realised more than his dues under the decree. The suit was decreed on the 12th April 1911. The decree directed that the then plaintiff do take possession within 15 days and that on failure to do so, he do forfeit his right to take an account of the sums received by his brother. The decree was accordingly forthwith executed on the 21st, 22nd and 23rd April 1911. The writ for delivery of possession directed that possession be delivered to the decree-holder by removal of any person who, though bound by the decree, refused to give up possession. Possession was delivered in the usual manner; bamboos were posted, drum was beaten and the purport of the decree and the writ was proclaimed. It was found that the plaintiff had locked up the granaries, ware-houses and store-rooms. The decree-holder and his nephews accordingly put on additional locks. The result was that it became impossible for any of the parties to obtain access to the ware-houses or store-rooms by removal of the lock put on by himself; they must act in concert and remove all the locks before any one could enter. Objection to the mode in which possession had been delivered was taken before the Execution Court, but was overruled on the 9th May 1911. An appeal was preferred to the High Court, but was ultimately abandoned on the 19th May 1913. Meanwhile, correspondence passed between the legal advisers of the parties with a view to arrange matters amicably so that the goods and papers locked up might be dealt with in due course. The attempt proved fruitless. The present plaintiff appears to have acted most unreasonably. He would not agree to the appointment of a common manager and also had the proceedings stayed by order of this Court. Ultimately, after the dismissal of the appeal to the High Court the Subordinate Judge directed a Commissioner, on the 15th January 1914, to unlock the doors. This order was carried out and on the 21st February 1914 the Commissioner submitted a report. He found that many of the granaries were empty and the papers were in disorder. On the 20th April 1917 the plaintiff commenced this action for damages on the allegation that the padlocks placed by him had been broken open at the time of delivery of possession and that the defendants had placed their own padlocks, with the result that the plaintiff had been ousted and had suffered heavy damages by the destruction and deterioration of the properties. The Subordinate Judge has held that the story set out by the plaintiff, namely, that the padlocks placed by him had been removed, was untrue. What happened was that when the defendant and his nephews found that the doors had been locked up by the plaintiff, they placed additional padlocks to make it impossible for the plaintiff to enter without their concurrence. We feel no doubt on the evidence that the Subordinate Judge has correctly found what actually took place. The question now arises, whether the conduct of the defendants was such as to amount in law to ouster of the plaintiff and thus to entitle him to claim damages.

The principles applicable to cases of this character are well settled. Each joint owner has the right to the possession of all the property held in common, equal to the right of each of his companions in interest and superior to that of all other persons. He has the same right to the use and enjoy-

ment of the common property that he has to his sole property, except in so far as it is limited by the equal right of his co-sharers. Accordingly, each co-owner may, at all times, reasonably enjoy every part of the common property, that is, he is entitled to such enjoyment as will not interfere with the like rights of the co-owners. It necessarily follows that one co-owner has no right to the exclusive possession and use of any particular portion of the joint property; and if he exercises such rights and excludes his co-sharer from participation in the possession, he must account to his co-sharer for his interest in the part from which he is ousted, even though he takes no more than his just share. But the co-sharer out of possession cannot complain of the mere possession of the co-owner, so long as he refrains from setting up any claim to share in that possession. Hence in order to give rise to a cause of action against the co-sharer, it must be proved that his act has amounted to ouster or disseisin. It is not easy to frame a formula which will cover all cases of ouster, but it may generally be stated that where there is an actual turning out or keeping excluded the party entitled to the possession, there is an ouster. Any resistance preventing a co-sharer from obtaining effective possession is an actual ouster. Such resistance must be clearly and affirmatively shown and is not presumed from equivocal facts which may or may not have been designed to operate as an exclusion. Thus, it was ruled in *Jacobs* v. *Seward* (1) that a finding that the gate of the premises was kept locked did not establish an ouster, because it did not show that plaintiff was excluded by the locking or that at some time he applied to have it unlocked and was refused. In the case before us, the defendants placed locks on the doors after the plaintiff had taken a similar measure. It was not their intention to exclude the plaintiff; they only desired to prevent the plaintiff from enjoying exclusive possession and were ready to remove the locks as soon as the plaintiff would do so and allow them to exercise their rights as joint owners. It was the plaintiff who acted unreasonably and in defiance of the rights of the defendants. He persisted in his obstructive attitude even after the title of the defendants had been judicially established and possession had been delivered by the Court. It is impossible to hold that there was ouster of the plaintiff by the defendants whose aim throughout has been, not to exclude the plaintiff, but to obtain joint possession with him. The principal ground set out in the plaint in support of the claim is consequently unsustainable.

In this Court, however, strenuous endeavour has been made to support the claim on a somewhat different ground. Our attention has been drawn to portions of the evidence to show that the 1st defendant has taken possession of some of the granaries and possibly carried off some of the crops stored there. No such allegation was made in the plaint, but even if it be established, the act could not constitute ouster or trespass on joint property. A tenant-in common, as was explained in *Mahesh Narain* v. *Nowbat Pathak* (2), cannot be held liable to his co-tenant for damages for use and occupation of the joint property, unless there has been waste or ouster. Where one tenant-in-common occupies part of the joint property without assertion of hostile or exclusive title and without claim by his co-tenant to be admitted into possession, he is under no obligation even to account, for he has a right to such occupancy. In the case before us, the embarrassment in which the parties now find themselves is due to the persistent attempt of the plaintiff to frustrate the decree obtained by the defendants against him for the enforcement of their undoubted rights in joint property.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) (1872) 5 H. L. 464; 41 L. J. C. P. 221; 27 L. 185.

(2) 32 C. 837; 1 C. L. J. 437.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 425 OF 1919.

June 19, 1919.

Present:—Mr. Justice Martineau.

MOTI RAM—PLAINTIFF—APPELLANT

versus

SANT RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 72, scope of—Mortgagor responsible for repairs—Mortgagee, whether entitled to carry out repairs—Charge on mortgaged property.

Section 72 of the Transfer of Property Act allows the mortgagee, in the absence of a contract to the contrary, to spend such money as is necessary for the preservation of the property and add it to the principal.

Where, however, there is a condition in a mortgage-deed that the mortgagor is to be responsible for repairs, the mortgagee is not entitled to do them himself without notice to the mortgagor and make the cost an additional charge on the property.

Second appeal from the decree of the District Judge, Gurdaspur, dated the 9th December 1918, varying that of the Munsif, 1st Class, Batala, District Gurdaspur, dated the 18th July 1918, decreeing plaintiff's claim with costs on payment of Rs. 650 to the defendants on or before 1st November 1918.

Lala *Fakir Chand*, for the Appellant.

Mr. *Chuni Lal Anand*, for the Respondents.

JUDGMENT.—The plaintiff has been given a decree for redemption of a shop and part of a house, and the only dispute is as to whether the defendants are entitled to the cost of repairs, for which they claim Rs. 100. The first Court held that they were not, and passed a decree for possession on payment of the mortgage-money Rs. 650. On appeal the District Judge allowed them Rs. 100 on account of annual repairs. The plaintiff has appealed to this Court, and the defendants have filed cross-objections, asking for costs.

What the defendants claimed was not for the expenditure incurred on annual repairs, but for specific repairs which they said they had carried out to the roof, platform and flooring. The Munsif found that they had failed to prove that they had done any such repairs, and apparently the District Judge was of the same opinion. The defendants do not appear to be entitled to be re-imbursed for expenditure on ordinary

annual repairs, for which they made no claim.

Moreover, under the terms of the mortgage-deed all repairs were to be done by the mortgagor. Counsel for the respondents contends that in accordance with section 72 of the Transfer of Property Act his clients were entitled to spend such money as was necessary for the preservation of the property and add it to the principal. Section 72, however, allows the mortgagee to do this only in the absence of a contract to the contrary. Where, as in the present case, there is a condition that the mortgagor is to be responsible for the repairs, the mortgagee is not entitled to do them himself without notice to the mortgagor and make the cost an additional charge on the property.

I accept the appeal, set aside the decree of the lower Appellate Court, and restore that of the first Court decreeing possession of the property on payment of Rs. 650 to the defendants. The defendants will pay the plaintiff's costs throughout. The cross-objections are dismissed.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 813 OF 1916.

August 1, 1918.

Present:—Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

A. T. S. RAJAM BHATTAR—PLAINTIFF—APPELLANT

versus

SINGARAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Religious office—Paricharaka, *sale of office of, to stranger, validity of—Public policy.*

Where the office of *paricharaka* is a religious office, the sale of the office to a person unconnected with the family that holds the office is void as being opposed to public policy. [p. 980, cols. 1 & 2.]

Rajah Yarmah Valia v. *Ravi Yarmah Kunhi*, 1 M. 235 (P. C.); 1 Ind. Jur. 134; 4 I. A. 76; 3 Sar. P. C. J. 687; 3 Suth P. C. J. 382; 1 Ind. Doc. (N. S.) 156, followed.

Mahamaya Debi v. *Haridas Holder*, 27 Ind. Cas. 460; 42 C. 455; 19 C. W. N. 208; 20 C. L. J. 183 and *Mancharam* v. *Ivanshankar*, 6 B. 298; 6 Ind. Jur. 426; 3 Ind. Dec. (N. S.) 655, distinguished.

RAJAM BHATTAR v. SINGARAMMALL.

Second appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 311 of 1914, preferred against the decree of the Court of the District Munsif, Conjeevaram, in Original Suit No. 522 of 1910.

FACTS appear from the judgment.

Mr. *G. S Venkatarama Aiyar*, for the Appellant.—The office of Parisharaka is an ordinary office and unlike that of a trustee of a religious trust. An alienation of such an office is not illegal. The alienation has been held to be valid in *Mahamaya Debi* v. *Haridas Haldar* (1) and *Mancharam* v. *Pranshankar* (2).

Mr. *C. Narasimhachariar* (with him Messrs. *K. S. Krishnaswami Aiyangar* and *T. M. Vedantam*), for the Respondents.—The finding is that the Parisharaka office was a religious office. An alienation of such an office is opposed to public policy. The Privy Council have held against the alienation in *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi* (3). See *Kuppa Gurukal* v. *Dorasami Gurukal* (4), *Annasami Pillai* v. *Ramakrishna Mudaliar*(5) and *Lakshmanaswami* v. *Rangamma* (6). In *Mahamaya Debi* v. *Haridas Haldar* (1) and *Mancharam* v. *Pranshankar* (2) the alienation was not to a stranger but to members of the family who were entitled to hold the office.

JUDGMENT.—The question for decision is whether the purchase by plaintiff of the office of Parisharaka is valid. From the finding as to the duties of Parisharaka it is clear that it is a religious office. It also appears that plaintiff is not connected with the family that held the office.

In *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi* (3) the Judicial Committee expressed their opinion that a custom which allowed the sale of a trusteeship for the pecuniary advantage of the trustee would be bad in law. The trusteeship referred to in that case was the Uraima of a Malabar temple. In a prior portion of the judgment we find the following:—"The first question is whether, independently of custom, persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships for this proposition; principle and reason seem to be strongly opposed to such a power and particularly to such an exercise of it as has taken place in this case."

In *Kuppa Gurukal* v. *Dorasami Gurukal* (4) it was held, following the *dictum* of the Privy Council in the above case, that alienation of religious trusts and offices is generally illegal, although it might be valid in exceptional circumstances such as when the transfer was to the next heir to the office. This principle was followed in *Annasami Pillai* v. *Ramakrishna Mudaliar* (5) and in *Lakshmanaswami* v. *Rangamma* (6) it was held that the sale of a religious office was opposed to public policy, and a similar view was taken in *Sundarambal Ammal* v. *Yogavanagurukkal* (7). We have not been referred to any authority directly to the contrary, although a custom recognising the validity of a transfer to those who by birth or marriage are entitled to hold the office was held to be reasonable in *Mahamaya Debi* v. *Haridas Haldar* (1) and in *Mancharam* v. *Pranshankar* (2) a transfer to one next in the line of succession was also held to be valid. These exceptional cases need not be considered now, for the transfer in the present case was made for consideration to a stranger. In accordance with the *dictum* in *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi* (3) which has been followed by all the subsequent decisions of this Court, we hold that the alienation sued on was invalid and dismiss this second appeal with costs.

M. C. P.

Appeal dismissed.

(1) 27 Ind. Cas. 400; 42 C. 455; 19 C. W. N. 208; 20 C. L. J. 183.

(2) 6 B. 298; 6 Ind. Jur. 426; 3 Ind. Dec. (N. S.) 655.

(3) 1 M. 235 (P. C.); 1 Ind. Jur. 134; 4 I. A. 76; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. S.) 156.

(4) 6 M. 76; 7 Ind. Jur. 75; 2 Ind. Dec. (N. S.) 331.

(5) 24 M. 219; 11 M. L. J. 1.

(6) 26 M. 31.

(7) 23 Ind. Cas. 72; 38 M. 950; 26 M. L. J. 315; (1914) M. W. N. 286; 1 L. W. 276.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 18 OF 1918.

May 22, 1919.

Present:—Mr. Justice Newbould.

SARBESWAR NAIK, MINOR, BY HIS UNCLE AND NEXT FRIEND NARENDRA NATH NAIK, AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAJANI KANTA CHAKRABARTY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), *Ch. X, Part II—Landlord and tenant—Rent, suit for—Tenant, whether can dispute amount of rent settled by Revenue Officer.*

In a suit for recovery of arrears of rent it is not open to the tenant to dispute the amount of rent settled by the Revenue Officer and entered in the rent roll prepared under Part II of Chapter X of the Bengal Tenancy Act.

Appeal against the decree of the Additional District Judge, Midnapore, dated the 4th October 1917, affirming that of the Munsif, 3rd Court, Tamluk, dated the 13th July 1916.

Babus *Jyotish Chandra Hazra* and *Mohesh Chandra Banerjee*, for the Appellants.

Babu *Saroda Charan Maity*, for the Respondents.

JUDGMENT.—This appeal arises out of a rent suit, the point in dispute being as to the rate of rent. Both the lower Courts have held that as the rent claimed by the plaintiffs was entered in the rent roll prepared under Part II, Chapter X of the Bengal Tenancy Act, it cannot now be disputed.

It is contended on behalf of the appellants that the entry was not made under Part II of Chapter X but under Part III. From the judgments of both the lower Courts I cannot believe that it was ever disputed in either Court that this entry was made under Part II. Both the Courts below referred to this as an ascertained fact, and the lower Appellate Court commenced its judgment by saying "The rent was settled by a Revenue Officer under Part II of Chapter X of the Bengal Tenancy Act." I cannot believe that the learned District Judge would have made this statement in this form without any comment, if there had been any suggestion before him that the record had not been prepared under that part. Further, the learned Pleader for the respondents has been able to show me that there are some materials from which the lower Appellate Court might draw the presumption that the Record of Rights was prepared under Part II and not under Part III. I am not prepared to hold that both the lower Courts were wrong in their decisions. If the record was so prepared, it is not now disputed that the decisions are right.

The appeal is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 111 OF 1917.

June 24, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Adami.

RAGHUNATH KURMI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DEO NARAIN RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings, issue not raised in—Court, power of, to frame issue—Res judicata—*Decree expressed in general terms—Judgment, whether can be looked at—Civil Procedure Code (Act V of* 1908), *O. XLI, rr.* 22, 31—*Appeal—Respondent, whether can support decree on ground decided against him—Appellate Court, power of, to modify decree.*

A Court is not justified in framing an issue on a question about which no dispute arises on the pleadings. [p. 983, col. 1.]

Where a decree is expressed in general terms, it is permissible to look to the judgment to ascertain what the real issues were in order to see how far the decree operates as *res judicata*. [p. 984, col. 1.]

It is open to a respondent in an appeal to support the decree on any of the grounds decided against him in the lower Court without preferring a cross-appeal [p 984, col. 1.]

An Appellate Court has power to pass any decree which ought to have been passed or to make any further decree as the case may require in favour of any of the parties [p. 984, col. 1.]

Appeal, under clause 10 of the Letters Patent, from a judgment of Mr. Justice Mullick, dated the 21st May 1917, reported as 40 Ind. Cas. 771, affirming a decree of the Subordinate Judge, Shahabad.

Mr. *Abani Bhusan Mukerji*, for the Appellants.

Mr. *Kaushal Narain*, for the Respondents.

RAGHUNATH KURMI v. DEO NARAIN RAI.

JUDGMENT.—The plaintiffs have preferred this appeal under clause 10 of the Letters Patent from a judgment of a single Judge of this Court, dated the 21st May 1917, affirming a decree of the Subordinate Judge.

The plaintiffs claim to be tenants of three small *raiyati* holdings in Mauza Parsanwah owned by the Dumraon Raj. In the last Survey and Settlement operations they were recorded in respect to two of the holdings as tenants of Deo Narain Rai, the defendant No. 1, who is described as a tenure-holder under the Raj, whereas they contend that they are in fact direct tenants under the Maharaja of Dumraon and that the defendant No. 1 has no interest as tenure-holder and is not their landlord. They were further aggrieved by the fact that three plots of land numbered 347, 348 and 482 in the survey had been recorded in the Survey Khatian as included within the Khata of the defendant No. 1, whereas they asserted that these plots should have been included as portions of their holdings. They, therefore, instituted a suit against (1) Deo Narain Rai, (2) the Maharaja of Dumraon and (3) Brija Raut, a *mokararidar* of the Maharaja who has mortgaged his interest to the latter.

By their prayer in the plaint the plaintiffs claimed the following declarations: (1) that the plaintiffs are the direct *raiyats* under the defendants Nos. 2 and 3, (2) that the relationship of tenant and landlord does not exist between the plaintiffs and defendant No. 1, (3) that the defendant No. 1 is not a tenure-holder of the lands in suit and (4) that the disputed plots numbered 347, 348 and 482 are not part of the tenure of defendant No. 1 but part of the plaintiffs' holdings and that the entries in the survey record to the contrary are wrong. They also claimed confirmation of their possession or alternatively delivery of possession.

The defendant No. 3 did not appear and service of summons on him was not proved. The defendants Nos. 1 and 2 contested the suit. The defendant No. 1 pleaded that he was a tenure-holder of the lands in suit under the Maharaja and that the disputed plots were not part of the holdings recorded in the plaintiffs' names. The Maharaja also pleaded that the plaintiffs were not his tenants but that the defendant No. 1 was. The defendant No. 1 further contended that the plaintiffs had no interest in the disputed holdings which had been settled in the names of the plaintiff No. 1 and his uncle repectively as *benamidars* of the defendant No. 1, who was himself the real holder of the occupancy rights and that he paid the rent and took receipts in the *farzi* name of the plaintiffs, who as well as their ancestors were and had been this defendant's ploughmen. He further contended that the plaintiffs had improperly got themselves recorded as his *raiyats*, whereas they had no rights in the land at all and the survey record was incorrect in so far as it recorded them as tenants under him.

It will thus be seen that the defendants agreed with the plaintiffs that there was no relationship of landlord and tenant between them although for different reasons. On the other issues they were in dispute.

The Munsif found (1) that the disputed plots were not part of the holdings claimed by the plaintiffs, (2) that the plaintiffs were not the direct tenants of the Raj, (3) that the defendant No. 1 was the tenure-holder of the disputed holdings. With regard to the question whether the plaintiffs were tenants under the defendant No. 1, I have already remarked that the plaintiffs disclaimed any such relationship and asked for a declaration that they were not the tenants of this defendant. The defendants were agreed about this and there was, therefore, no issue on this question raised by the pleadings. There was no alternative claim that they held under defendant No. 1 in the event of the first declaration being refused. The Munsif ought, therefore, to have treated the matter as concluded by the pleadings. It appears, however, from his judgment that he framed a separate issue No. 4: "Does the relationship of landlord and tenant exist between the plaintiffs and defendant No. 1 in respect of Khatas numbered 175 and 178" (the disputed holdings). In dealing with this question he said: "It seems to me that the defendant No. 1, after taking settlement of the lands *benami* in the name of plaintiff No. 1 and his uncle, allowed the plaintiffs to cultivate the land taking certain shares of the produce and used to pay the

rent of the holdings to the Raj." He then came to the conclusion that the oral evidence on both sides was not sufficient to rebut the presumption of the settlement entry and held that the Record of Rights was not liable to alteration and that the plaintiffs were the tenants of defendant No. 1. He then ordered that the suit be dismissed with costs. The decree has not been produced before us, but it is agreed that it is merely to the effect that the suit is dismissed with costs.

From this decision the plaintiffs appealed to the Subordinate Judge. It will be seen that in so far as the judgment of the Munsif is concerned, it found that the plaintiffs were the tenants of the defendant No. 1. This was, in fact, a finding against the defendants who denied the relationship. In fact there was no issue between the parties on this point and the Munsif ought not to have raised it as it was not the case of either side. He did, however, settle issue No. 4 raising this very question and decided it in the plaintiffs' favour. The decree, therefore, dismissing the suit with costs, although it was drawn in apt language to express a dismissal of the suit as originally pleaded, did not properly describe the result of the findings upon the 4th issue, which was really a finding in favour of the plaintiffs assuming they were found not to be the tenants of the Raj. When the plaintiffs appealed to the Subordinate Judge, the defendants entered a cross-appeal although the decree was apparently in their favour and contended that the finding that the plaintiffs were their tenants should be set aside. No objection was raised to this procedure at the time. The Subordinate Judge agreed with the Munsif in finding that the plaintiffs were not tenants of the Raj and as both parties disputed the correctness of the entry in the Survey Khatian showing the plaintiffs as tenants of defendant No. 1, he allowed the cross-appeal and a decree was entered accordingly, the material part of which was: "It is ordered that the appeal is dismissed with costs and the cross-appeal is allowed without costs and the plaintiffs appellants have no *kasht* rights." From this decision the plaintiffs appealed to this Court and contended that the lower Appellate Court should not have entertained the cross-appeal as the decree was in favour of the defendants who had, therefore, no right of appeal, as the Code of Civil Procedure only allows appeals against decrees and not against findings merely.

The learned Judge of this Court who heard the appeal was of opinion that although he thought the finding that the plaintiffs were the tenants of defendant No. 1 would operate as *res judicata* under the decree of the Munsif, it was not necessary to decide this point because the defendant No. 1 could, without filing a cross-appeal at all, have supported the Munsif's decree by satisfying the Subordinate Judge that the finding was wrong and that the decree, in so far as it dismissed the plaintiffs' claim including a dismissal of the claim under issue No. 4 that they were tenants of the defendant No. 1, was right. He, therefore, dismissed the appeal with costs.

From that decision the plaintiffs have preferred the present appeal.

The real difficulty in the case arises from the fact that the Munsif framed an issue on a question about which no dispute arose on the pleadings and having decided it really in favour of the plaintiffs and against the defendant No. 1, he dismissed the plaintiffs' suit and entered a decree to that effect, ignoring or forgetting the fact that part of his findings were in favour of the plaintiffs and that he ought to have decreed the claim in part, treating the case as one in which the plaintiffs had claimed in the alternative that they were tenants of the defendant No. 1. It is true the plaint claimed a declaration, first, that the plaintiffs were tenants of the Maharaja and, secondly, that they were not tenants of the defendant No. 1. The defendants denied the right to the first declaration but admitted the second, and as there was no alternative claim that in the event of the first being decided against the plaintiffs they were entitled to a declaration that they were at least the tenants of the defendant No. 1, there was no necessity to raise this issue. This issue, however, was raised at the trial and decided in the plaintiffs' favour just as if it had been claimed in the plaint as an alternative relief. It must be taken, therefore, that it was one of the issues in the case and although the finding was in the plaintiffs' favour the decree on this as on other

issues was in favour of the defendants. Now when the decree is in general terms, it is permissible to look to the judgment to ascertain what the real issues were in order to see how far the decree operates as *res judicata*, and if the Munsif's decree is binding, it must be taken that the 4th issue was decided against the plaintiffs and in this respect it was not in accordance with the findings. The plaintiffs might have applied to the Munsif to amend the decree in their favour in accordance with the findings or they could have appealed. They chose the latter course. In these circumstances it was open to the respondent before the Subordinate Judge without instituting a cross appeal to support the decree on any of the grounds decided against him in the Court below. This is in fact what the defendant did and his cross-appeal was not really necessary. The defendant No. 1, the respondent before the Subordinate Judge, convinced him that the Munsif's finding was wrong and that the decree was right, although its effect was not that which the Munsif had intended. It seems to me, therefore, that although in form the Subordinate Judge may have been wrong in saying that the cross-appeal was allowed, as the decree was not appealable by the defendant in substance, he was right in embodying in the decree a declaration that the plaintiffs had no *kasht* right in the property in suit. By Order XLI, rule 33, the Appellate Court has power to pass any decree which ought to have been passed or to make any further decree as the case may require in favour of any of the parties. The decree on the facts found by the Subordinate Judge was right, but he was entitled in order to prevent ambiguity to add that the plaintiffs had no *kasht* right. In these circumstances it appears to me that the learned Judge of this Court was right in dismissing the appeal. This appeal, therefore, fails and is dismissed with costs. In order to prevent any further question, the decree of this Court will be that the appeal is dismissed with costs and it is further declared that the plaintiffs have no interest as tenants of the lands in suit.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1463 OF 1917.

May 23, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Duval.

KALIKESH CHANDRA CHATTOPADHYA—PLAINTIFF—APPELLANT

versus

JAHARULLAH MANDAL SARKAR—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 74—Penalty—Landlord and tenant—Kabuliyat *fixing rent—Enhancement of rent on failure to take fresh settlement, whether penalty.*

In a *kabuliyat* granted for a term of years, the rent was stated to be Rs. 76 but an abatement of Rs. 26 was allowed for the term of the *kabuliyat*, it being provided that on expiry of the term there would be a fresh settlement, and that, so long as the fresh settlement was not made, the rent was to be Rs. 76. For some years after the expiry of the term of the *kabuliyat*, the landlord accepted Rs. 50 as rent, and then sued to recover the balance:

Held, that he was not entitled to do so, as the stipulation to pay a higher rate of rent was in its nature penal and was never intended to be acted upon. [p. 985, col. 1.]

Appeal against the decree of the District Judge, Rungpur, dated the 25th April 1917, affirming that of the Munsif, 2nd Court, Gaibandha, dated the 10th April 1916.

Babus *D. N. Chuckerbutty*, *Broja Lal Chuckerbutty* and *Mohim M. Bhattacharjee*, for the Appellant.

Babu *Manmatha Nath Mookerjee*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for rent based upon a *kabuliyat*.

The *kabuliyat* was for a term of 10 years. It was stated in the *kabuliyat* that the rent was fixed at Rs. 76 a year, that there was to be a temporary abatement of Rs. 26, that Rs. 50 would be payable for the term of the *kabuliyat*, that on the expiry of the term there would be a fresh settlement, that so long as a fresh settlement was not made, the rent was to be paid at the rate of Rs. 76 a year.

The defence *inter alia* was to the effect that the stipulation about *rashad* inserted in the *kabuliyat* was a penal clause and was never intended to be acted upon.

It is found that although the term of the lease expired long ago, the defendant went on paying rent at the rate of Rs. 50, which appears to have been entered in the landlord's book as *amanat* and although the

plaintiff's servants pressed the defendant to enter into a fresh settlement, he never demanded rent at the rate of Rs. 76. The Courts below have held under the circumstances that the stipulation for payment of rent at the rate of Rs. 76, after the expiry of the term and so long as there was no fresh settlement, was never intended to be acted upon.

No doubt, the mere fact that the rent was realized at the rate of Rs. 50 for a number of years does not preclude the landlord from recovering rent at the rate agreed upon, because the receipt of rent at the reduced rate is consistent with the reduction having been a mere voluntary and temporary abatement: and any subsequent variation of the rent would require a registered instrument as the original *kabuliyat* in the present case was a registered document. But the Courts below have in effect accepted the defendants' case, namely, that the stipulation that the defendants should pay at the rate of Rs. 76, after the expiry of the term so long as a fresh *bandobast* was not made, was inserted in the *kabuliyat* as a penal clause, that is for the purpose of putting pressure upon the defendant to enter into a fresh settlement after the expiry of the term of the *kabuliyat*, and was not intended to be acted upon.

Having regard to the facts found, we think that the appeal must be dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 65 OF 1917.

April 23, 1919.

Present:—Mr Daniels, A. J. C., and Mr. Lyle, A. J. C.

Thakur BASANT SINGH—DEFENDANT No. 1—APPELLANT

versus

Thakur RAMPAL SINGH—PLAINTIFF,

Musammat RAJJAN KUAR—DEFENDANT No. 2—RESPONDENTS.

Mortgage—Redemption by trespasser, effect of—Mortgagor, position of—Limitation Act (IX of 1908), s. 19, Sch. I, Art. 135—Acknowledgment of mortgage by mortgagor, effect of—Mortgage-deed giving several options to mortgagee—Default made by mortgagor—Mortgagee, remedy of—Limitation, commencement of—Transfer of Property Act (IV of 1882), s. 91—Redemption—Reversioner, whether entitled to redeem during lifetime of limited owner—U. P. Court of Wards Manual, para. 218—Release, deed of, effect of—Interpretation of Statutes—Act repealing earlier Act, effect of.

If a mortgagee allows a mere trespasser, who has not perfected his title by adverse possession, to redeem the mortgage, the true owner is entitled to treat the transaction as a nullity. [p. 988, col. 1.]

The fact that a trespasser acquires by adverse possession the interest of a mortgagor, cannot validate a redemption effected by him before he acquired that interest. [p. 991, col. 1.]

Where a mortgage-deed gives the mortgagee more options than one for the purpose of realising his principal money or interest, he is quite at liberty to exercise any of those options at his will. [p. 992, col. 2.]

A mortgage-deed provided that interest would be paid every six months, and that in default of such payment the mortgagee might,

(*a*) allow the interest to run on, treating the unpaid interest as principal,

(*b*) take a bond from the mortgagor for the amount of interest accrued up to date,

(*c*) take possession of the mortgaged property,

(*d*) sue for sale of the mortgaged property in lieu of principal and interest then due,

and, further, that the mortgagee could also wait for the expiry of the period fixed in the deed for payment of the entire money and then take possession of the property. Nothing was paid by the mortgagor to the mortgagee and after the expiry of the said period the mortgagee sued the mortgagor for possession of the property:

Held, that the mortgagee's right to possession of the property could not be deemed to have determined within the meaning of Article 135, Schedule I to the Limitation Act, so long as he had given no intimation of any intention to adopt the remedy given in the third clause mentioned above. [p. 992, col. 2.]

An admission by a mortgagor of his liability under the mortgage, within the meaning of section 19 of the Limitation Act, carries with it an admission of all the remedies to which the mortgagee might be entitled under it. [p. 993, col. 1.]

During the lifetime of a limited owner the reversioner has no more than a mere *spes successionis* and has not, therefore, a sufficient interest in the property of that owner within the meaning of section 91 of the Transfer of Property Act to enable him to redeem a mortgage on that property effected by the said owner [p. 988, col. 1.]

Gumani Singh v. *Chakkar Singh*, 8 O. C. 349, overruled.

Where an Act repeals a previous Act and provides that all orders issued under the repealed Act shall, so far as may be, be deemed to have been issued under the new Act, the provision is designed to safeguard the validity of orders, appointments, etc., issued under the repealed Act, and not to give retrospective effect to the new Act. [p. 990, col. 1.]

The object and effect of a deed of release required by paragraph 218 of the U. P. Court of Wards

Manual is merely to protect the Court of Wards from subsequent claims by the ward in respect of anything done during the period of superintendence. It has nothing to do with claims against third parties. [p. 990, col. 1.]

Appeal from the decree of the Subordinate Judge, Sitapur, dated the 25th April 1917.

The Hon'ble Pandit *Gokaran Nath Misra*, Mr. *A. P. Sen* and Babu *Basudeo Lal*, for the Appellant

The Hon'ble Syed *Wazir Hasan*, Mr. *St. George Jackson*, Babus *Chhail Behari Lal* and *Satyanand Roy*, for Respondent No. 1.

JUDGMENT.—This is an appeal by the defendant Thakur Basant Singh in a suit brought by Thakur Rampal Singh for possession as mortgagee of the suit properties or in the alternative for foreclosure or for sale. The suit was based on two mortgages, a mortgage partly simple and partly usufructuary dated the 29th May 1890 and a deed of further charge dated the 3rd November 1890, both executed in favour of the plaintiff's deceased father Thakur Pirthipal Singh by the latter's mother in-law *Musammat* Phul Kuar. The appellant was at the time of the suit admittedly in possession of all the suit properties except a 2 *biswas* 2 *biswansis* share in Mirzapur. The following pedigree will show the relationship of the parties.

RAGHUNATH

First wife = Second wife

Musammat Phul Kuar =Gulab Singh, — Basant Singh (Defendant No. 1 Appellant).

Musammat Munna Kuar =Thakur Pirthipal Singh.

Thakur Rampal Singh (Plaintiff). — Daughter (dead). — *Musammat* Rajjan (Defendant No. 2.

Musammat Phul Kuar acquired the properties in suit under the Will of her husband Gulab Singh, and it is now common ground that she obtained them as full owner and not merely with a Hindu widow's estate. This point was contested both in the Court below and in the grounds of appeal, but the learned Advocate who represents the appellant has admitted that he is unable to support this plea. The property being *stridhan*, *Musammat* Phul Kuar's interest descended on her death subject to the mortgages in suit to her daughter *Musammat* Munna Kuar and then to the latter's daughter *Musammat* Rajjan, who was on this account impleaded. She did not defend the suit and has not been represented in this Court.

A number of issues were framed in the lower Court and 15 pleas were taken in the grounds of appeal to this Court, but these pleas are all referable to two main grounds of defence, which are :—

I. That the mortgage has been redeemed, and

II. That the suit is barred by limitation.

It is now admitted with reference to the Privy Council ruling in *Sheo Partab Bahadur Singh* v. *Allahabad Bank, Ltd* (1) that apart from special custom *Musammat* Phul Kuar's interest in the property descended first to her daughter Munna Kuar who took a Hindu female's estate, and after her death to the 2nd defendant. Basant Singh, however, pleads a special custom by which daughters are excluded. If this custom is proved, he would be the immediate heir on *Musammat* Phul Kuar's death. He also pleads adverse possession. It is admitted that he remained in possession of the whole of the mortgaged properties, except one village Patti Mirzapur as to possession of which the parties are at issue. The following dates which are given in the lower Court's judgment are material and are now admitted to be correct :—

Date of Phul Kuar's death	23rd July 1892.
Date of plaintiff's birth	22nd March 1894.
Date of Pirthipal Singh's death	24th March 1894.
Year of Munna Kuar's death	1899.

The original mortgagee Pirthipal Singh became insane before his death and his estate was taken over by the Court of Wards in 1893. On his death in the following year the Court of Wards again took charge of the estate on behalf of the infant heir, namely, the plaintiff, and continued to hold possession till the plaintiff attained majority in 1915. In 1899 the Deputy Commissioner, who was managing the property on behalf of the Court of Wards, was proposing to file a suit against the defendant Basant Singh for possession of the property. Negotiations were entered into with him, which resulted in his paying a sum of Rs. 8,080-5-6 on 14th December 1899 to the Deputy Commissioner in full settlement of the mortgage.

(1) 25 A. 476 (P. C.); 7 C. W. N. 840; 13 M. L. J. 335; 5 Bom. L. R. 833; 30 I. A. 209; 8 Sar. P. C. J. 535.

The mortgage-deeds were ultimately returned to him by the Deputy Commissioner's order of 26th April 1900 (Exhibit 36). The learned Subordinate Judge has found that Basant Singh was not at the time the owner of the equity of redemption and that the action of the Collector in accepting from him in satisfaction of the mortgage a sum admittedly less than one-third of what was due on it at the time was not in the interest of the plaintiff and is not binding on him.

The appellant's contentions on this issue are :—

1. That by a custom obtaining in the clan to which the parties belonged daughters were excluded from inheritance and that, therefore, he succeeded to the equity of redemption on *Musammat* Phul Kuar's death and was entitled to redeem.

2. That even if the custom be not proved, he was entitled to redeem by virtue of his possessory title.

3. That in any case the action of the Court of Wards in allowing redemption is binding in law on the plaintiff.

4. That whether the appellant was in 1899 entitled to redeem or not, he has now acquired by adverse possession the interest of the mortgagor and that this debars the plaintiff from contesting the redemption to which he was then a party.

On the question of custom we are in entire agreement with the view of the learned Subordinate Judge There is, undoubtedly, a custom prevalent in the villages in suit and recorded in the *wajib ul arzes* by which daughters are excluded from inheriting the property of their fathers, but the appellant has wholly failed to show that this custom extends to property inherited from females which is *stridhan* in the special sense. There are, as the learned Subordinate Judge has pointed out, ample indications in the *wajib-ul-arzes* relied on that the persons who drew up those documents had in their minds the ordinary case of succession to a male owner, and even those witnesses on whose evidence the appellant relies were unable to give any clear instance of exclusion from succession to *stridhan*. The instances which they bring forward are instances of widows succeeding to their husbands' property with an ordinary widow's estate and being succeeded on their death by male collaterals, although there was a daughter in existence who would under the ordinary law have inherited. They say in some instances that there was moveable property and ornaments in existence at the time of the widow's death, but moveable property may or may not be *stridhan* in the strict sense (compare Trevelyan's Hindu Law, 2nd Edition, page 469). Ordinarily a woman with a limited estate has no greater power of disposal over moveables than she has over immoveables, and it has not been shown that the property in question was purchased with savings so as to become the woman's own property. In fact in several cases the witnesses have stated very definitely that the widow had no power of transfer over the moveable property to which they refer. This is expressly stated by Gur Prasad, D. W. No. 9, Khushal Singh, D. W. No. 10, and Shankar Singh, D. W. No. 13, with reference to the instances which they bring forward. Similarly Kalyan Singh, D. W. No. 11, Baldeo Singh, D. W. No. 12, Bisheshwar Bakhsh, D. W. No. 18, and others admit that they know of no instance in which a Bachhil Thakurain held any property with absolute power of disposition. Even where witnesses have stated in examination in-chief that the custom of exclusion extends to the property of the mother, when in cross-examination they were asked to repeat the actual custom which they had heard, they generally omitted any mention of the mother and simply said a daughter (or a daughter or a granddaughter) has no right. One witness Baldeo Singh, D. W. No. 12, who had stated in examination-in-chief that the custom extended to the property of the mother, was candid enough to admit in cross-examination that he had not heard from his ancestors of any such custom extending to the property of the mother, nor did he know of any instance but that what he had stated in examination-in-chief was merely his own personal opinion. Where daughters are excluded from inheriting the property of their fathers, it is obvious that cases of women owning property in their own right as absolute owners must be very rare, and this will sufficiently account both for the absence of any specific mention of *stridhan* property in the *wajib ul-arzes* and for the absence of rebutting evidence. In the judgment of this Court in a suit brought by the appellant against *Musammat* Munna

BASANT SINGH v. RAMPAL SINGH.

Kuar to contest the alienation made by her mother, it was remarked with reference to these very *wajib-ul arzes* that, because under them a daughter could not inherit her father's property, this would be a strong reason for Gulab Singh under his Will to have given *Musammat* Phul Kuar a heritable estate, *descendible to his daughter*. This assumes that the custom does not extend to *stridhan* property and that such property would descend to the daughter. It can be readily understood that the reasons which would lead to daughters being debarred from inheriting to a male would not operate to anything like the same extent in the case of property which was already held by a female. After considering all the evidence which has been adduced under this head, we are satisfied that the conclusion at which the learned Subordinate Judge has arrived is correct.

As to the second contention the appellant can point to no authority in which it has ever been held that a trespasser who has not perfected his title by adverse possession is entitled to redeem. It is clear that if a mortgagee allowed a mere trespasser to redeem, the true owner would be entitled to treat the transaction as a nullity. It is true that there is one case of this Court, *Gumani Singh* v. *Chakkar Singh* (2), in which it has been held that a reversioner has a sufficient interest in the property within the meaning of section 91 of the Transfer of Property Act to enable him to redeem a mortgage during the lifetime of a Hindu widow in possession. This doctrine has been dissented from by the Allahabad High Court in *Ram Chandar* v. *Kallu* (3) and in view of the principle which has been recently affirmed by the Privy Council in *Amrit Narayan Singh* v. *Gaya Singh* (4) that during the life of the limited owner a reversioner has no more than *spes successionis*, we do not ourselves see how it is possible to hold that he has a present interest in the property within the meaning of section 91. The Madras High Court in *Narayana Kutti Goundan* v. *Pechiammal* (5) has approved of the Allahabad ruling though it has at the same time held that, where a suit has been brought on a mortgage and the property is actually being put up for sale, it is open to the reversioner to prevent the loss of his contingent right by paying the amount of the decree and that he thereby acquires a charge over the mortgaged property. During the life of *Musammat* Munna Kuar the appellant was not even the next reversioner and though it is admitted that she died in 1899, the date of her death is not known and it cannot be said with certainty whether she died before or after 14th December 1899, the date on which the mortgage money was paid.

The third contention is with the plea of custom that which has been most strenuously urged on this issue. The appellant seeks to rely on section 47 of the U. P. Court of Wards Act, 189), which came into force on 3rd January 1900. That section runs:—

"The exercise of any discretion conferred on the Local Government or the Court of Wards by this Act shall not be questioned in any Civil Court."

The respondent on the other hand contends that redemption took place on 14th December 1899, when the powers of the Court of Wards were still regulated by Chapter VIII of Act XVII of 1876, which contained no similar provision. It may be noted that at one stage of the proceedings the plaintiff's Pleader made a statement contradictory to the case which he had originally set up and which he still sets up. In paragraph 17 of the plaint it is stated that redemption took place in December 1897, 1897 being clearly a slip for 189). On the other hand in the proceedings of 29th November 1916 his Pleader stated that the money was deposited in December 189) but that redemption took place either in 1900 or 1901. The fact of deposit of the money was correctly stated; the question whether it operated to redeem the mortgage is one of law and it would not be fair to hold the plaintiff bound by the mistake of his Pleader. The proper course is to decide the point on the evidence. The documentary evidence relating to this transaction is incomplete; apparently some of the correspondence

(2) 8 O. C. 349.
(3) 20 A. 497; A. W. N. (1898), 225; 5 A. L. J. 631.
(4) 44 Ind Cas 402; 45 C 590; 23 M. L. T. 142; 22 C. W. N. 402; 27 C. L. J. 296; 34 M. L J. 293; 4 P. L. W. 22; 16 A. L J. 265; (1918) M. W. N. 306; 7 L. W. 581; 20 Bom. L. R. 548; 45 I. A. 35 (P. C.).

(5) 15 Ind. Cas 203; 36 M. 426; 23 M. L. J. 354; 11 M. L. T. 174; (1912) M. W. N. 353.

between the Deputy Commissioner, the Commissioner and the Board of Revenue was withheld by the Board as being confidential under the provisions of section 123 of the Evidence Act. Exhibit A30 is a petition of Basant Singh to the Deputy Commissioner of Sitapur asking to be allowed to redeem the mortgages in suit. Exhibit A25 is a letter of the Deputy Commissioner to the Commissioner dated the 31st October 1899, suggesting that Basant Singh's applications should be accepted. On 13th December 1899 the Board wrote to the Commissioner (Exhibit A26) directing that the plaintiff's sisters (he had then two sisters living, *Musammat* Rajjan Kuar and another sister, since deceased) should be given the first opportunity of redeeming and that if they were unable or unwilling to do so, the appellant Basant Singh should be permitted to redeem. On 20th December the Commissioner wrote to the Board (Exhibit A28) inquiring the exact effect of their letter. In the meantime, however, on 14th December 1899, Basant Singh tendered the amount of Rs. 8,080 6 6 with an application which is Exhibit 20, and the Deputy Commissioner accepted the amount and definitely credited it in satisfaction of the mortgage. He did not hold it in deposit pending further orders of the Board but he placed it at once to the credit of the estate. The Deputy Commissioner, Mr. Pike, was about to leave the district and it may be that he was desirous of getting the matter definitely settled before his departure. It does not appear that *Musammat* Rajjan Kuar or her sister was ever actually consulted. On 15th January 1900, we find Mr. Pike's successor reporting to the Commissioner (Exhibit A29) that one of the plaintiff's sisters was married to an impoverished Thakur in the Mainpuri District while the other was a child nine years old maintained by the estate. He concludes his letter by saying:

"They are not at present in the position to pay up the mortgage money and in consequence my predecessor has accepted the money due on mortgages from Basant Singh and settled the matter."

It would seem that the Board must have accepted this as a *fait accompli*, for on 25th April 1900 we find a report being made to the Deputy Commissioner stating that Basant Singh had applied for the return of the mortgage-deeds and asking whether they should be given back to him. On this the Deputy Commissioner by an order dated 26th April directed the return of the documents (Exhibit 36). That no further correspondence had been received from the Board or the Commissioner in the meantime may be inferred from the office report which concludes: "Please see correspondence ending with your No. 1165 of 17th January." This letter No. 1165 of 17th January is Exhibit A29 already referred to, which though dated 15th January appears to have been despatched on the 17th. From the fact that this letter is referred to as terminating the correspondence it may be inferred that no further reply had been received from the Board.

The date on which the money was accepted and credited in satisfaction of the mortgage must be taken as the actual date of redemption. The fact that there was some delay in returning the documents is immaterial. The only argument which requires consideration on this point is that, as under section 161 of Act XVII of 1876, as amended by Act XX of 1890, the Board of Revenue was declared to be the Court of Wards, the Deputy Commissioner had no authority to accept the money and, therefore, the actual date of redemption could only be the date on which his action was endorsed by the Board. The answer to this objection is that section 177A of the same Act lays down that the Court of Wards may exercise all or any of the powers conferred on it by this Act through the Deputy Commissioner of the District in which the property is situated. In this case it would seem that the Court of Wards did exercise its powers through the Deputy Commissioner. The Board appears to have accepted as concluding the transaction the Deputy Commissioner's letter reporting the acceptance of the money and to have communicated no further orders to the Deputy Commissioner on the subject. Reliance is placed on the appellant's behalf on section 2 of the Court of Wards Act, 1899, which says that all orders issued under repealed enactments shall, so far as may be, be deemed to have been issued under the new Act, and on the strength of this it is argued that even if redemption took place under Act XVII of 1876, section 47 of Act III of 1899 should be held to be appli-

cable. This argument is clearly untenable. Section 2 is merely the usual provision, now incorporated in a modified form in section 24 of the U. P. General Clauses Act, 1904, designed to safeguard the validity of orders, appointments, etc., issued under a repealed enactment. It was certainly never intended to give retrospective effect to Act, III of 1899. Equally untenable is the argument that the plaintiff is precluded from challenging the Deputy Commissioner's action because on the release of his estate in March 1915 he executed the usual receipt or deed of release (Exhibit A31) required by paragraph 218 of the Court of Wards Manual declaring that he releases the Court of Wards from all accounts, claims or demands whatsoever for and in respect of.....any act done or suffered by the Court of Wards itself or under its orders or with its consent in respect of his estate or the management thereof. The object and effect of this dead is merely to protect the Court of Wards from subsequent claims by the ward in respect of anything done during the period of superintendence. It has nothing to do with claims against third parties. Even if section 47 of Act III of 1899 had been applicable, it has not been shown to us that there is anything in that Act to confer on the Court of Wards a discretion to allow redemption of a mortgage by a person who had no legal title to redeem: the section extends only to the exercise of a discretion conferred on the Court of Wards *by this Act*.

If, as we have held, redemption actually took place under Act XVII of 1876, there is this further difficulty in the appellant's way that the powers of the Court of Wards as defined in section 172 of that Act were these:—

"The Court of Wards shall have power to give such leases or farms of the whole or part of the immoveable property under its charge, and to mortgage or sell any part of such property, and to do all such other acts as it may judge to be most for the benefit of the property and the advantage of the disqualified proprietors."

It is perfectly clear that it was not to the advantage of the disqualified proprietor to accept redemption for a sum of Rs. 8,080 at a time when the amount due on the mortgage was admittedly in excess of Rs. 26,000, nor does it appear that either the Deputy Commissioner or the Board exercised a judgment as to what was for the ward's benefit in accepting Basant Singh's offer. The Deputy Commissioner seems rather to have been guided by a consideration of what would be fair toward Basant Singh. The latter had alleged in his application what was no doubt true, namely, that the conditions of the mortgage were very hard and that if he was required to pay the full amount, he would be obliged to part with his own ancestral property in order to do so. He asked to be allowed to redeem on payment of "double or at most triple the amount of the principal mortgage money", which taking the two deeds together was Rs. 3,500. The amount actually paid was less than the amount of his larger offer and less than one-third of what was actually due. In this connection the remarks in the judgment of a Bench of this Court in an unreported case (First Civil Appeals Nos. 30 and 32 of 1908), which is printed as Exhibit 42 on pages 123 129 of the respondent's paper-book, are very apposite. Mr. Piggott in delivering the leading judgment, in which Mr. Chamier concurred, said:—

"Had such action been taken by an ordinary guardian, it can scarcely be denied that the ward would have been entitled to dispute it on attaining his majority. Making every allowance for the somewhat ill-defined extent to which the powers of a Deputy Commissioner under section 172 (the reference is perhaps to 177A) of the Oudh Land Revenue Act may be held to have exceeded those of an ordinary guardian, I do not think that the action of the Court of Wards in this case can be supported. It amounted to the abandonment for no consideration whatever of a very considerable sum legally due to the disqualified proprietor.....This was certainly not an act done for the benefit of the disqualified proprietor and in view of the mistake of fact under which the Deputy Commissioner was labouring, and of the evidence afforded by the correspondence on the record as to the attitude of mind with which he approached the question, it seems to me that he was thinking rather of the sort of position which the Local Government might reasonably have adopted towards a respectable and deserving gentleman like Thakur Mohar Singh, than of what was required by the interests of the disqualified

proprietor under his charge." Substitute "mistake of law" for "mistake of fact" (for the Deputy Commissioner seems to have thought that Basant Singh was legally entitled to redeem) and "Basant Singh" for "Mohar Singh" and the above remarks are exactly applicable to the present case.

As regards the fourth contention it has not been shown how the fact that Basant Singh may now have acquired adverse possession of the mortgagor's interest against *Musammat* Rajjan Kuar can affect the validity of what was done in the year 1892.

On the question of limitation the appellant's case is that the mortgagee became entitled to possession of Patti Mirzapur from the date of the first of the two mortgages, namely, 29th May 1890, and of the remaining property on the occurrence of the first default in payment of interest six months later. The first part of the contention is admitted--the mortgage-deed, undoubtedly, provided for immediate possession of this *patti*—but it is contended that the mortgagee actually obtained possession; the second part of the contention is denied. It is admitted that no interest was ever paid under the deed. If limitation began to run in the year 1890 when Pirthipal Singh was alive and of sound mind, no subsequent disability of the plaintiff or his father could operate to stop its running. The plaintiff's case is that limitation did not begin to run at earliest till the year 1899 when the mortgage was redeemed. The plaintiff was admittedly a minor at that time and as the suit has been brought well within three years of his attaining majority, limitation is in this view saved by section 6 of the Limitation Act. The plaintiff also relies on two acknowledgments by Basant Singh as saving limitation under section 19 of the Limitation Act.

On the question of possession of Patti Mirzapur we are constrained to differ from the learned Subordinate Judge. The weight of oral evidence is, we think, certainly on the side of the appellant. He examined a number of witnesses, including the son of the old Patwari and persons who were in the service of Pirthipal Singh at the time. On the other hand the plaintiff relies on one witness only, who professes to have made collections during Pirthipal Singh's life and for five or six years after his death. He admits, however, that he never dictated any account of collections to the Patwari as every Zemindar or his agent must do to enable the Patwari to keep up his *siaha* and that he never paid the Government revenue and does not know who paid it. He cannot give the name of any other *karinda* or of any of the other co-sharers in the village, and his evidence appears to us on the face of it to be entirely worthless. The point chiefly relied on by the learned Subordinate Judge on the strength of which he discredits the defendant's evidence is that mutation on the basis of the mortgage was effected in favour of the mortgagee. As the transaction was a friendly one between *Musammat* Phul Kuar and her son-in-law, intended to keep the reversioner out of the property in case Phul Kuar should be held eventually to have only a life-interest, mutation would certainly be effected whether actual possession was made over or not. It was only necessary for the parties applying for mutation to say that possession had been given and as the application for mutation was unopposed, this would be sufficient. For the same reason when Pirthipal Singh's name had once been recorded as mortgagee, it would necessarily continue to be so recorded until redemption or until an adverse decision of the Civil Courts, and the fact that on *Musammat* Phul Kuar's death Basant Singh was recorded as mortgagor and not as full owner adds nothing fresh to whatever weight may be attached to the fact of mutation. The important fact which remains entirely unexplained on the side of the plaintiff is that, as admitted by his witness Bhikam Dat, the Court of Wards never obtained possession of the property. This fact unless explained raises a very strong presumption indeed that this property cannot have been in the ward's possession. The Court of Wards admittedly assumed superintendence of the whole estate of Pirthipal Singh. A suggestion is thrown out, unsupported by any evidence, that the Court of Wards may have left the ward in control of this village for his maintenance and that of his dependents. The suggestion is absurd on the face of it,

The sole justification for the Court of Wards assuming superintendence at all was that the ward was disqualified by insanity from managing his property and if he had had any near relative competent to act as his guardian and manage the property on his behalf, there would have been no occasion for the Court of Wards to intervene. Moreover, in the Board's order of 13th December 1899 at the time of redemption it is definitely stated that Basant Singh is in possession of the property and no exception is made as regards this particular village. As regards this particular property, therefore, we should hold that the suit was barred unless limitation was saved by a subsequent acknowledgment.

As regards the remaining property we have been referred to a number of cases, some dealing with Article 75 of the Limitation Act and others dealing with Article 132 on the question whether, when a mortgagee is given the option of taking possession, or of realising his money, in default of payment of interest at a date prior to the expiry of the mortgage, limitation should be held to run from the date of default or from the expiry of the term of the mortgage. We must, however, not lose sight of the fact that the Article applicable to this case is Article 135, which differs in its language from either of the two Articles previously referred to. Under Article 75 limitation runs from the date of default except where there is waiver; under Article 132 it runs from the date when the money sued for becomes due. Under Article 135, however, the starting point of limitation is the date when the mortgagor's right to possession can be said to have determined on the first default being made in payment of interest. The period of the mortgage was ten years, but the appellant relies on clause 11 of the deed which runs as follows:—

"In default of payment of interest the mortgagee will have the power to add the unpaid interest to the principal amount and the total amount will carry interest at the rate, or the mortgagee may obtain from me a fresh bond for the unpaid interest. He may, if he so desire, obtain possession of the mortgaged property or realise the principal amount with interest and compound interest through Court by sale of the mortgaged property; I shall have no objection to it."

The parties clearly intended under this clause to give the mortgagee the option of taking any one of four courses:—

1. He might allow the interest to run on, treating the unpaid interest as principal.

2. He might take a bond from the mortgagor for the amount of interest accrued up-to-date.

3. He might take possession of the mortgaged property.

4. He might sue for sale of the property in lieu of the principal and interest then due.

By clauses 15 and 18 another alternative course of action was permitted to him, namely, to wait for the expiry of a period of ten years and then take possession of the property, and if at the end of the second ten years the mortgage was not redeemed, the mortgage was to become a sale, *i. e.*, the mortgagee was at liberty to foreclose. We do not think that it can be said, having regard to these clauses, that the mortgagee's right to possession had determined so long as the mortgagee had given no intimation of any intention to adopt the third of the five courses open to him and to take possession of the property. On this ground, therefore, the plea of limitation fails as regards these properties and it is unnecessary to consider the numerous cases cited, which have only a very indirect bearing on the problem before us. The only case cited to us under Article 135 is a Punjab case of *Achhar Mal* v. *Hukman* (6), and in that case it was left doubtful whether Article 135 or Article 143 was applicable and the actual question discussed was whether repeated failure to pay interest constituted a continuing breach of contract within the meaning of section 23 of the Limitation Act. The actual stipulation in the mortgage was:

"If interest for any year is not paid, the mortgagee is entitled to eject the mortgagor and take possession."

The respondent further relies on two very definite acknowledgments of the existence of the mortgage made by Basant Singh in the year 1899, and on this

(6) 28 P. R. 1897.

ground also the learned Subordinate Judge has found in the respondent's favour. The first acknowledgment is that contained in Basant Singh's petition to the Deputy Commissioner (Exhibit A30) in which he not only admitted both mortgages, giving their dates, but asked the Deputy Commissioner's permission to redeem them on favourable terms. This petition was presented through his Pleader Babu Chhail Behari Lal, and there can be no doubt that the Pleader made the acknowledgment in the course of his employment as such and within the scope of his authority as the appellant's agent The document was put in and has been relied on by the appellant himself in connection with the other issue. The second acknowledgment is that contained in the petition (Exhibit 20) with which the mortgage money was actually tendered by the appellant through his general agent Pragi Lal, who signed the application on the appellant's behalf. This document, as the learned Subordinate Judge shows, has been proved by the evidence of two witnesses and its genuineness has not in this Court been disputed. These applications were presented before limitation had expired and if they give a fresh starting point for limitation, then by reason of the plaintiff's minority the whole suit is undoubtedly within time. The only serious objection taken by the appellant to these acknowledgments is that they do not in terms admit the plaintiff's right to take possession under the mortgage-deed. The appellant seeks to draw a distinction between an admission of his liability under the mortgage and an admission of a particular remedy to which the mortgagee might be entitled under it. This distinction is, in our opinion, without validity. The right which was in question and which the appellant acknowledged was the plaintiff's right as mortgagee under the terms of the mortgage, and the right necessarily carries with it the power to claim the particular reliefs to which the provisions of the deed entitled him. In this connection we may refer to the judgment of the Privy Council in *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy* (7), where Lord Hobhouse in delivering the judgment said:—

"The Subordinate Judge held that the defendant did not thereby admit any liability to the plaintiff nor promise to pay him anything, but it is not required that an acknowledgment within the Statute shall specify every legal consequence of the thing acknowledged. The defendant acknowledged a joint debt. From that follow the legal incidents of her position as joint debtor with the plaintiff, one of which is that he may sue her for contribution."

Applying this principle to the present case, the appellant admitted the mortgage as a subsisting mortgage and from that follows the legal consequence that the plaintiff is entitled to enforce those remedies to which the mortgage-deed entitled him.

The appeal accordingly fails and it is hereby dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM AND CROSS-OBJECTIONS AGAINST ORIGINAL DECREE No. 54 OF 1917

AND

APPEAL FROM ORIGINAL DECREE No. 248 OF 1917.

January 20, 1919.

Present :—Justice Sir Charles Chitty, Kt., and Mr. Justice Panton.

TARAPADA MAZUMDAR, AS CHAIRMAN OF THE KUSHTIA MUNICIPALITY—DEFENDANT—APPELLANT

versus

SATISH CHANDRA SAHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Municipal Act (III, B. C., of 1884), ss. 29, 85 (a), 91 (a), 102, 103—Assessment of Municipal tax—Holding increased by addition of land on account of extension of Municipal limits—Additional assessment, legality of—Suit against Municipality—Parties, proper.

Where in a suit the claim of the plaintiff is directed against a Municipality as such, the only proper defendant to the suit is the Chairman in whose name alone the Municipality can properly be sued. [p. 995, col. 2]

The only section of the Bengal Municipal Act which gives the Commissioners of a Municipality power to revise valuation and assessment is section 108 of the Act. That section does not provide for enhancement of valuation and rating of any holding, except where it appears to have been insufficiently valued or rated through mistake, oversight or fraud.

(7) 25 C. 844 (P. C.); 25 I. A. 95; 2 C. W. N. 402; 7 Sar. P. C. J. 294; 13 Ind. Dec. (N. S.) 550.

TARAPADA MAZUMDAR *v.* SATISH CHANDRA SAHA.

The section provides for re-valuation and re-assessment of any holding the value of which has been increased by additions or alterations to any building thereon, but not of any holding the value of which has been increased by the addition of land [p. 996, col. 1.]

Where a portion of a holding, being within the limits of a Municipality, was assessed with Municipal tax and afterwards during the currency of that assessment the rest of the holding was also included within the Municipality by reason of the extension of the Municipal limits, whereupon the Municipality assessed that portion with additional Municipal tax:

Held, that the additional assessment was illegal, as the Municipality had no course open to them but to continue the assessment already made for the quinquennial period which had then commenced, or until such time as they could alter such assessment under section 97 (*a*) or 102 of the Bengal Municipal Act [p. 996, col. 1.]

APPEAL No. 54 OF 1917.

Appeal against the decree of the Subordinate Judge, Nadia, dated the 30th November 1916.

APPEAL No. 248 OF 1917.

Appeal against Title Appeal No. 4 of 1917, preferred in the Court of the District Judge of Nadia, on the 8th of January 1917, against the decree of the Subordinate Judge, Nadia, dated the 30th November 1916, and transferred to the file of this Court, by an order of Justice Sir Edward Fletcher, KT., and Mr. Justice Newbould of this Court, made on the 4th July 1917.

Babus *Dwarkanath Chakrabarty*, *Satindra Nath Mitter* and *Pyari Mohan Chatterjee*, for the Appellant.

Babus *Mohendra Nath Roy* and *Sarat Chandra Khan*, for the Respondents.

JUDGMENT.—These appeals are preferred by the Chairman of the Municipal Commissioners of Kushtia and arise out of two suits filed by the plaintiff Satish Chandra Saha against the Chairman, Vice Chairman and certain other officers of the Municipality claiming a declaration that certain taxes levied upon him were illegally levied and demanding a refund thereof with damages for illegal distress. The Subordinate Judge has given the plaintiff a decree in each case for refund of the taxes and Rs. 100 as damages. The plaintiff has preferred cross-objections in each case, claiming Rs. 1,900 and 600 respectively more as damages.

The plaintiff and his brothers Suresh Chandra Saha and Jogesh Chandra Saha, *pro forma* defendants Nos. 6 and 7, are admittedly owners of the premises now in question, which are situate in village Majampur in the District of Nadia. The property lay on the outskirts of the Kushtia Municipality. The land surrounding the plaintiff's house, which he and his brothers hold under one title, comprises an area of 21 *bighas* and is surrounded by one set of boundaries. In 1909-10 a dispute arose between the plaintiff and the Municipality with regard to the taxation of the plaintiff's premises. On 23rd March 1910 the plaintiff instituted Suit No 178 of 1910 claiming that the whole of his premises lay outside the Municipal limits, but that, in case any portion should be found to lie within those limits, that portion should be properly demarcated. He also claimed a refund of the taxes then levied. On 30th April 1912 the Court decided in his favour and gave him a decree fixing the Municipal limit along the line A, B, C running roughly from south to north, as shown in the Commissioner's map in that case which map is also on the present record. It further gave him a decree for refund of the taxes then levied. The effect of this demarcation was to leave the plaintiff's house and 10 *bighas* of his land within the limits of the Municipality, the remaining 11 *bighas* of land with a large tank falling outside the limits of the Municipality to the west.

In 1911 a suggestion was made for the extension of the Municipal limits. The matter passed through the usual channels and eventually on 19th June 1912 the Local Government sanctioned such an extension of the limits as to include the 11 *bighas* of the plaintiff's land now in question within the Municipality. The declaration for that extension is dated 26th June 1912. The Local Government did not at that time issue any notification sanctioning the imposition of taxes in respect of the added area. This notification was eventually issued on 14th August 1913.

On 27th November 1912, in consequence of the decree of the Civil Court above mentioned, the Municipality assessed the plaintiff in respect of his holding which was then numbered 352 and was expressed to be 21 *bighas* in area. The plaintiff objected to that assessment on three grounds:—(1) that the premises had been found by the

Civil Court to be partly without the Municipal limits; (2) that the assessment was *ultra vires* and illegal; and (3) that the valuation was excessive. On 8th February 1913, after the hearing of the plaintiff's objections, the Municipality reduced the rateable value to Rs. 1,200. At that time the quinquennial period for the next assessment was approaching. It would commence from 1st April 1913. Accordingly the plaintiff's holding, now stated to be 10 *bighas*, was assessed for that period. The holding, which had been numbered 352 about this time, was given a new number 380 The plaintiff objected. We have a petition of objection of 19th August 1913 when he raised much the same objections as before. On 24th September 1913 those objections were overruled by the Appeal Committee. Demand was duly made upon the plaintiff for payment of the tax, but he refused or neglected to pay. On 4th November 1913 a distress warrant was issued for the realization of taxes in respect of this holding, which amounted to Rs 28-11-0. That sum, with costs, for the second quarter of 1913-14 was realised on 13th November 1913. A further distress warrant was issued for the third quarter in December 1913 and the amount was realized in the same way.

Meanwhile, after the Government notification of 14th August 1913 sanctioning the imposition of taxes on the added area, the Municipality assessed the plaintiff to tax in respect of the 11 *bighas* now included within the Municipal limits. This tax amounted to Rs. 2-13 0 a quarter. The plaintiff objected on 15th October 1913; but his objections were overruled. The Municipality, it should be stated, had numbered these 11 *bighas* as a separate holding under number 380/1. The tax first levied for that holding was for the last quarter of 1913-14. It was subsequently levied for another quarter also.

The first suit now before us is for refund of the taxes realized in November and December 1913 in respect of holding No. 380. The second suit is for refund of the taxes levied in respect of both the holdings for two quarters, those amounts having been realized on 29th May 1914 and 27th June 1914. The question for determination in these appeals is whether on these facts, the plaintiff has any, and what, ground for relief.

Before discussing that, it may be well to mention that the suits as framed, making the Vice-Chairman and other officers of the Municipality parties defendant, were not in order. No damages are claimed against any of those defendants for any wrong done by them personally. If that were the case, such relief would have to be sought in a separate suit and not in a suit brought against the Chairman as representing the Municipal Commissioners. As a matter of fact, the claim in both these cases is directed against the Municipality as such, and the only proper defendant to the suits is the Chairman in whose name only the Municipality can properly be sued (see section 29). No further costs have been incurred by reason of this improper addition of defendants, so we may dismiss the subject with these remarks. The suits can only be regarded as suits against the Municipal Commissioners of Kushtia.

Some attempt was made on behalf of the Municipality to make out that there were two holdings in this case which were properly assessed separately. This, however, as the law stands, is clearly not the case. The plaintiff was, undoubtedly, liable to taxation in respect of holding No. 352 (380) consisting of 10 *bighas* which was found by the Civil Court to fall within the Municipal limits. That holding was, in the first instance, valued at Rs. 2,000, that valuation being subsequently reduced to Rs. 1,200. On this value he was liable to taxation; and, in our opinion, it made no difference that another 11 *bighas* were added to that holding by reason of the extension of the Municipal limits. It could not be said that there was ever more than one holding. It is conceded that the 21 *bighas* of land held by the plaintiff were held by him and his brothers under one title and surrounded by one set of boundaries, thus falling within the definition of "holding" in section 6 (3). The proviso to that definition makes the point still clearer. It says: "Provided that where two or more adjoining holdings form part and parcel of the site or premises of a dwelling-house, such holdings shall be deemed to be one holding for the purposes of this Act other than those mentioned in clause (*a*) of section 85." It is,

therefore, abundantly clear that after the addition there was still but one holding; but even if they could be said to be two holdings, those holdings under the Act must be deemed to be one. Section 85 (*a*), which relates to a tax upon persons, has no bearing on the present case. For this holding the plaintiff was, undoubtedly, liable to taxation; and, in our opinion, he was properly so taxed.

Turning to holding No. 380/1 the matter stands on a different footing. In the first place, as it formed part of holding No. 380 the Municipality were not justified in assessing it separately; nor could they justify this action, as was contended by their learned Pleader, by adding to the valuation of holding No. 380. The only section, it is conceded, which could give the Commissioners power to revise valuation and assessment is section 108. It was contended that the words "any holding which has become liable to valuation and rating after the publication thereof," *i. e.*, of the notice under section 112, might apply to holding No. 380/1. The answer to that is that that is not a separate holding which has become liable to valuation and rating. That section does not provide for enhancement of valuation and rating of any holding, except where it appears to have been insufficiently valued or rated through mistake, oversight or fraud, which is not the case here. The section provides for re valuation and re-assessment of any holding the value of which has been increased by additions or alterations to any building thereon, but not of any holding the value of which has been increased (as here) by the addition of land. It appears, therefore, that the Municipality had no course open to them but to continue the assessment of No. 380 including No. 380/1 at the valuation already made for the quinquennial period which had then commenced or until such time as they could alter the assessment under section 97A or 102 (*i. e.*, by altering the percentage or changing the rate of tax).

The plaintiff's claim for damages is, in our opinion, wholly unsustainable. He has been fighting the Municipality in the matter of the taxation of his premises for the past 9 or 10 years and has contested every demand which has been made upon him. In the particular instance now before us, he forced the Municipality by his neglect or refusal to pay the tax to take the only remedy which was open to them, *i. e.*, to levy a distress. On the distress warrants being served, the plaintiff preferred to let his property be attached rather than immediately pay up the trifling amounts under protest. It is not clear whether the amounts were actually realized by sale of the property attached or by ultimate payment by the plaintiff. In any event he had only himself to thank for the proceedings which were taken against him. It does not appear that he was unduly harassed in the execution of these warrants, which were perfectly legal and which were executed with the due formalities. We think, therefore, that the plaintiff is not entitled to anything by way of damages in respect of the distress warrants levied by the Municipality.

The result is that Appeal No. 54 of 1917 is allowed and the plaintiff's Suit No. 89 of 1914 dismissed with costs in both the Courts. The plaintiff's cross-objection is also dismissed. We make no order as to costs of the cross-objection.

Appeal No. 248 of 1917 is allowed in part. There will be a decree for the plaintiff for Rs. 5-10-0, which he had to pay in respect of the tax for two quarters for holding No. 380/1, with proportionate costs. The remainder of the plaintiff's claim is dismissed with costs in both Courts. We assess the hearing fee in this case at three gold *mohurs*. The cross-objection of the plaintiff in this appeal is also dismissed. We make no order as to costs of the cross-objection.

Appeal No. 54 *allowed*; *Cross-Objection dismissed.*

Appeal No. 248 *partly allowed.*

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1161, 1162 AND 1163 OF 1917.

June 23, 1919.

Present :—Mr. Justice Das.

Munshi JUTHAN LAL—PLAINTIFF—APPELLANT

versus

RAM DAT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885*), s.* 88—*Division of holding—Landlord, consent of, proof of—Presumption—Road-cess return, whether rent roll··· Receipt granted by* patwari, *value of—Plaint filed by previous landlord, statement in, value of.*

JUTHAN LAL v. RAM DAT SINGH.

To enable a tenant to succeed upon a plea that there has been a division of holdings and distribution of rent thereof, he must establish that the division was made either with the express consent in writing of the landlord, or with the express consent in writing of his agent duly authorised in that behalf. The consent of the landlord will be presumed if there is proved to have been made in the landlord's rent roll any entry showing that the holdings have been divided or that the rent payable in respect thereof has been distributed. [p. 997, col. 2.]

A Road-cess return, which is not a rent roll within the meaning of section 88 of the Bengal Tenancy Act, does not justify the conclusion that there has been such a division, especially where the road-cess return has been rejected by the Collector and has not in any way been acted upon. Nor is a rent receipt signed by the *patwari* admissible as evidence of such division, inasmuch as giving consent on behalf of his master to a division of the holding is outside the scope of the authority of a *patwari*, who is a mere rent collector. [p. 997, col. 2; p. 998, col. 1; p. 999, col. 1.]

A plaint filed by a previous landlord for recovery of rent, as to which there may be a complete explanation, would also not justify such a conclusion. [p. 999, col. 2.]

Appeals from a decision of the Subordinate Judge, Patna.

Mr. *Abani Bhushan Mukherji*, for the Appellant.

Mr. *Ganesh Dut Singh*, for the Respondents.

JUDGMENT.—The plaintiff purchased the entire 16 annas of Mouza Berbna Saidpur, bearing Touzi No. 2005, at a sale for non-payment of Government Revenue, and he commenced the actions out of which these appeals arise for rent against the tenants recorded as such in the finally published Record of Rights. The tenants put forward various defences to the suits, of which it is only necessary to mention that which was argued before the lower Appellate Court and which found favour with that Court, namely, that there has been a division of the holdings and distribution of the rent payable in respect thereof, and that, therefore, the suits were not maintainable in the form in which they were presented.

On behalf of the appellant it has been argued before me that the facts found by the lower Appellate Court do not justify the conclusion "that the holdings of these three suits have been split up." It will be noticed that so far as the Record of Right is concerned, it does not show that there has been any division of holdings and distribution of rent. The plaintiff is the purchaser at a revenue sale, and, therefore, it cannot be suggested that he has suppressed the rent roll and other Zemindari papers which would establish that there has been such a division with the consent of the Zemindar.

The law on the subject is contained in section 88 of the Bengal Tenancy Act. In order to succeed, the tenants must establish that the division was made either with the express consent in writing of the landlord or with the express consent in writing of his agent duly authorised in that behalf, provided that the consent of the landlord will be presumed if there is proved to have been made in the landlord's rent roll any entry showing that the holdings have been divided or that the rent payable in respect thereof has been distributed. I do not think that the proviso has any effect at all in these cases, because no entry in the landlord's rent roll has been proved to show that the holdings have been divided or that the rent payable in respect thereof has been distributed. The learned Subordinate Judge does indeed say that "the road-cess return may be treated and is really a rent roll showing the holdings and the *jama* of the defendants within the meaning of the proviso of section 88, Bengal Tenancy Act." With this view I am wholly unable to agree. Rent roll is a term which has a definite significance, and is well understood in common language to mean the Jamabandi papers of the Zamindar, and I am of opinion that the term deliberately employed by the Legislature must be construed in its popular sense, meaning by the words "the popular sense" that sense which people conversant with the subject matter with which the Statute is dealing would attribute to it [see *Grenfell* v. *Inland Revenue Commissioners* (1)]. I do not think that anyone conversant with the subject-matter with which the Bengal Tenancy Act is dealing, would understand by the term "rent roll" the road-cess returns which the landlord is required to lodge under another Statute, and I am, therefore, unable to agree with the learned Subordinate Judge that the road-cess return is really a rent roll. In the second place, the learned Subordinate Judge himself says that the road-cess returns in this case were not acted upon.

(1) (1876) 1 Ex. D. 242; 45 L. J. Ex. 465; 34 L. T. 676; 24 W. R. 657.

He says that the Collector valued the estate under section 21 of the Act. Now section 21 applies only where no returns are lodged by the holder of the estate. As there is a positive finding that the returns were in fact lodged on behalf of the proprietor, I thought that perhaps the Collector acted under section 22 of the Cess Act, which gives him power to value the estate when he is satisfied that the return made is untrue or incorrect. Exhibit 6, however, (which is the order sheet in the cess re valuation case) makes it perfectly clear that the Collector was not satisfied with the return made and called for an explanation and, as no explanation was offered, he valued the estate under section 21 of the Cess Act. This, in my opinion, is destructive of any argument that may be founded on the cess returns lodged by the late proprietor. The Collector rejected the returns altogether and proceeded on the basis that no returns were lodged by the proprietor. I cannot see how these returns which were rejected by the Collector can, by any stretch of language, be described as the rent roll within the meaning of the proviso of section 88 of the Bengal Tenancy Act. I hold that the tenants have failed to bring these cases within the proviso of section 88 and that, in order to succeed, they must establish that the sub-division of the tenancy took place with the express consent in writing of the landlord or with that of his agent duly authorised in that behalf.

The lower Appellate Court relies upon two items of evidence as establishing the consent of the landlord or that of his agent duly authorized in that behalf: (1) the road-cess returns filed by the landlord, and (2) the rent receipts granted by the landlord. So far as Second Appeal No. 1163 of 1917 is concerned, he relies upon an additional item of evidence, namely, a plaint filed by the previous landlord. So far as the road-cess returns are concerned, they were admittedly not signed by the landlord, but by one purporting to be the manager of the landlord. The form of return prescribed by section 14 of the Cess Act shows that it must be signed by the holder or his authorized agent. I do not understand the lower Appellate Court to hold that the person who signed the returns as manager was in fact the manager of the holder or his authorized agent. The burden of proving authority was undoubtedly on the tenants. See *Janki Sahu* v. *Thakur Run Bohadur Singh* (2). If the road-cess returns had been filed on behalf of the present plaintiff, then the matter would be peculiarly within his special knowledge and the burden would perhaps be on him to show to whom he had given authority to sign the road-cess returns. But the present plaintiff is a complete stranger and there is no privity between him and the previous landlord and, if he is to be affected with something done by the previous landlord, I think he is entitled to say "prove that it was done by the previous landlord or by his agent authorized in that behalf." If these road-cess returns had been accepted by the Collector, it might have been possible to argue with some show of reason that they must be presumed to have been regularly filed on behalf of the landlord, but the learned Subordinate Judge himself records a finding that they were not acted upon. There is, therefore, on the one hand, no evidence that these returns were signed by any person authorized in that behalf by the landlord; on the other hand, there is positive evidence that they were rejected by the Collector and were not in any way acted upon. In my opinion, it is impossible to hold that these returns prove the express consent in writing of the landlord or that of his agent duly authorised in that behalf within the meaning of section 88 of the Bengal Tenancy Act.

The rent receipts do not, in my opinion, stand on a better footing. They were admittedly given by the Patwaris, and there is no finding that the Patwaris had any authority to recognize a sub-division of a tenancy. The question was debated in the case of *Wyatt* v. *Sheo Gobind Sahu* (3). The late Chief Justice of this Court in the course of his judgment said: "The position and duties of a Patwari are well known. He is a poorly paid underling employed only to collect rents due to his master and to grant receipts for the same. His implied authority would extend to all subordinate acts which are necessary

(2) 39 Ind. Cas. 398; 1 P. L. W. 658; 2 P. L. J. 231.
(3) 36 Ind. Cas. 777; 1 P. L. J. 414; 3 P. L. W. 85.

or incidental to his express authority. It is not suggested that he had authority to manage any part of the property. In my opinion, it is not within the scope of the authority of a rent collector to consent on behalf of his master to the transfer of an occupancy holding. That is an important act to be performed only by a person having some at least of the powers of a manager. I cannot accept the suggestion which has been made that it lay on the landlord in this case to prove that the Patwari had not authority to consent to the transfer Landlords would be in a very difficult position if it were held that Patwaris and other underlings should be presumed, till the contrary is shown, to have the power to sign away their master's rights." Substantially the same view was taken in the case of *Janki Sahu* v. *Thakur Run Bahadur Singh* (2). If it is not within the scope of the authority of a Patwari to consent to the transfer of an occupancy holding, it is difficult to see how it can be within the scope of his authority to consent to a division of the holding or distribution of the rent payable in respect thereof. I am of opinion, therefore, that the rent receipts are not evidence against the plaintiff as establishing a division of the holdings with the express consent in writing of the landlord or that of his agent duly authorized in that behalf.

The rent receipts and the road cess returns were the only items of evidence relied upon by the learned Subordinate Judge in Second Appeal No. 1161 of 1917 and Second Appeal No. 1162 of 1917. In my view they were not admissible against the plaintiff and they do not justify the conclusion that there has been a division of the holdings within the meaning of section 88 of the Bengal Tenancy Act. I would, therefore, allow these appeals, set aside the judgment and decree of the lower Appellate Court and restore the judgment and decree of the Court of first instance.

I will now deal with Second Appeal No. 1163 of 1917. In this case, the lower Appellate Court relied, in addition to the evidence already referred to, upon a plaint filed by the previous landlord against Chota Lal for the recovery of rent for 1319, 1320 and 1321. It is impossible to say what the conclusion of the lower Appellate Court would have been, had it dismissed from its consideration the rent receipts and the road-cess returns. The survey area is shown as 3 *bighas*, 13 *cattahs*, 18 *dhurs*, bearing a *jama* of Rs. 11 6-7 *dame*. The argument is that the previous landlord by bringing a suit against Chota Lal in respect of 2 *bighas*, 16 *cattahs*, 4 *dhurs* at a rent of Rs. 8-4-1 showed conclusively that he had consented to a division of the holding. I cannot agree that it does. One noticeable feature about this appeal is that although the admitted area of the original holding was 3 *bighas*, 13 *cattahs*, 18 *dhurs*, the area after the alleged division comes up to 3 *bighas*, 9 *cattahs*, 7 *dhurs*. There is no explanation as to what has happened to 4 *cattahs*, 11 *dhurs*. I am wholly unable to come to the conclusion that there was a division of the holding within the meaning of section 88 of the Bengal Tenancy Act merely on the basis of the plaint filed by the previous landlord as to which there may be a complete explanation, especially as I am excluding from my consideration the rent receipts and the road-cess returns on which the lower Appellate Court strongly relied. I would, therefore, allow this appeal, set aside the judgment and decree of the lower Appellate Court and restore the judgment and decree of the Court of first instance.

The appellant must have his costs throughout.

Appeals allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 441 OF 1915.

July 5, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Richardson.

T. C. TWEEDIE, RECEIVER, HATHURIA ESTATE—DEFENDANT No. 22—APPELLANT

versus

JOGESH CHANDRA ROY CHOWDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Court of Wards Act (IX B. C. of 1879), ss 39, 40—Alienation, reference to, by Court of Wards—

TWEEDIE v. JOGESH CHANDRA ROY.

Approval of Court, whether must be in writing—Sanction of Court, whether necessary—Ratification, effect of—Award, part performance of, effect of—Specific Relief Act (I of 1877), s. 25, applicability of—Bengal Tenancy Act (VIII B C. of 1885), s. 97—Permission of District Judge, whether necessary for reference to arbitration by Court of Wards—Limitation Act (IX of 1908), Sch. I, Art. 113—Contract, whether includes award.

To settle certain disputes arbitration was proposed on behalf of the Court of Wards in charge of the defendant's estates and was accepted by the plaintiffs. No submission in writing was drawn up, and the arbitrators gave an award which was carried out in part. In a suit for enforcement of the award so far as effect had not already been given to it:

Held, (1) that there was no statutory rule which required that the approval of the Court of Wards should have been signified in writing; that, although no previous sanction had been obtained, if the submission was a good one and the Court of Wards had subsequently approved and ratified the action of the circle officers, it was bound by the result; [p. 1003, col. 1.]

Saturjit Pertap Bahadoor Sahi v. *Dulhin Gulab Koer*, 24 C. 469; 12 Ind. Dec. (N. S.) 980, followed.

(2) that the award having been carried out in part, the plaintiffs were entitled to the performance of the remainder. [p. 1004, col. 1.]

Having regard to the provisions of section 97 of the Bengal Tenancy Act, the permission of the District Judge for a reference to arbitration by the Court of Wards is not necessary. [p. 1001, col. 2.]

Section 25 of the Specific Relief Act is inapplicable to a case where an award has been in part performed. [p. 1004, col. 2.]

The word 'contract' in Article 113 of the First Schedule to the Limitation Act does not include "award." [p. 1005, col 2]

Appeal against the decree of the Officiating Subordinate Judge, 2nd Court, Faridpur, dated the 21st June 1915.

Babus *Provash Chandra Mitter* and *Ambica Pada Choudhury*, for the Appellant.

Babus *Jogesh Chandra Roy*, *Girija Prasanna Roy Chowdhury* and *Bhupendra Chandra Guha*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—The suit out of which this appeal arises was instituted on the 29th March 1911 and judgment was pronounced by the Subordinate Judge of Faridpur on the 21st June 1915. The appellant before us is Mr. T. C. Tweedie, who was brought on the record as defendant No. 22 in his capacity of Receiver of an estate known as the Haturia Estate, in which capacity he represents in this suit the interests of a Mohammadan family, members of which were originally impleaded as defendants Nos. 1 to 19. The Haturia Estate is the collective name of a number of properties in the districts of Faridpur and Backergunge inherited by this family from Golam Ali, a wealthy Zamindar (of Haturia in Faridpur) who died in the year 1295.

The plaintiffs are members of a joint Hindu family owning land in Faridpur. The most influential of them is Babu Jogesh Chandra Roy Chowdhury or Jogesh Babu, plaintiff No. 1. The transactions to which the suit relates were carried out in the name of his cousin, Bhupesh Babu, plaintiff No. 3.

The main purpose of the suit is to enforce an award of arbitrators dated the 13th May 1905, so far as effect has not already been given to it. There is, however, an alternative prayer in the plaint for the recovery of possession with mesne profits of certain properties. The circumstances which led to the award must be briefly narrated.

Golam Ali had three wives and left him surviving three sons and many daughters. The three sons all died, Amjad Ali soon after his father, Ali Ahmad in 1301 and Kuti Mia or Tazammal a little later. Ali Ahmad's mother Aijennessa and one of his widows Bafatanessa as security for a loan of Rs. 4,000 mortgaged their shares in 48 properties derived from Golam Ali. The mortgagee brought a suit on his mortgage and obtained a decree in 1897 for Rs. 6,827. In execution he purchased the mortgaged properties for a sum of Rs. 66. Then in September 1902 he conveyed these properties to Bhupesh Babu, acting for the plaintiffs, for a sum of Rs. 1,000 and he also conveyed to Bhupesh Babu the still unsatisfied decree for a sum of Rs. 6,000.

Tazammal Ali before his death had with certain other heirs of Golam Ali embarked on a still larger transaction. They mortgaged their shares to the Eastern Mortgage and Agency Company, Limited, to secure a loan of Rs. 4,50,000 and under the terms of the bond appointed Messrs. Garth and Weatherall as their Managers. Quarrels, however, arose among the co-sharers and in 1902 the District Judge of Backergange under section 95 (*b*) of the Bengal Tenancy Act appointed a Common Manager to take charge of the Haturia Estate, After one common Manager had

been removed and a second appointed, the District Judge by a formal order, dated the 10th September 1903, directed under section 95 (*a*) of the Act, with the consent of the Court of Wards, that the Haturia Estate should be managed by the Court. The order was made at the instance of Messrs. Garth and Weatherall, the Eastern Mortgage and Agency Company having agreed to reduce their claim by Rs. 1,50,000 and also to reduce the rate of interest on the loan from $7\frac{1}{2}$ to 5 per cent. per annum.

The Court, therefore, took the place of the Common Manager.

The legality of these orders under the Tenancy Act has not been questioned before us. When the Manager appointed by the Court, Babu Atul Krishna Dutta, applied for registration in the Collectorate under the Land Registration Act, his application was opposed by Bhupesh Babu, who had already obtained registration in respect of the share of the revenue-paying properties purchased in his name. The Manager had previously complained that the shares claimed by Bhupesh Babu were in excess of those to which he was entitled (see his report of 10th September 1904, Exhibit 2).

The authorities responsible under the Court of Wards were confronted with this difficulty with Bhupesh Babu. They were also anxious that Golam Ali's heirs should come to an arrangement about their respective shares and execute an *ekrar* or formal deed of agreement. For this purpose it seems to have been thought necessary that Bhupesh Babu should reconvey the shares purchased by him.

In that state of things Jogesh Babu was approached by the Collector of Backergunge, Mr. Streatfield. Arbitration was proposed on the one side on behalf of the Court of Wards and accepted on the other. No submission in writing was drawn up but two respectable gentlemen were appointed arbitrators, Mr N. Gupta, the Government Advocate, and Babu Hara Nath Ghose, a leading Pleader of Barisal. In their award dated the 18th May 1905 they state that a dispute having arisen, they had been "asked by the Collector of Backergunge and Babu Jogesh Chandra Roy to settle this and other connected matters by arbitration."

The principal conclusions of the arbitrators are set out in the Subordinate Judge's judgment. Shortly, the precise share in the properties to which Jogesh Babu or Bhupesh Babu was entitled under the conveyance of 1902 was determined, the share allotted being smaller than that claimed by Bhupesh Babu. Jogesh Babu or Bhupesh Babu was to receive Rs. 500 for small shares in the properties which had come to Aijennessa and Bafatanessa, on its being held by this Court that Karimannessa, one of Golam Ali's daughters, was illegitimate. He was to receive Rs. 7,500 for the unsatisfied decree and the rest of the share purchased in all the properties except six, but his interest in these six properties was to be placed along with his interest in the other properties under the management of the Court of Wards.

As regards the properties to be re-conveyed, the payment of the sum of Rs. 7,500 and the profits to be paid to the plaintiffs pending reconveyance, the arbitrators say this:—

"The Manager of the Court of Wards is unable to pay up this amount at once; the parties have, therefore, come to this arrangement that a deed of agreement should, with the permission of the District Judge, be executed by both the parties, whereby the Manager would be entitled at any time within the period of four years from the date hereof to get a conveyance of all the mortgaged properties save and except properties Nos. 9, 11, 16, 17, 27 and 31 and the decree for the sum of Rs. 7,500 and that Babu Jogesh (or Gopesh) Chandra Roy would be entitled to the profits of three properties (from the date of confirmation of sale of such of these properties as have been sold) less ten per cent. collection charge, until such time as the conveyance may be duly executed."

The permission of the District Judge was not obtained. The Collector thought it was unnecessary and in view of section 97 of the Tenancy Act his view may be accepted. Jogesh Babu on his side never demanded a reference to the Judge. It may be taken, therefore, that the term of the subsidiary arrangement incorporat-

ed in the award was waived by consent of parties.

No formal deed of agreement was ever executed. There can, however, be no question that the award was carried out in three respects:—

(1) Consent petitions were filed in the Collectorate of Faridpur and registration of shares was effected according to the decision of the arbitrators.

(2) An application for the execution of the decrees of 1897 was dismissed for want of prosecution on the 13th September 1904. No further steps were subsequently taken to realize the decree and execution is now barred by limitation. It was never intended by anyone that the decree should be executed and the defendants cannot, therefore, complain because the decree was not kept alive. This distinguishes the present case from that of *Jatindra Nath Basu* v. *Peyer Deye Debi* (1).

(3) The properties in which Jogesh Babu or the plaintiffs were interested came into the undisputed possession of the Court of Wards. This, no doubt, facilitated management and benefited the Haturia Estate as a whole.

The Court of Wards was in charge of the Estate for some years and only withdrew the management in May 1912, more than a year after the institution of this suit. One of the original defendants was Babu Jnan Ranjan Goswami, Manager under the Court of Wards. He was impeached apparently as defendant No. 20 and also with the added description of Manager as defendant No. 21. Mr. Tweedie, as Receiver, was added by an order of 23rd November 1912. A further order of 30th August 1913 says this:—"On the application of the plaintiffs Mr. Tweedie, Receiver, Haturia Estate, is made a party representing all the defendants." It appears that Babu Jnan Ranjan Goswami was struck off the list of defendants and that in addition to Mr. Tweedie one Debendra Nath Dutt, the last Manager or Common Manager of the Haturia Estate, was made a party as defendant No. 23. The latter, however, the Estate being no longer under common management under the Bengal Tenancy Act, has not appeared.

Mr. Tweedie was appointed Receiver in a suit for partition brought by Majidunnessa, one of Golam Ali's daughters, in which suit, we are informed, the share of the plaintiffs was taken as the share fixed by the arbitrators. The Subordinate Judge says that in his capacity as Receiver Mr. Tweedie is in sole possession of the Estate including the plaintiffs' share, and the statement is not disputed. It is clear, however, that in the present suit with the consent and at the instance of the plaintiffs he represents the interests of all the original defendants Nos. 1 to 19 who have survived and the personal representatives on the record of any who have died since the suit begun. The added defendants Nos. 20 and 21 are included in this last category. In the present suit neither party can repudiate their representative character which Mr. Tweedie bears.

The Subordinate Judge has discussed the question whether Mr. Tweedie was at liberty to file a written statement raising defences not raised in the written statement of the original defendants Nos. 1 to 21 filed by Jnan Ranjan Goswami as Manager under the Court of Wards. It is not necessary to express an opinion on that question, partly because the respondents did not press their contention on this point before us and partly because Mr. Tweedie's new case depends on the success or otherwise of his attack on the validity of the award of 15th May 1905, and there he fails on the merits. The two relevant issues are Nos. 5 and 6 in the following terms:—

"5. Was the arbitration made by Messrs. Gupta and Ghose informal and illegal and is the award made by them invalid and not binding upon the parties?

"6. Was the said award acted upon and ratified by the parties and are the defendants entitled to recede from it?"

As to issue No. 5, in the Court below the award was assailed on five grounds. The only contentions seriously pressed before us were, *firstly*, that the award was invalid because it did not receive the sanction or the sanction in

(1) 34 Ind. Cas. 69; 20 C. W. N. 816; 14 A. L. J. 527; (1916) 1 M. W. N. 403; 18 Bom. L. R. 509; 24 C. L. J. 67; 20 M. L. T. 25; 3 L. W. 553; 31 M. L. J. 248; 43 C. 990; 43 I. A. 108 (P. C.).

writing of the Court of Wards and *secondly*, that the award was incomplete.

As to the first point we were not referred to any statutory provision or statutory rule, in force at the time, which required that the approval of the Court should be signified in writing. But if a writing is necessary, there is a writing which will answer the purpose.

Provisions as to the general powers of the Court and their exercise are contained in sections 14 and 15 of the Court of Wards Act (Bengal Act IX of 1879), while sections 39 and 40 of the Act relate to the powers and general duties of a Manager. It was not disputed that it was within the power of the Court to submit the dispute with Jogesh Babu to arbitration and if the submission was a good submission, the Court, apart from special circumstances, would be bound by the result. It may, however, be that the previous sanction of the Court was not obtained. The question would then be whether the Court subsequently approved and ratified the action of the circle officers [*Saturjit Pertap Bahadoor Sahi* v. *Dulhin Gulab Koer* (2)].

The award itself was certainly approved by the Collector, who in a minute of the same date describes it as "extremely satisfactory." The Manager in a letter of 7th July 1905 formally reported to the Collector the completion of the award and summarized its effect. In concluding he begged that "the sanction of the higher authorities to the present settlement might be procured." The Collector submitted the report to the Commissioner "for approval" stating reasons, particularly requesting "that this agreement may be sanctioned."

From some further papers which we obtained from the Board of Revenue during the hearing of the appeal, it appears that the Commissioner forwarded the Manager's report with a copy of the Collector's memorandum to the Board of Revenue or Court of Wards and in his turn requested that the agreement might be approved. The Commissioner's memorandum is No. 820 M. P, dated the 26th July 1905, to which reference is made in paragraph 7 of the Court's letter No. 503 W.T. dated October 1905. That paragraph seems to refer to the Manager's report of 7th July 1905. The Collector is instructed to issue orders directing that the "Ekrarnama be executed and the sum paid over out of the surplus of the estate." It is not clear why the Court spoke of the "Ekrarnama" and not of the award or the deed of agreement contemplated in the award. But there is little doubt that the award was intended. This view is confirmed by paragraph 9 of Mr Savage's note of 16th March 1916, Mr. Savage being at the time member of the Board (see also paragraph 8 of the Collector's letter to the Commissioner, dated 16th February 1910). The conclusion is that the Board not only accepted the award but directed that it should be carried into execution.

Some stress was laid on the notice of 1st November 1905, but that notice had no particular reference to the plaintiffs. It was a general notice issued to all the co-sharers and seems to have referred more especially to the quarrels among the original co sharers and the Ekrarnama by which the authorities contemplated that these quarrels should be composed.

As to the contention that the award was not complete, I have already adverted to the opinion to obtain the sanction of the District Judge. But the principal argument in this connection was that the formal deed of agreement which the award contemplated was not executed. This was not the fault of Jogesh Babu (see his letter of 18th July 1906 and his Pleader's letter of 21st September 1909). The conclusions of the award were final and were intended to be final. They were accepted as final by the responsible parties and, in my opinion, the parties cannot now go behind them. It is immaterial that one part of the award was of a somewhat complicated nature and the arbitrators considered it desirable that it should be embodied in a deed. The terms of the arrangement were prescribed by the award and in the circumstances, no further instrument was essential as between the parties to make the award binding.

(2) 24 C. 469; 12 Ind. Dec. (N. S.) 980.

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What I have said really disposes of both issues Nos 5 and 6. I will only add this, that it seems to me that the award must stand or fall as a whole. As I have shown, the award has been carried out in part. But the part which has been carried out is not independent of the part which has not been carried out. If the award be regarded for the moment as an agreement, the lump sum settled for the decree and the properties to be reconveyed was also the consideration for the reduction of Jogesh Babu's shares and the management of the whole by the Court of Wards. At this stage it is not seriously suggested that the award was in excess of the reference. It would, therefore, seem to follow from the award having been performed in part that the plaintiffs are entitled to performance of the remainder [*Brij Mohan Lal* v. *Shiam Singh* (3)].

Issue No. 7 relates to a defence common to both the written statements. It is as follows:—

"7. Was the said award superseded by another agreement, as mentioned in paragraph 16 of the written statement of the Receiver defendant No. 22 and paragraphs 5 and 6 of the written statement of the Court of Wards."

No doubt, proposals for a second arbitration were mooted. The difficulties which arose are explained in the Manager's letter to the Collector dated the 11th November 1907. It appears to have been discovered that Jogesh Babu had not a clear title to six of the properties which he was to reconvey. It also appears that the member of the Board in charge had come to be of opinion that the lump payment settled by the arbitrators was too high. The latter in my view was a question which it was not fair to raise as a general one. If the Court of Wards had contented itself with a claim for compensation in respect of the six properties and if the matter had been promptly and considerately handled, it seems probable that an agreement might have been arrived at. But the discussion was allowed to drag on. It was not till the 16th February 1910 that the Collector addressed the letter to the Commissioner to which reference has already been made, detailing all the circumstances and asking that the sanction of the Court might be obtained to a second arbitration. Sanction was given by the Court's letter of 2nd April 1910 to the Commissioner, a copy of which the latter forwarded to the Collector under an endorsement dated 9th April. What followed turns largely on the oral evidence. On this occasion the submission to arbitration was to be in writing and a draft agreement was drawn up. Babu Jnan Ranjan Goswami says that the draft produced is not the original draft but a copy of it. Even if this draft agreement was expressed on stamped paper, it is quite clear that it was never executed by the plaintiffs or any of them. It appears unlikely that Jogesh Babu would ever have accepted the last sentence of the draft, declaring that the parties were not bound by the terms of the previous award relating to the lump payment. On the whole I see no reason to differ from the Subordinate Judge and hold that no concluded agreement for second arbitration was ever arrived at. The negotiations failed as negotiations sometimes do.

Then comes the question raised by the 8th issue, whether the title of the plaintiffs to the six properties is defective. The Subordinate Judge has dealt with this matter very cursorily, and I do not enter into details because the question to my mind is immaterial so far as the lump payment is concerned. If it be assumed that the alleged defects exist, what is the result? In argument reference was made to sections 25 and 30 in Chapter II of the Specific Relief Act. Section 30 enacts generally that the provisions of the chapter as to contracts are to apply *mutatis mutandis* to awards. In view of the principle so laid down section 25 is, in my opinion, inapplicable in the circumstances of the present case. If the defects exist and the section was applied, it would seem that the award could not be enforced at all. Such a result would be obviously inequitable. The section is inapplicable for reasons already indicated, namely, because the lump payment cannot be allocated entirely to the properties to

(3) 24 A. 164; A. W. N. (1901) 208.

be re conveyed and the decree and because the award has been in part performed. Similarly the defendants are not entitled on the ground of defect of title to compensation.

Something but not very much was said on the question raised by issue No. 12. Have the plaintiffs any cause of action against any defendants other than the heirs of Aijennessa and Bafatanessa? The finding of the Subordinate Judge, which is in effect that the cause of action is against defendants Nos. 1 to 21 and Mr. Tweedie as representing the interest of those defendants as a body in the Hathuria Estate, must be accepted. From the time of the award onwards, the position has always been that the plaintiffs were to be bought out in the interests of the original co-sharers in the Hathuria Estate as a body.

As to issue No. 11, "what damages and mesne profits, if any, are the plaintiffs entitled to get and from whom?" the Subordinate Judge is quite right in saying that the possession of the Court of Wards and the Receiver has been from the date of the award the possession of the plaintiffs, so far as their properties are concerned. The plaintiffs are, therefore, not entitled to mesne profits, but they are entitled to have an account taken of the income from their properties and under the award to have that income less ten per cent. for collection charges paid over to them. The statements, however, on which the Subordinate Judge has relied in finding the annual income at Rs. 593-10-0 can only be regarded as estimates. What the plaintiffs are entitled to is, as I have said, an account of the profits. Moreover, the question of the title of the plaintiffs to the six properties becomes in this connection of importance. Reasonably construed, the award only entitles the plaintiffs to those profits to which they can show a good title. Something was also said as to the period for which the award should be taken. This must be according to the award the period for which profits have been allowed by the Subordinate Judge.

The decree of the Subordinate Judge must also be amended so far as it makes Mr. Tweedie personally responsible for costs.

As to the plaintiffs' cross-objections they appear to be entitled to interest on the sum due to them under the head of profits.

The question of limitation was not argued before us. There is an authority in this Court for the view that the word "contact" in Article 113 of the Schedule to the Limitation Act cannot be interpreted as including an award [*Bhajahari Saha Banikya* v. *Behary Lal Basak* (4)] and even if the present suit as a suit to enforce the award of 1905 is governed by Article 120, the suit was instituted within six years of the date of the award and it is unnecessary to consider whether the cause of action in part arose at some later date.

The result is that the decree of the Subordinate Judge will be confirmed so far as it relates to the payment by the defendants of the lump sum of Rs. 8,000 and the execution of a conveyance by the plaintiffs.

For the rest the decree will be modified as follows:—

There will be a preliminary decree for an account of the profits of the properties purchased in the name of Bhupesh Babu for the period specified by the Subordinate Judge, 1306—1317, and in this connection a further enquiry will be made as regards the six properties of which the title is now in dispute. The right of plaintiffs to the profits of these six properties to depend on the result of such further enquiry. Subject thereto the plaintiffs to be entitled to the profits of all the properties during the said period less ten per cent. for collection charges. Interest to run at the rate of six per cent per annum to the date of realization.

The lump sum of Rs. 8,000 and the profits found due to the plaintiffs to be paid out of the interest in the Hathuria Estate of the defendants Nos. 1 to 21, without prejudice to any adjustment of their relative liabilities which may be made as between those defendants either by agreement or otherwise.

As to costs, neither party has been wholly successful; the costs should be divided. The plaintiffs will receive from the defendants two-thirds of their (the

(4) 5 C. L. J. 162; 33 C. 881.

plaintiffs') costs in this Court and the Court below. The plaintiffs will pay the defendants one-third of the defendants' costs in this Court and the Court below. The plaintiffs and defendants to be jointly and severally liable for the costs respectively payable by them; the liability for costs to be a personal liability but no personal liability to attach to any minor or to Mr. Tweedie. Mr. Tweedie to be liable for the costs payable by defendants in his representative character, in which character he will be entitled to pay costs out of the interest of the other defendants in the Hathuria Estate.

TUDON, J.—I agree but in the 8th issue I desire to note further that against property No. 29 of schedule *Ka* to the plaint, which had been sold away in execution of a rent-decree, no income was shown in the list of properties which was before the arbitrators. Properties Nos. 1, 2 and 6 of schedule *Kha* were purchased by Akbar Ali in execution of a money-decree and were subject to the mortgage of Balaram Guha. Properties Nos. 3 and 4 of schedule (*Kha*) were apparently purchased by Tazammal Ali *alias* Kuti Mea in execution of a decree obtained on a prior mortgage after the mortgage in favour of Balaram Guha. Thus the plaintiffs had the right to redeem. Moreover, Akbar Ali and Tazammal were both co-sharers in the estate taken possession of by the Court of Wards under the District Judge's order of 10th September 1903 and before 1905 the officers of the Court of Wards should have been aware of the true fact. It is not pleaded, far less proved, that in the submission to or in the proceedings before the arbitrators the plaintiffs practised any fraud. Further, it does not appear that the contention that the appellants were entitled to resile from the whole award on three grounds was taken before October 1907 (if then), by which time the decree of Balaram Guha had become barred by limitation.

In this state of facts I agree that the award is not vitiated by any defect in the title of the plaintiffs to these six properties.

Decree modified.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 275 OF 1918.

April 14, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

SHEO SAHAI SINGH—DEFENDANT—APPELLANT

versus

Rai RAJASHWAR BALI—PLAINTIFF—RESPONDENT.

Landlord and tenant—Ryot, *right of, to construct well on land appurtenant to house.*

A *ryot* has a right to construct a well in a portion of his house or on land in his possession as an appurtenance to his house. [p. 1007, col. 1.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated 5th April 1918, modifying that of the Munsif, Ram Sanehi Ghat (Bara Banki), dated 15th December 1917.

Babu *Bisheshwar Nath Srivastava*, for the Appellant.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT—The dispute in this case relates to plot No. 172 *khasra abadi*. On the west of the plot is the house of the defendant. The land in dispute is claimed by the defendant as his *sahan*. A well has recently been constructed by him opposite his house which the plaintiff seeks to have removed. Along with the removal of the well the plaintiff sues for the ejectment of the defendant from the entire plot No. 170 *khasra abadi*.

The Court of first instance found against him. The lower Appellate Court held that part of the land in dispute was appurtenant to the house of the defendant, in the sense that his possession over it in certain respects was necessary for the possession and enjoyment of his house and that there were other portions too over which he had been in possession in different ways. It chose to demarcate the portion over which the defendant has been in possession, regardless of the extent of No. 172 *khasra abadi* to which the claim was confined. On the findings arrived at by the Subordinate Judge the delimitation excludes certain portions over which the defendant has some kind of possession. In fact the well in dispute may, in itself, fall outside it, though both the parties admitted in the pleadings that it was within the limits of plot No. 172 *khasra abadi*. The Commis-

sioner was unable to define satisfactorily the limits of plot No. 172 *khasra abadi*. The delimitation made by the learned Subordinate Judge is purely arbitrary. It was enough for the purpose of this case to determine whether the defendant had been in possession of plot No. 172 *khasra abadi* or not and whether the plaintiff was entitled to the removal of the well which the defendant has constructed. As he has constructed the well over the land of which he has been in possession as an appurtenance to his house, the plaintiff has no right to sue for its removal. The decisions in *Bhagwan Das* v. *Muhammad Yahia* (1) and *Mahabal Kurmi* v. *Sarju* (2) recognise the right of a ryot to construct a well in a portion of his house or on land in his possession as an appurtenance to his house. The land lying opposite the house of the defendant has been in the possession of the defendant from long before. Any land which lies outside No. 172 *khasra abadi* is not now in question. The appeal is, therefore, allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs throughout.

Appeal allowed.

(1) 18 Ind. Cas. 928; 11 A. L. J. 301; 35 A. 292.
(2) 42 Ind. Cas. 51; 4 O. L. J. 454.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 55 OF 1918.

March 17, 1919.

Present:—Justice Sir Ernest Fletcher, KT., and Mr. Justice Cuming.

Srimati BASINI DASI—OBJECTRIX—APPELLANT

versus

KRISHNA LAL CHATTERJEE—PETITIONER—RESPONDENT.

Probate proceedings—Will, proof of—Will made on deathbed in favour of spiritual guide—Undue influence—Court, duty of—Civil Procedure Code (Act V of 1908), O. XIV, r. 3—Issues, framing of—Court, duty of—Matters to be considered.

Where it is sought to propound the Will of a deceased person made one day before his death in which the testator's spiritual guide is named as the universal legatee, it is incumbent upon the Court to see that spiritual influence was not exercised improperly by terrifying the dying man or by holding out hopes of benefitting his soul. [p. 1008, col. 2.]

In proceedings upon an application for Probate of a Will, it appeared that the Will had 12 witnesses and that the testator did not sign his own name, but his name was written by his uncle. When the first witness for the petitioner was giving evidence, he named five witnesses and proceeded to prove their signatures on the document. The trial Judge, however, suggested that it was not necessary for him to prove more:

Held, that this was a defect in procedure; the Will required to be carefully scrutinised and it was necessary to place before the Court all the available evidence so that the Judge could form a right conclusion having a free mind. [p. 1008, col. 2.]

The sole guides to a Court in framing issues for trial in a case are not the pleadings of the parties: issues should be settled on the pleadings and after hearing the Pleaders. [p. 1008, col. 2.]

Appeal against the decree of the District Judge, Birbhum, dated the 5th January 1918.

FACTS appear from the judgment.

Mr. *Pugh* (with him Babu *Joytish Chandra Sarkar*), for the Appellant.—This appeal arises out of an application for Probate with a copy of the Will annexed. The testator is purported to have made his Will on the 29th December 1912. He died on the 30th December. The testator by his Will bequeathed some money to the respondent, who was his *guru*. The widow was given Rs. 45 under the Will. The testator had several mortgage bonds which were paid off by the widow. These re-payments were attested by the *guru*. My contention is that the Will was procured by the *guru*. It is in evidence that he was present about the place of death. The man kept quiet for 5 years and then applied for Probate. The reason of his setting up the Will is to have a claim on the barred debts. My next point is that the lower Court should not have held that no further evidence was necessary. I submit he should have taken all the available evidence and properly tried the suit on the issues framed. As a matter of law there is nothing to justify the grant of the Probate.

Babu *Bankim Chandra Mukerjee*, for the Respondent.—The witnesses were all present. The Judge did not say that he would take no further evidence. The simple issue that the learned Judge had to decide was whether the Will was forged or genuine. This he has done.

Mr. *Pugh* replied in brief.

BASINI DASI v. KRISHNA LAL.

JUDGMENT.

FLETCHER, J.—This appeal is preferred against the decision of the learned District Judge of Birbhum, dated the 5th January 1918, and it arises out of an application that was made by the respondent to the Court of the District Judge propounding a certain document which he alleged was the last Will of a deceased Hindu, named Ram Ranjan Chowdhury. The Will is stated to bear date the 29th December 1912 and the death of the testator took place on the 30th December 1912 The Will was not propounded in the Court of the District Judge until the 11th July 1917. The learned Judge, having heard such evidence as was offered before him, came to the conclusion that the Will was genuine, and, therefore, he granted Probate of it. Against that decision, this appeal has been preferred.

The respondent to the appeal is not a relation of the dead man, Ram Ranjan. The relationship subsisting between them was purely one of a spiritual nature—the respondent being the spiritual guide of the deceased. How and in what manner Ram Ranjan on the day before he died became anxious that his properties should pass to his spiritual guide is not altogether clear on the evidence. The story as shown is this:—that this Will, which was made, as I have said, on the 29th December 1912, that is, one day before the testator died, was made while the respondent was in the premises. It does not appear from the evidence where he was—whether in the room or in some other place—and it is also not clear exactly where the deceased man was—whether he was in the room or in the verandah. However, what happened was this. The Will had 12 witnesses. The deceased Ram Ranjan, according to the evidence, did not sign his own name but his name was written by his uncle, one Nidhiram. What sort of uncle he was does not clearly appear. But the unfortunate part of the case is this. When the first witness on behalf of the petitioner was giving his evidence and named five witnesses and proceeded to prove their signatures appearing on the document, the learned Judge suggested, as his note in the record shows, that it was not necessary for him to prove more. That is a view that I cannot agree with. This is a Will that requires a very careful scrutiny. It was a death-bed Will and made in the interest of a person who claimed to have spiritual influence over the dying man. This is a case in which the Court ought to be careful to see that that spiritual influence was not exercised improperly either by terrifying the dying man or by holding out hopes of benefitting his soul. The learned Judge ought not to have stated that it was not necessary to give all the evidence, because it was a case in which it was necessary to place before the Court all the available evidence so that the learned Judge could form a right conclusion having a free mind. The procedure adopted by the learned Judge was also defective in another respect. The learned Judge neglected the duty cast upon him by the Code of Civil Procedure of properly framing the issues that arose between the parties; and so as far as I can see, the issues tried were purely with reference to the question whether the Will was or was not a forgery. Under the terms of the Civil Procedure Code in this country the issues are not solely settled on the pleadings. The Court has got to settle the issues on the pleadings and after hearing the Pleaders. It is obviously a case where, at any rate, some sort of enquiry ought to have been made as to how this spiritual adviser came to be named in the Will as the universal legatee subject to a small amount in favour of the widow. I think the case ought to be re-heard by the learned District Judge of the Court of first instance after settling proper issues in the case so as to have a proper guide as to what the case is. The judgment of the Court below ought to be set aside on the ground that there has been a mis-trial before the learned Judge, and the case must be sent back to the primary Court to have a new trial on proper issues to be settled as indicated above. Costs will abide the result of the re-trial before the learned District Judge. We assess the hearing fee in this Court at three gold *mohurs*.

CUMING, J.—I agree.

Case sent back.

END OF VOLUME LI.

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—— :-o:-O-:o-: ——

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Where in cross-examination a witness admits that a statement previously made by him relative to a certain fact is a false statement, he ought to be asked in re-examination by the prosecution, or at any rate by the Court, why he made a statement which was false. The mere fact that the witness acknowledges the previous statement to be false is no justification for rejecting such previous statement, if on other grounds the Court is able to reach the conclusion that that statement is in substance true.

A person accused of a crime is under no obligation to offer any explanation of his conduct or of any circumstances which direct suspicion towards him. He may, if he chooses, let the case against him rest entirely upon the prosecution evidence or he may meet the charge in any other way he thinks fit. It is the duty of the prosecution to prove its case, but when such proof has been given and the time comes when the prosecution evidence, whether direct or circumstantial, has to be weighed, it is impossible for a Court to ignore the fact that it is unweakened or unrebutted by contrary evidence, which might have been produced if the facts alleged were not true. The Court has nothing to do with the reasons which lead an accused to meet the case against him with silence; he is at liberty to defend himself in any way he thinks proper, but the Court cannot ignore the consideration that the prosecution evidence has been left unrebutted.

Where two persons set out to accomplish a particular act and agree that, if the necessity should arise, they would resort to the use of firearms, with which they provide themselves, and on the necessity arising one of them indulge in shooting, the other must be treated as having abetted the shooting, as this takes place in pursuance of the common intention which inspired the two persons. **O** SUSHIL CHANDRA *v.* EMPEROR, 6 O. L. J. 210; 20 CR. L. J. 465 **449**

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The possession of one of several joint owners is in law the possession of all, unless it is proved that the joint owner in actual possession set up a hostile title and excluded the other owners who were not in actual possession.

The question whether there has been such adverse possession on the part of one joint owner as would extinguish the title of the other owners is a mixed question of fact and law. **C** CHINTAMANI PRAMANIK *v.* HRIDAY NATH KAMILA, 29 C. L. J. 241 **123**

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Where a tenant agrees to pay rent at a certain rate, he is not in possession of his holding without the landlord's consent, and section 34 of the Agra Tenancy Act has, therefore, no application to his case. He is liable to pay the rent agreed upon by him under section 33 of the Act. **A** HOTI LAL *v.* CHUTTAN LAL **15**

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A joint decree having been passed in favour of certain plaintiffs for recovery of possession of certain property, the defendant preferred an appeal but did not take steps for the representation of one of the plaintiffs-respondents who was a minor and the result was that the appeal as against the infant respondent was dismissed:

Held, that the appeal as against the other respondents could not proceed inasmuch as even if the appeal succeeded, the decree in favour of the infant must remain untouched, so that he would be in a position to execute the decree. **C** SRIRAM CHANDRA NAIK *v.* HRIDOY NATH GUPTA, 29 C. L. J. 461 **409**

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The plaintiff sued for a declaration of her title to, and possession of, a mango garden. It appeared that the garden appertained originally to a *taluk* which was amicably partitioned into three shares: later on, one of these shares was partitioned and the garden fell to the share of one *N. A.* from whom the plaintiff purchased it. In order to prove her title to, and exclusive possession of, the garden the plaintiff produced certain documents, but the Sub-Judge, on appeal, considered these documents only in connection with the question of partition, and excluded them from consideration on the question of possession, holding that they were inadmissible in evidence:

Held, that this was wrong; the documents were title-deeds and contained an assertion of title to, and possession of, the property in dispute on behalf of the predecessor-in-title of the plaintiff, and were thus evidence in favour of the plaintiff and against the defendant, and should not have been excluded from consideration on the question of possession. **C** NITYA KALI DUTT *v.* SARAT CHANDRA BOSE **866**

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Held, that the appeal should not fail in its entirety and that the whole claim for mesne profits should not be dismissed and that it was still open to the decree-holder to obtain a decree, as against the judgment-debtors other than the two minors against whom the appeal had been dismissed, in respect of what would be their share of the mesne profits. **C** MAKUND SINGH *v.* SARASWATI BIBI, 29 C. L. J. 245 **98**

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——— ——— Judgment delivered in former suit, whether can be admitted as additional evidence—Review—Procedure. **652**

Appeal (second)—concld.

——— ——— *New point, whether can be raised.*

A new point may be raised for the first time in second appeal, provided it is purely a question of law arising on the findings of the Courts below and not affected by any facts outside those findings. **L B** MA LAY *v.* TUN SHWE, 10 L. B. R. 10 **588**

——— ——— *Question of fact and inference from facts—Appeal, whether competent.*

Where the sole question in a case is one of fact and the inference to be drawn from facts, a second appeal is not competent. **L** RAJ MAL-BISHAMBHAR NATH *v.* DIWAN CHAND **620**

——— ——— *Question of knowledge of contents of document, whether can be raised.*

The question whether the attestation of a document implies assent to the terms of the document is a question of fact and must be determined with reference to the circumstances of each case, and the High Court cannot entertain such a question in second appeal. **O** DURGA PRASAD *v.* DEBI PRASAD **621**

——— *Question of law, whether can be raised.*

In second appeal the High Court cannot deal with a question of law the determination of which is based upon a question of fact not raised in the Courts below. **Pat** MADANMOHAN PANIGRAHY *v.* BANDU BARIK **256**

——— ——— *Question necessitating remand, whether can be raised for first time.*

A question which necessitates a remand and the taking of evidence, if not raised in the Courts below, cannot be raised for the first time in second appeal.

Where, therefore, it was objected for the first time in second appeal that, in order to give jurisdiction to the Sub-Registrar in whose jurisdiction a certain lease-deed had been registered, a fictitious plot of land had been entered in the lease, the High Court refused to entertain the objection. **C** KALU *v.* HAMIJUDDI HOWLADAR **862**

——— ——— *Sale of land*—Shamilat, *share of, whether passes—Question of fact—Construction of document.*

The question whether a *pro rata* share of the *shamilat* was intended to be conveyed to the vendees under a sale-deed which is silent on the subject is a question of fact, and no question of the construction of the sale-deed arises in the case. **P** MUHAMMAD ALI *v.* AMIR KHAN, 36 P. R. 1919 **380**

——— ——— *Sale of land*—Shamilat, *share of, whether passes—Question of fact—Construction of document.*

The question whether the parties to a sale-deed intended the sale to include a *pro rata* share of the *shamilat* is one of fact and not of law, and where the document does not present any difficulty, no question of the construction of the instrument arises in the case. **P** SULTAN ALI *v.* AMIR, 35 P. R. 1919 **378**

Appellate Court—Judgment, contents of —Failure to weigh evidence—Procedure, error of **I**

Arbitration—Award dissolving marriage and directing payment of money by one of the parties —Application to file award to enforce payment of money—Jurisdiction of Small Cause Court—'Subject-matter of award,' meaning of—Irregularities in procedure of arbitrators, waiver of, by parties **53**

——— *Award not signed by one of several arbitrators, validity of—Decision in accordance with wishes of parties, whether award.*

The omission of one of several arbitrators to sign the award does not vitiate the award where the arbitration proceedings took place in the presence of all the arbitrators.

Where a suit having been referred to arbitration, the arbitrators took down the depositions of the plaintiff and the defendant but finally approved an arrangement put forward by the plaintiff and agreed to by the defendant:

Held, that the decision of the arbitrators, though it was in accordance with the wishes of the parties was nothing but an award. **C** SRICHARAN *v.* MAKHAN LAL **378**

——— *Reference to arbitrators, including presiding Judge, legality of—Applicability of Sch. II—Award by majority—Decree following on award, whether binding.*

A reference of the subject-matter of a pending suit to arbitrators, one of whom is the presiding Judge, is not governed by Schedule II, Civil Procedure Code, and a decree following on an award passed by the majority is valid and binding on the parties.

Per *Seshagiri Aiyar, J.*—It is undesirable that a Judge, before whom a case is pending, should associate himself with other persons as arbitrators in the case.

Where parties have chosen to entrust their case to a Judge and two others, they must be deemed to have agreed to accept the decision of that body as final and as not being open to the attacks to which otherwise a judgment is liable.

Per *Wallis, C. J.*—A reference of a pending suit to the presiding Judge must be held to be altogether *extra cursum curiæ* and not the less so when two others are joined with him, and the decree passed in accordance with their decision must be regarded as a consent decree and as not subject to the provisions of the Second Schedule to the Civil Procedure Code. **M** CHINNA VENKATASAMI NAICKEN *v.* VENKATASAMI NAICKEN, 36 M. L. J. 291; (1919) M. W. N. 221; 25 M. L. T. 397; 42 M. 625 **827**

———, reference to, by Court of Wards—Approval of Court, whether must be in writing—Sanction of Court, whether necessary—Ratification, effect of—Award, part performance of, effect of **999**

———, reference to—*Ex parte* defendant, whether 'party interested'—Reference, application for, without exonerating *ex parte* defendant—Jurisdiction of Court to refer—Award, validity of **155**

Arms Act (XI of 1878), ss. 13, 14, 15, 16, 19—*Servant of person exempted carrying and using master's gun—Offence.*

The servant of a person exempted from the operations of the Arms Act commits no offence by carrying his master's gun and shooting game with it with his master's permission. **A** MALUA *v.* EMPEROR, 20 CR. L. J. 432; 17 A. L. J. 758; 1 U. P. L. R. (H. C.) 61 **205**

Attaching creditor, whether representative of decree-holder 375

Attachment. *See* EXECUTION OF DECREE.

———, *unlawful—Attached property, removal of—Damages, suit for.*

Where an unauthorised attachment is made and the property attached is subsequently removed by a third party without the knowledge and against the will of the person who has made the attachment, the person removing the property is nevertheless liable in damages to the owner of the property. **O** DULARE *v* EMPEROR 191

Attestation, *effect of—Witness, whether affected with knowledge of contents of document.*

The attestation of a document does not involve the witness in any knowledge of the contents of the document, nor affect him with notice of its provisions. **O** DURGA PRASAD *v.* DEBI PRASAD 621

Bengal Court of Wards Act (IX B. C. of 1879), ss. 39, 40—*Arbitration, reference to, by Court of Wards—Approval of Court, whether must be in writing—Sanction of Court, whether necessary—Ratification, effect of—Award, par performance of, effect of.*

To settle certain disputes arbitration was proposed on behalf of the Court of Wards in charge of the defendant's estates and was accepted by the plaintiffs. No submission in writing was drawn up, and the arbitrators gave an award which was carried out in part. In a suit for enforcement of the award so far as effect had not already been given to it:

Held, (1) that there was no statutory rule which required that the approval of the Court of Wards should have been signified in writing; that, although no previous sanction had been obtained, if the submission was a good one and the Court of Wards had subsequently approved and ratified the action of the circle officers, it was bound by the result;

(2) that the award having been carried out in part, the plaintiffs were entitled to the performance of the remainder. **C** TWEEDIE *v.* JOGESH CHANDRA ROY 999

Bengal Municipal Act (III B. C. of 1884), ss. 2º, 85 (a) 993

——— **ss. 97 (a), 102, 108**—*Assessment of Municipal tax—Holding increased by addition of land on account of extension of Municipal limits—Additional assessment, legality of.*

Where a portion of a holding, being within the limits of a Municipality, was assessed with Municipal tax and afterwards during the currency of that assessment the rest of the holding was also included within the Municipality by reason of the extension of the Municipal limits, whereupon the Municipality assessed that portion with additional Municipal tax:

Held, that the additional assessment was illegal, as the Municipality had no course open to them but to continue the assessment already made for the quinquennial period which had then expired, or until such time as they could obtain reassessment under section 97 *read with* 102 of the Bengal Municipal Act **C** TARAPADA MAZUMDAR *v.* SATISH CHANDRA SAHA, 23 C. W. N. 611 993

——— **s. 103**—*Holding increased by addition of land on account of extension of Municipal limits—Additional assessment, legality of.*

Bengal Municipal Act—concld.

The only section of the Bengal Municipal Act which gives the Commissioners of a Municipality power to revise valuation and assessment is section 108 of the Act. That section does not provide for enhancement of valuation and rating of any holding, except where it appears to have been insufficiently valued or rated through mistake, oversight or fraud. The section provides for re-valuation and re-assessment of any holding the value of which has been increased by additions or alterations to any building thereon, but not of any holding the value of which has been increased by the addition of land. **C** TARAPADA MAZUMDAR *v.* SATISH CHANDRA SAHA, 23 C. W. N. 611 993

Bengal Regulation VIII of 1793, s. 5—Bengal Regulation I of 1801, ss 8, 14—Declaration of independence of Taluk Balasuti Digar 148

Bengal Regulation I of 1801, ss. 8, 14—*Bengal Regulation VIII of 1793, s. 5—Declaration of independence of Taluk Balasuti Digar—"Actual produce," what is.*

The estate of Balasuti Digar, within the *zemindari* known as Parganna Pukhuria in the district of Mymensingh, was, on the application of the *talukdar*, declared in 1805 to be an independent *taluk* within the meaning of Bengal Regulations VIII of 1793 and I of 1801, and that independence has not been lost by any laches of the *talukdar* in affirming his rights to obtain the separation of his *taluk* or by any want of diligence on his part.

The expression "the actual produce" in section 8 of Bengal Regulation I of 1801 on which the assessment of the revenue of the aforesaid *taluk* was to be based, means "the actual produce" at the time when proceedings were instituted for the separation of the *taluk*, as the Legislature could not have intended to lay down an ambulatory standard which would vary according to the period or time when separation was being carried into effect. **P C** HEMANTA KUMARI DEBI *v.* JAGADINDRA NATH ROY, 23 C. W. N. 149 148

Bengal Tenancy Act (VIII B. C. of 1885), s. 12—*Permanent tenure—Transfer by private sale—Transferor, liability of, for rent—Rent, charge for, whether subsists.*

Where the provisions of section 12 of the Bengal Tenancy Act are complied with, the transferor of a permanent tenure ceases to be liable for subsequent rent and any property which he has mortgaged as security for the rent ceases to be subject to the charge for such rent. **C** BEJOY CHAND MOHATAB BAHADUR *v.* SARAT CHANDRA, 29 C. L. J. 476 909

——— **ss. 49, 85 (2)**—*Ejectment—Suit to eject under-raiyat by notice—Permanent lease set up by under-raiyat, validity of—Previous possession—Estoppel.*

In a suit to eject an under-*raiyat* after service of a notice to quit under section 49 of the Bengal Tenancy Act, the defendant set up a permanent sub-lease granted by the plaintiff's vendor and pleaded that he could not be ejected and contended that on principle such a lease should be held to be binding on the lessor on the ground of estoppel:

Held, (1) that according to the provisions of clause (2) of section 85 of the Bengal Tenancy Act, the lease set up was invalid and the tenancy could be

Bengal Tenancy Act—contd.

put an end to by a notice under section 49 of the Act and as the defendant had no subsisting tenancy, he could not rely upon his previous possession;

(2) that the general rule as regards the application of the principle of estoppel being that that principle cannot be invoked to defeat the plain provisions of a Statute, and as the application of that principle would clearly defeat the object of section 82 (2) of the Bengal Tenancy Act, the principle could not be applied to the case.

The fact that a lease contains a clause, inserted at the request of the lessee, that the interest of the lessor is that of a *raiyat* at fixed rates, cannot be availed of by the lessee to support a plea of estoppel. **C** ALIMUDDI BEPARI *v.* CHINTAHARAN MUKHOPADHYAY, 23 C. W. N 437 **403**

——— **s. 50**—*Evidence—Presumption as to fixity of rent—Specific plot must be shown to be fixed rate—Burden of proof.*

In order to enable a Court to come to the conclusion that a tenant is a fixed-rate tenant it must be established that he has held at a rent or rate of rent which has not been changed from the time of the permanent settlement.

The rule laid down in sub-section (1) of section 50 of the Bengal Tenancy Act is a rule of law, whereas the rule laid down in sub-section (1) of the section is a rule of evidence which merely raises a presumption that the conditions laid down in sub-section (1) have been satisfied.

In a case where the evidence, if accepted, gives rise to a presumption under section 50 (2) of the Bengal Tenancy Act that the entire area is a fixed-rate holding, but it is conceded that a portion of the holding is not held at a fixed rate, the presumption arising under section 50 (2) is affected and the holding cannot be held to be a fixed-rate holding. **Pat** LAL MOHAMMAD KHAN *v.* KRISHNA DAYAL GIR **302**

——— **ss. 50, 105**—*Presumption arising under s. 50—Kabuliyat executed after inception of tenancy showing rent enhanceable—Rent not enhanced in fact—Presumption, whether rebutted.*

In a proceeding under section 105 of the Bengal Tenancy Act, the landlord produced a *kabuliyat* executed by the tenant after the inception of the tenancy showing that the rent was liable to be enhanced, but there was nothing to show that the rent had ever in fact been enhanced:

Held, that the mere fact that the rent was enhanceable was not sufficient to rebut the presumption arising under section 50, clause (2), of the Bengal Tenancy Act, the question being whether the rent was in fact altered or not, and if it was not altered, then the tenant was entitled to the full benefit of the presumption. **C** DHIRENDRA NATH GHOSE *v.* PURNA CHANDRA DUTTA **904**

——— **ss. 50, 115**—Presumption under s. 50, whether arises after publication of Record of Rights. **552**

——— **s. 52 (2)** **969**

——— **s. 52**—*Rent, enhancement of—Increase of rent for additional area—Measurement, inaccuracy in, proof of, whether necessary.*

A landlord may be entitled to additional rent under section 52 of the Bengal Tenancy Act, even though he is unable to establish that the previous measurement was accurate and reliable, where it appears that the inaccuracy in the previous measurement was in favour of the landlord and the tenant is found to be in possession of more land than was found in the previous measurement. **C** SUKRAJ ROY *v* LAL BAHADUR, 29 C. L J. 253 **34**

——— **s. 65**—*Rent, suit for—Landlord and tenant, relationship of, determination of—Decree, whether rent-decree.*

The fact that at the time a suit for rent is brought, the defendants have ceased to be tenants of the plaintiff does not make the decree obtained in the suit any the less a decree for rent, although it cannot be executed as a rent-decree.

A person who has ceased to be the landlord at the time he sues for rent cannot enforce the decree obtained by him as a rent-decree in accordance with the provisions of section 65 of the Bengal Tenancy Act; but his decree may be a decree for rent for other purposes. **C** DWARKANATH CHAKRAVARTI *v.* ATUL CHANDRA CHAKRAVARTI, 29 C. L. J. 465 **922**

——— **ss. 69, 70**—*Notice to landlord, failure to give, effect of—Order by Collector directing deposit in treasury without direction for payment, whether final.*

A failure to give a landlord an opportunity of being heard in a proceeding under section 70 of the Bengal Tenancy Act is an irregularity going to the root of jurisdiction and vitiates the whole proceeding.

In order to bring proceedings under sections 69 and 70 of the Bengal Tenancy Act, it must be shown that, as required by section 70 (5), the Collector has passed an order having complete finality and enforcible as a decree. An order directing the deposit of money in the treasury without any direction for payment of the amount to any one is not such an order. The fact that, generally, under the *batai* system the division is half and half, is not enough to dispense with the necessity of a final order enforcible as a decree. **Pat** SURAJ PROSAD *v.* KARU SINGH, 4 P. L J. 315 **763**

——— **s. 85 (2)**—*Under-raiyati lease for more than nine years, whether admissible in evidence—Tenancy, proof of—Possession and payment of rent.*

Although an under-*raiyati* lease for more than nine years cannot be adduced in evidence, the under-*raiyat* can prove his tenancy *aliunde*, such as by possession and payment of rent **C** NIBARAN CHANDRA MIRDHA *v.* RAM CHARAN MANDOL, 28 C. L. J. 479 **928**

——— **s. 88**—*Division of holding—Landlord, consent of, proof of—Presumption—Road-cess return, whether rent roll Receipt granted by* patwari, *value of—Plaint filed by previous landlord, statement in, value of.*

To enable a tenant to succeed upon a plea that there has been a division of holdings and distribution of rent thereof, he must establish that the division was made either with the express consent in writing of the landlord, or with the express consent in writing of his agent duly authorised in that behalf. The consent of the landlord will be presumed if there is proved to have been made in the landlord's rent roll any entry showing that the holdings have

Bengal Tenancy Act—contd.

been divided or that the rent payable in respect thereof has been distributed.

A Road-cess return, which is not a rent roll within the meaning of section 88 of the Bengal Tenancy Act, does not justify the conclusion that there has been such a division, especially where the road-cess return has been rejected by the Collector and has not in any way been acted upon. Nor is a rent receipt signed by the *patwari* admissible as evidence of such division, inasmuch as giving consent on behalf of his master to a division of the holding is outside the scope of the authority of a *patwari*, who is a mere rent collector.

A plaint filed by a previous landlord for recovery of rent, as to which there may be a complete explanation, would also not justify such a conclusion. **Pat** JUTHAN LAL *v.* RAM DAT SINGH **996**

——— **s. 97**—*Permission of District Judge, whether necessary for reference to arbitration by Court of Wards.*

Having regard to the provisions of section 97 of the Bengal Tenancy Act, the permission of the District Judge for a reference to arbitration by the Court of Wards is not necessary. **C** TWEEDIE *v.* JOGESH CHANDRA ROY **999**

——— **Ch. X, Part II**—*Landlord and tenant—Rent, suit for—Tenant, whether can dispute amount of rent settled by Revenue Officer.*

In a suit for recovery of arrears of rent it is not open to the tenant to dispute the amount of rent settled by the Revenue Officer and entered in the rent roll prepared under Part II of Chapter X of the Bengal Tenancy Act. **C** SARBESWAR NAIK *v.* RAJANI KANTA **981**

——— **s. 102 (b)** **144**

——— **(as amended by Act III B. C. of 1898), s. 104G**—*Board of Revenue, power of, to alter record published before Act III of 1898 came into force.*

It was not the intention of the Legislature to apply section 104G of the Bengal Tenancy Act to records finally published before Act III of 1898 B C. came into force. Therefore, the Board of Revenue has no authority under section 104G of the Bengal Tenancy Act to alter a record finally published on the 6th of April 1898. **C** BEHARY LAL *v.* NARAIN MISRA, 29 C. L. J. 237 **127**

——— **s. 104H**—"Raiyats"—"*Tenure-holders*"—*Test for determining, whether person is "raiyat" or tenure-holder—Record of Rights, entry in—Presumption as to correctness of entry, rebuttal of—Burden of proof.*

In a suit for a declaration that the plaintiffs are "*raiyats*" and not "tenure-holders" the question ultimately depends on [illegible] must look to the attendant [illegible] of the purpose for [illegible]

If in the Record of Rights [illegible] as "tenure-holders," the [illegible] the statutory presumption [illegible] correct and if the [illegible] the further presumption [illegible] "tenure-holders."

A person who [illegible] in order to make money [illegible] to cultivators, who [illegible] avocations elsewhere, [illegible] a

Bengal Tenancy Act—contd.

"*raiyat*" in the sense in which that term is used in the Bengal Tenancy Act and a tenure derived from such a person is not a "*raiyati* tenure." **P C** RAJANI KANTA GHOSE *v.* SECRETARY OF STATE FOR INDIA, 46 C. 90; 23 C. W. N. 649 **226**

——— **s. 104H**—*Rent, enhancement of, on ground of rise in price of crops—Suit for revision of rent, maintainability of—Special conditions and incidents of tenancy—Rent, whether special incident.*

Section 104 H, clause (3), of the Bengal Tenancy Act does not contemplate a suit by a person who has been aggrieved by an enhancement of rent made on the ground that there has been a rise in the prices of staple food crops.

Section 104 (H) (3) *g* of the Bengal Tenancy Act does not apply to the incidents of a tenancy generally but to the special conditions and incidents mentioned in section 102 (*h*) of the Act.

Rent is not a special incident of a tenancy but a general incident, because all lands held from a landlord are generally liable to pay rent. **C** KALI PRASONNO *v.* SECRETARY OF STATE FOR INDIA, 25 C. W. N. 383 **144**

——— **ss. 105, 50**—Presumption arising under s 50—Kabuliyat executed after inception of tenancy showing rent enhanceable - Rent not enhanced in fact—Presumption, whether rebutted **904**

——— **ss. 105, 105A, 106, 107, cl. (2), 50 (2)**—*Record of Rights—Application under s. 105 for settlement of rent—Settlement Officer, whether can decide question of status of tenant and can make note correcting entry as regards status—Scope and object of s. 105—"Issues" in s. 105A, meaning of.*

On an application made by a landlord under section 105 of the Bengal Tenancy Act for settlement of rent, the Assistant Settlement Officer decided the question of status of the tenant and dismissed the application by the following order: "Rent is held to be at a fixed lump rental, and as such note should be made in the Record of Rights as *mokta mokarari* in place of the status of occupancy recorded for him:"

Held, that although no formal issue was framed as to the tenant's status, it was obligatory upon the Settlement Officer to try and decide the question of status of the tenant, as the question was one of the kind described in clause (*c*) of section 105A.

The word "issue" in section 105 A, Bengal Tenancy Act, cannot mean merely an issue framed and recorded according to law. The object of section 105A, Bengal Tenancy Act, is to give the defendant in proceedings under section 105 the right to raise questions which should properly form the subject-matter of proceedings under section 106. Therefore, although in such a case the tenant does not apply under section 106 to have the entry corrected, the Settlement Officer should order a correction of the entry to be made in the Record of Rights. **C** JATINDRA NARAIN ACHARJEA *v.* MALU [illegible] **969**

——— **s. 105**—*Rent, enhancement of—Price of staple food crops, rise in—Procedure—Settlement officer, power of, to [illegible] question.*

Bengal Tenancy Act—concld.

A landlord, who claims enhancement of rent on the ground of rise in the average local price of staple food crops during the currency of the existing rent, should have his case decided by the Settlement Officer in a proceeding under section 105 of the Bengal Tenancy Act and should not be driven to a separate suit. **C** SUKRAJ ROY *v.* LAL BAHADUR, 29 C. L. J. 253 **34**

——— **s. 109A (3) 760**

——— **s. 115, 50**—*Presumption under s.* 50, *whether arises after publication of Record of Rights.*

After the publication of a Record of Rights under Chapter X of the Bengal Tenancy Act in respect of a tenancy, the tenants are debarred by the provisions of section 115 of the Act from claiming the presumption which is mentioned in section 50 of the same Act. **C** MURLIDHAR *v* RADHA MOHAN **552**

——— **s. 153**—*Rent suit of less than Rs.* 100 *in value—Decision on question of title—Appeal, whether lies—Landlord and tenant—Rent realised by third person, effect of.*

In a suit for recovery of rent of a holding the value whereof was less than Rs 100, the defence was that the plaintiff was entitled only to a half share of the rent of the holding. The lower Appellate Court decreed the suit for rent of only half the holding. Plaintiff preferred a second appeal:

Held, that as there was a dispute as to the share of the plaintiff, there was a dispute as to the amount of rent annually payable by the defendant and that a decision having been given on that point, a second appeal was competent

If one man realizes rent due to another, that fact cannot constitute the former the landlord in place of the latter. **C** BASHIRAM NATH *v.* DINA NATH DEY **397**

——— **s. 155 (1)**—*Notice to restore land to original condition—Compensation, demand for, whether necessary—Formal defect, whether vitiates notice.*

Where a notice under section 155 (1) of the Bengal Tenancy Act intimated to the tenants that they should, within one month from the date of service, restore the land to its original condition and that if they failed to do so a suit would be brought against them for ejectment and for recovery of damages:

Held, that the notice did not fulfil the requirements of section 155 (1), as there was no claim for compensation either in addition or as an alternative to a demand on the tenants to remedy the misuse or breach.

A notice does not become insufficient because it is open to criticism on a meticulous examination of some of the phrases employed **C** MAHARAJ BAHADUR SINGH *v.* MAKHAN CHANDRA GHOSH, 29 C. L. J. 430 **385**

——— **s. 161**—*Sale of portion of non-transferable occupancy holding, whether incumbrance—Exchange, whether sale*

The sale of a portion of a non-transferable occupancy holding is not an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. **C** KRIPA SINDHU MUKHERJEE *v.* SURENDRA NATH BANERJEE, 30 C. L. J. 4 **285**

Berar Municipal Law, 1886, ss. 79, 116—*Bye-law depriving public of right, legality of—Approval by Local Government, whether confers validity.*

Section 116 (1) (*j*) of the Berar Municipal Law empowers a committee to make rules for certain purposes and generally for carrying out the purposes of the Municipal Law, but it does not, even by implication, authorise a Committee to make a bye-law depriving the public of a right long enjoyed by it.

The Camp Municipal Committee of Amraoti made a bye-law under section 79 read with section 116 (1) (*j*) and (2) of the Berar Municipal Law prohibiting, within the limits of that Committee, a particular class of traffic on certain specified roads, the effect of the bye-law being to deprive the public of a right, in respect of the prohibited traffic, which it had long enjoyed:

Held, that the bye-law was illegal and *ultra vires*, and a conviction for a breach of its terms could not be maintained.

The mere fact of the Local Government having signified its approval to a bye-law would not render the bye-law valid, in the absence of clear and unmistakable language in the Act empowering a Committee to make such a bye-law. **N** MAHAMMAD SARWAR *v.* SECRETARY, CAMP MUNICIPALITY, AMRAOTI, 20 CR. L. J. 453; 15 N. L. R. 105 **341**

Bihar and Orissa Excise Act (II of 1915), ss. 47, 55—*Report under s.* 47 (h)—*Cognizance of offences under s.* 47 (a) *or s.* 55, *legality of—Removal of liquor—Presumption under s.* 48, *whether permissible.*

In the report of an Excise Sub-Inspector prosecution was asked for only under section 47 (*h*) of the Bihar and Orissa Excise Act, but the accused was in addition tried for and convicted of offences under sections 47 (*a*) and 55 of the Act:

Held, that such a proceeding was not illegal, especially as the report disclosed facts constituting offences under the other sections.

Section 48 of the Bihar and Orissa Excise Act does not apply to a case of removal of liquor, and it is, therefore, illegal to make use of the presumption created by that section in the trial of an offence under section 47 (*h*) of the Act. **Pat** MAHABIR SINGH *v* EMPEROR, 20 CR. L. J. 487 **471**

Bihar and Orissa Public Demands Recovery Act (IV of 1914)—Certificate Officer, whether Court—Order directing prosecution, legality of **769**

Bombay Bhagdari and Narvadari Act (V of 1862), s. 3—*Sale of different portions of recognised sub-division of* bhag *by different owners in favour of single vendee, validity of.*

The defendant purchased from the plaintiff certain *bhagdari* lands, and at the same time purchased certain other such lands from another person. The whole of the lands so purchased comprised a recognised sub-division of a *bhag*. The plaintiff brought a suit to recover the land she had sold, on the ground that the sale was illegal and void as being of an unrecognised sub-division of a *bhag*:

Held, that the effect of the two sales being to bring together various dismembered portions of a recognised sub-division of a *bhag* into the hands of

Bombay Bhagdari and Narvadari Act—concld.

one owner, the transactions did not violate the terms of section 3 of the Bhagdari Act and were not illegal or void. **B** GULAB RAIJI *v.* RAI TEJBAI, 21 BOM. L. R. 707 **947**

Bombay District Municipalities Act (III of 1901), s. 96—*Permission to build—Time-limit, power of Municipality to impose.*

Accused obtained permission from the complainant Municipality to re-build his house. The permission purported to be limited in effect to six months. The accused was found building his house three years after the date of the permission:

Held, that there being no proof that the work was not begun within six months from the date of the permission, the accused was not guilty of any offence.

Per *Heaton, J.*—A Municipality has power to say that a work to which it gives permission under section 96 of the Bombay District Municipalities Act shall be begun within a certain time, but it is doubtful whether it has power to say that a work must be finished within a given time.

Per *Hayward, J.*—A time-limit was not contemplated by the Legislature in enacting section 96 of the Bombay District Municipalities Act, and, therefore, such a limit contained in a permission to build is *ultra vires* **B** GODHRA MUNICIPALITY *v.* HARILAL LALLUBHAI, 21 BOM. L. R. 255; 20 CR. L. J. 438 **262**

Bombay Khoti Settlement Act (I of 1880), s. 20, *scope of—Entry in Settlement register that interest of occupancy tenant is not transferable, whether conclusive.*

The rule of evidence laid down in section 20 of the Khoti Settlement Act, that the entry in the Settlement register purporting to record the fact that the interest of any occupancy tenant is not transferable shall be conclusive evidence, cannot apply where according to a judgment *inter partes* the person relying on the section is not an occupancy tenant; for the fact of the tenancy of the individual is not conclusively settled by the entry. **B** CHINTO MAHADEO KHANDEKAR *v.* MADHAV RAMCHANDRA PATKAR, 21 BOM. L. R. 361; 43 B. 565 **101**

Bombay Rent (War Restrictions) Act (II of 1918), s. 2 (c)—*"Landlord," who is.*

A lessee of premises who is entitled to recover rent for the premises falls within the terms of the definition of "landlord" in section 2 (c) of the Bombay Rent Act, 1918 **B** MORARJI GOKULDAS & CO. *v.* ASIAN COMMERCIAL ASSURANCE CO., LTD., 21 BOM. L. R. 397 **293**

Bombay Summary Settlement Act (VII of 1863)—*Grant of land to mosque—Summary settlement—Grant said to stranger—Agreement, whether evidence—Summary Settlement Act, construction of.*

The plaintiff [illegible] certain land [illegible] endowment [illegible] title from a [illegible] manager of the [illegible] granted for the [illegible] Amod by the [illegible] Province. In [illegible] under the Summary Settlement, when an annual quit rent was imposed and a *sanad* was issued to the manager of the mosque which, after reciting the above fact, provided: "that the said land, subject in addition to *salami* or other payments which may have been hitherto levied to the payment to Government of an annual quit rent of Rs. 7-8-0 only, shall be continued for ever by the British Government as the endowment property of the Juma Masjid at Amod without increase of the said quit rent but on condition that the managers thereof shall continue to be loyal and faithful subjects of the British Government." The defendant pleaded that as the land had practically ceased to be the endowment property of the mosque, it had become liable to full assessment to land revenue. The suit was dismissed and the plaintiff appealed to the High Court:

Held, that the settlement in question was governed by the Bombay Summary Settlement Act, VII of 1863; that the terms of the *sanad* pointed to the conclusion that the land need not continue to be the property of the mosque to enable the holder for the time being obtaining the benefit of the exemption from assessment, and that the Government did not get any right under the *sanad* to levy the full assessment even when the property ceased to be the endowment property otherwise than by a lawful alienation. **B** SHANKARLAL *v.* SECRETARY OF STATE FOR INDIA, 21 BOM. L. R. 688 **910**

Bombay Watan Act (V of 1886), s. 2—*Panch Mahal, tenure in—Jivak badal grant—Death of vatandar—Daughter, whether entitled to share.*

A dispute whether an hereditary office in the Panch Mahals was held on service tenure was settled by Government. In announcing the settlement the Government admitted that the grant had been made *jivak badal, i.e.*, without the condition of service, and it was found that this announcement was made before the extension to the Panch Mahals of the Vatan Amendment Act, V of 1886. On the death of the last male holder his daughter filed the present suit for a declaration that she was entitled to a one-fourth share of her father's property. Her suit was decreed, and the defendants appealed to the High Court contending that the property in suit was all *watan* property:

Held, that the property in suit was not service [illegible] to which alone the Watan Act applied, and that, therefore, the plaintiff's suit had been rightly decreed. **B** LAVKARDAS MOTILAL *v.* BAI JEKORE, 20 BOM. L. R. [illegible]; 41 B. 423 **179**

Burmese Law, Burmese, *applicability of, to marriages of non-Buddhists.*

The Burmese Law is not applicable to marriages of Europeans or non-Buddhist non-Burmans celebrated according to Burmese ceremonies or custom prevailing in the time of the Burmese Kings. **B** [illegible] 12 BOM. L. R. 48; 17 C. W. N. (1913) 28 **542**

——— **Burmese**—*Marriage [illegible] by husband [illegible] Civil Procedure [illegible], O. XXIV, r. 1.*

Buddhist Law--concld.

Per *Twomey, C J, Pratt and Maung Kin, JJ*—A Burmese husband who mortgages the joint property of himself and his wife with her knowledge and consent does not act as *benamidar* for the wife, and a decree against him alone will not affect the wife's interest in the property.

Per *Ormond, J.* (*per contra*)—A Burmese husband mortgaging the joint property of himself and his wife is a *benamidar* for the wife and a decree against him alone will bind the wife's interest in the property. **L B** MA NYUN *v.* TEXEIRA, 12 BUR. L. T. 31; 10 L. B R. 36 **563**

——, **Burmese**—*Succession—Shares of widow and children from different marriages*

Where a Burmese Buddhist marries two wives successively and dies leaving a widow, children by her and children by his earlier wife, the widow is entitled to a one-fourth share of the deceased's property, her children to one-eighth and the children of the former wife to five-eighths. **L B** MA LAY *v.* TUN SHWE, 10 L. B. R. 10; 12 BUR L T 75 **588**

——, **Chinese**—*Adoption Letters of Administration to estate of deceased Chinese, whether can be granted to widow for benefit of adopted son*

K T applied for Letters of Administration to the estate of *T F*, a Chinese Buddhist alleging that she was the deceased's widow and that *A W* was their adopted son *G S* opposed the application on the ground that she was the deceased's widow and not *K T*, who was merely a concubine The District Judge granted *K T*'s application leaving the question of the status of *G S* to be decided in a regular suit. *G S* appealed to the Chief Court objecting that *A W* was not entitled to inherit: *T Y*, a paternal uncle of the deceased, also objected to *A W*'s adoption:

Held, that among Chinese Buddhists a person belonging to the same clan as the deceased and with the same surname may be regarded as an agnate that as *A W* belonged to the same clan, and his father had the same surname as the deceased, *prima facie* he fell within the clan of agnates of the deceased; that so far as the question of Letters of Administration was concerned, the objection to his adoption should not prevail: and that, in the circumstances, *K T* was entitled to Letters of Administration for the minor *A W*'s use and benefit **L** GYAN SHWE KIN TWE, 10 L B R 23 1 BUR L. T. 65 **608**

Burden of proof—*Malicious prosecution, damages for, suit for—Plaintiff, duty of*

In a suit for damages for malicious prosecution the plaintiff must call evidence to prove that he was innocent of the charge that had been brought reasonable and probable cause. Merely to show that the criminal proceedings terminated in his favour is not enough.

Where the criminal case is dismissed on a technical ground, it is still more incumbent on the plaintiff to establish his innocence. **P** PHOLO RAM *v.* HUKAM SINGH 42 P R 1919 **279**

——— Suit on unregistered bond—Denial of consideration **579**

Burma Excise Act (V of 1917), s. 30 (2)—*Selling liquor without license—Restaurant keeper procuring liquor for customers, whether commits offence*

A restaurant keeper, who holds no license for the sale of liquor and who, to oblige a customer, procures for him a bottle of beer from a liquor shop, cannot be convicted under section 0 *b* of the Burma Excise Act of selling liquor without a license **L B** AH KWAY *v.* EMPEROR, 12 BUR. L. T. 54; 20 CR L J. 529 **769**

Burma Excise Act—concld.

Burma Village Act (III of 1889), s. 9 **773**

C. P. Tenancy Act (XI of 1898), s. 41

—*Occupancy holding, sale of—Mortgage, simultaneous, by vendee in favour of vendor for part of consideration—Notice to landlord in respect of mortgage, absence of, effect of—Landlord, remedy of—Vendee, position of—Lien, whether exists Transfer of Property Act IV of 1882, s 55, 4 (b).*

B, an absolute occupancy tenant, after giving the landlord the notice prescribed by section 41 (2) of the C. P. Tenancy Act, sold on 2nd November 1903 his holding to *A* and two others for Rs. 1,500, out of which Rs. 850 were paid in cash and for the balance of Rs 650 the purchasers executed the same day a mortgage deed without possession in favour of the vendor with a condition of foreclosure in case the amount remained unpaid after three years. On the 21st July 1917 *B* obtained possession of the holding in execution of a final foreclosure decree obtained on the foot of the mortgage The landlords brought the present suit to eject him on the ground that the notice prescribed by section 41 (2) C. P Tenancy Act, was not given before the mortgage was effected. For the defence it was pleaded, *inter alia*, that the sale and mortgage practically constituted one transaction, so that no separate notice was necessary:

Held, (1) that the sale and the mortgage were separate transactions and that no notice having been given to the landlords in respect of the mortgage, the defendant was liable to be ejected

(2) that the statutory charge, which the defendant had under clause *b*) of section 55 4 of the Transfer of Property Act, was excluded by the express mortgage which the defendant not only took but foreclosed

(3 that the landlords were not restricted by section 41 5) of the C. P Tenancy Act to a remedy of pre-emption only **N** MULCHAND *v.* BISSU, 5 N. L R 109 **721**

——— **s. 43 (1).**

The Central Provinces Tenancy Act does not in any way limit, or interfere with, or render inapplicable, the ordinary rights and incidents attaching to joint family property, in cases where a family is governed by the Mitakshara Law, to *raiyati* holdings in those localities which are governed by the Act. **Pat** SUKURU MALI *v.* BRAHMAPURA BALBHADRA MAHAPRABHU, 4 PAT. L J. 354 **896**

Ceylon Insolvency Ordinance (VII of 1853), ss. 124, 126 **38**

Charge *on immoveable property, whether mortgage—Suit on security-bond, maintainability of*

Per *Spencer, J., Quære*—Whether a security bond which amounts to a charge on immoveable property is a mortgage involving a transfer of interest in the property

Per *Sadasiva Aiyar, J*--Even where there is no personal covenant to pay a document creating a charge on specific immoveable property is a mortgage

Charge—concld.

and not a mere charge liable to be defeated by a subsequent mortgage-deed or sale-deed, though executed in favour of a *bona fide* transferee for consideration without notice

Distinction between a charge and a mortgage pointed out **M** SRINIVASA RAGHAVA IYENGAR *v.* RENGANATHA IYENGAR, 20 M. L. T. 347; 36 M. L. J. 618 **963**

Cheating—Deception, proof of, whether necessary—Property obtained for one purpose used for another—Offence **173**

Chota Nagpur Encumbered Estates Act (VI of 1876), s. 8 *Manager, suit against, whether lies—Manager, power of, to criticise debts decreed by competent Courts.*

A suit will not lie for a declaration against the manager of an estate notified under the Chota Nagpur Encumbered Estates Act, if it is found, as a question of law or fact, that his action was done in good faith under the provisions of section 8 of the Act but if what he purports to have done was not really an act which he was competent to do under section 8, a suit will lie for a declaration that what he had done was outside the scope of the Act altogether

In dealing with an estate under section 8 of the Chota Nagpur Encumbered Estates Act the manager must take up and scrutinize all debts and finally pass orders, even upon debts decreed by competent Courts **Pat** THAKUR PRASAD *v* MANAGER, BARABHUM ESTATE, (1919) PAT. 25 : 4 P. L. J. 52 **69**

Chota Nagpur Tenancy Act (VI of 1908), ss. 26, 27 *Occupancy tenant Contract as to enhancement of rent, validity of.*

The language of section 27 of the Chota Nagpur Tenancy Act is very peremptory and leaves no scope whatever for any agreement between the parties.

A *kabuliyat* executed by an occupancy tenant to pay enhanced rent is illegal and is not binding upon the tenant under section 7 of the Chota Nagpur Tenancy Act. **Pat** JAGDEO KISHORE SAHU *v* SHAMBHU NATH **27**

Civil Procedure Code (Act V of 1908) *Order disallowing objection to jurisdiction, whether open to revision—Evidence, examination of, in revision.*

Where an objection to the place of suing is investigated and a formal order is passed by the Court in respect thereof, the High Court has jurisdiction to interfere with the order in revision.

When a Court of Revision looks into the evidence, it does so with a view to determine whether the subordinate Court has assumed a jurisdiction which it did not possess **A** BHARGAVA AND CO *v* JAGAN NATH-BHAGWAN DASS, 17 A. L. J. 1 ; 1 U. P. L. R. (H. C.) 10 **331**

——— S. 10, *scope of—Matter directly and substantially in issue in two suits—Stay of subsequent suit—Reliefs claimed, difference in, effect of*

In order to attract the operation of section 10 of the Code of Civil Procedure it is necessary that every matter in dispute should be directly and substantially in issue in the previous suit.

Where, however, the matters in dispute in the suits are substantially the same but the relief claimed in the subsequent suit is not identical with the relief claimed in the earlier suit would not operate to enable the parties to continue the litigation. **Pat** KESHO PRASAD SINGH *v.* SHIVA SARAN LAL, (1919) PAT 284; 4 P. L. J. 507 **36**

——— S. 11 Res judicata—*Decree not based on finding—Finding, whether* res judicata *'finally decided,' meaning of.*

Plaintiff sued defendant for ejectment and arrears of rent Defendant pleaded that he was a permanent tenant and could not, therefore, be ejected. The Court found that the defendant was a tenant from year to year, but that a legal notice to quit had not been served upon him It, therefore, decreed the claim for arrears of rent but dismissed the claim for ejectment Subsequently the plaintiff gave the defendant a notice to quit and sued to eject him:

Held, that although the issue as to the nature of the defendant's tenancy was directly and substantially in issue in the previous suit, it could not be said to have been finally decided in that suit and that, therefore, it was not *res judicata*

Per *Pratt, J.*—The question, whether an issue was substantially raised and decided in a suit is a matter of fact to be decided upon the circumstances of each particular case.

Where a decree is not based upon a finding but is made in spite of it, the finding cannot operate as *res judicata*

Per *Heaton, J.*—The Legislature did not intend the words "finally decided" in section 11 of the Civil Procedure Code to apply to a finding not followed by anything peculiarly appropriate to itself

Where a finding is followed by a result which would equally follow from something essentially different, that finding cannot be regarded as a final decision It is merely an expression of opinion and nothing more **B** DALDBHAI LALLBHAI *v* DAYA RAMA, 21 BOM. L. R. 65, 3 I. C. 68 **109**

——— S. 11— es judicata *Landlord and tenant—Rent suit—Rate of rent, whether* res judicata.

The general rule of law is that a decision in a previous rent suit as to the amount of rent annually payable does not operate as *res judicata* in a suit for the rent of subsequent years, although it may give rise to a presumption that the rent remains the same. This rule does not, however, apply where the suit is based on a contract between the parties and the question of the rate of rent under the contract was a point in issue in the previous suit **Pat** SHEO PRASAD MANDER *v.* BATESWAR MAHTON **56**

——— S. 11 Res judicata *Revenue Court, decision of, whether* res judicata *in civil suit.*

A decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit, unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself, in which the issue is subsequently raised. **C** BEHARY LAL *v.* NARAIN MISRA, 20 C. L. J. 207 **124**

——— ss. 16 (c) 17, 21—*Applicability of Code to Scheduled Districts, Jurisdiction—Objection, whether can be taken in appeal*

On an appeal to the High Court against an order decreeing the [illegible] suits of which are situated in what are known as the Agency

Civil Procedure Code—1908—contd.

Districts, an objection was taken for the first time that the order was made without jurisdiction. The High Court, viewing the objection as relating to the place of suing, overruled it on the ground that under section 21 of the Civil Procedure Code such objection could not be taken for the first in appeal:

Held, that as the provisions of the Code under which the order of sale was made did not apply to the district in which some of the lands were situate and as the objection was one going to the nullity of the order on the ground of want of jurisdiction, it must, so far as that portion of the lands was concerned, prevail, notwithstanding the provisions of section 17 of the Code, the word "Courts" in which section must be held as meaning Courts to which the Code applies. **P C** SETHUCHERLA *v.* MAHARAJA OF JEYPORE, 17 A. L. J. 694; 37 M. L. J. 11; (1919) M. W. N. 502; 26 M. L. T. 127; 21 BOM. L. R. 914; 30 C. L. J. 269; 23 C. W. N. 1033 **185**

——— **ss. 20, 21**—*Place of suing—Jurisdiction, objection to—Order disallowing objection—Contract made by broker in contravention of authority—Ratification by principal—Suit on basis of contract—Forum, proper.*

Defendants, who were carrying on business at Delhi, authorised their broker to sell certain goods at a certain price. The broker agreed to sell the goods to the plaintiffs at Agra at a lower price. This agreement was subsequently ratified by the defendants at Delhi. Plaintiffs brought a suit against the defendants for damages for breach of the contract in the Agra Court:

Held, that the contract having been made at Delhi, the Agra Court had no jurisdiction to entertain the suit **A** BHARGAVA AND CO. *v.* JAGAN NATH BHAGWAN DASS, 17 A. L. J. 718; 1 U. P. L. R. (H. C.) 120 **331**

——— **ss. 37, 38**—*Mortgage decree passed by Court having no territorial jurisdiction over hypotheca—Execution, application for, whether can be presented to Court having jurisdiction without transfer of decree from Court which passed it—Transfer for execution, when not competent.*

A mortgage decree was passed by the Additional Munsif's Court of Tinnevelly, which had no jurisdiction over the hypotheca but which was established only to aid the other Courts. An application for execution was made to the Koilpatti Munsif's Court which had jurisdiction over the hypotheca, but without a transfer of the decree from the Additional Munsif's Court which had not ceased to exist:

Held, that the Koilpatti Munsif's Court had no jurisdiction to execute until the decree was transferred to it by the Court which had passed it.

No transfer of a decree should be made for execution so as to evade the provisions of the Limitation Act or to validate an invalid application. **M** VENKATASAWMI NAIK *v.* SIVANU MUDALI, 36 M. L. J. 139; 42 M. 461 **102**

——— **ss. 47, 115, O. XXI, rr. 69, 71, 84**—Contract Act (IX of 1872), s. 6—Execution of decree—Sale—Bid, nature and effect of—Death of highest bidder—Revocation of bid—Procedure, subsequent—Order for fresh auction—Declaring next lower bidder as purchaser, illegality of—Re-sale, order for, on default of payment of deposit—Jurisdiction, wrong exercise of—Appeal, maintainability of—Revision **805**

Civil Procedure Code—1908—contd.

——— **s. 47**—*Execution of decree—Sale—Objection allowed—Remedy of decree-holder—Separate suit, maintainability of.*

Where an objection to a sale in execution of a decree is allowed, the decree-holder, if aggrieved thereby, has his remedy by way of appeal and second appeal, and if he omits to appeal the order of the executing Court is final and binding upon the parties. Section 47 of the Civil Procedure Code forbids the institution of a regular suit to avoid the consequences of such an order. **A** PARBHU DAYAL *v.* ANANDI DIN, 17 A. L. J. 832; 1 U. P. L. R. (H. C.) 49 **184**

——— **s. 60**—*Attachment—House occupied by agriculturist, whether liable to be attached—Protection, extent of.*

The protection from attachment afforded by section 60 *c* of the Code of Civil Procedure to the house and other buildings occupied by an agriculturist is not confined to his actual dwelling-house, and would extend to any house occupied or used for agricultural purposes, such as for keeping bullocks, or storing grain or for the residence of an agent to supervise the cultivation.

The requirements of an agriculturist under section 60 (*c*) of the Civil Procedure Code ought not to be judged with reference to the number of bullocks he keeps, but with reference to the possibility of his cultivating the whole of the area he possesses. **N** BHAIYALAL *v.* BALLABHADASS, 15 N. L. R. 83 **129**

——— **s. 60**—*Execution of decree—Agriculturist, house belonging to, whether can be sold.*

Having regard to the provisions of section 60 of the Civil Procedure Code, the house of an agriculturist, which is appurtenant to his agricultural holding, is not liable to sale in execution of a decree obtained upon a mortgage of the house made by the agriculturist **A** NIADAR SINGH *v.* SABIT KHAN **553**

——— **s. 60**, *proviso, cl. f*—*Execution of decree—Mahabrahman, office of, whether can be sold.*

The office of a Mahabrahman or a Birtacharji is a right to perform personal service and, as such, is exempt from attachment and sale in execution of a decree under clause (*f*) of the proviso to section 60 of the Civil Procedure Code. **A** DURGA PRASAD *v.* SHAMBHU, 17 A. L. J. 842; 1 U. P. L. R. (H. C.) 101 **539**

——— **s. 66**—*Execution of decree—Sale—Agreement by purchaser to convey property purchased—Suit to enforce agreement, maintainability of—Benami purchase, allegation of, in plaint, effect of.*

Section 66, Civil Procedure Code, does not debar a person from maintaining a suit for specific performance of an agreement by the auction-purchaser subsequent to the purchase to convey the property to him. The transaction is not *benami* and the mere allegation in the plaint that it was a *benami* transaction does not bring it within the mischief of the section. **M** AMRUTAM VENKATAPPA *v.* VAVILALA JALAYYA, 9 L. W. 598; 26 M. L. T. 46; (1919) M. W. N. 355; 37 M. L. J. 98; 42 M. 615 **111**

——— **s. 72**—*Execution of decree by Collector—Collector, powers of—Collector, whether can propose temporary alienation of land.*

The position of a Revenue Officer executing the decree of a Civil Court, by the attachment of land or by temporary alienation or otherwise, is that

of a ministerial officer of the Civil Court taking his orders from such Court, and he has no power to order a temporary alienation of the land attached.

Land belonging to a member of an agricultural tribe is liable after attachment to be dealt with under section 73 of the Civil Procedure Code, the object of that section being to avoid the evils of a sale of agricultural land in execution of decrees by providing an alternative process of a more equitable and less harsh description. A Collector, therefore, has jurisdiction to make a proposal to effect a temporary alienation of the land of an agriculturist judgment-debtor attached in execution of a decree. **F C P** SALIH MUHAMMAD *v.* MEHAR SINGH, 1 P. R. 1919 Rev. **399**

——— **s. 73**—*Mortgage—Sale of mortgagor's porperty in execution of decree obtained by some other creditor—Rateable distributioa—Mortgagee, position of.*

A mortgagee of a judgment-debtor who has obtained no decree against the latter, and has not made any application under section 73 of the Civil Procedure Code, cannot claim the assets realised by the sale of the judgment-debtor's property in execution of a decree held by another creditor. **L B** Po So *v* BA ZAN, 12 BUR. L. T. 43 **580**

——— **s. 73 (b), O. XXI, r. 66 (4)**—Execution of decree—Property subject to mortgage, whether can be attached and sold—Procedure **750**

——— **s. 86**—Kurundwad Jahageerdars, *whether Ruling Chiefs—Suit against Ruling Chief—Consent of Governor-General, whether necessary.*

Kurundwad Jahageerdars are Ruling Chiefs and cannot be sued without the consent of the Governor-Geueral **B** KRISHNAJI GANESH *v.* SECRETARY OF STATE FOR INDIA, 21 BOM. L. R. 376 **228**

——— **s. 92,** *scope of.*

Section 92 of the Civil Procedure Code is not applicable to a case where the relief claimed is not one of the reliefs mentioned in the section. **L** AFIMAN *v.* HAMID-UD DIN HUSAIN **799**

——— **s. 92**—*Suit relating to public trust - Sanction—Court, whether can grant relief not included in sanction.*

A suit brought under section 92 of the Civil Procedure Code must be limited to matters included in the sanction and it is not competent to the Court to enlarge the scope of the suit and to grant reliefs other than those included in the terms of the sanction. **L** NIZAM-UL-HAQ *v.* MUHAMMAD ISHAQ **511**

——— **s. 96**—*Appeal—*[illegible] *tried as* [illegible] *able.*

Where a suit [illegible] instituted in a Court [illegible] not invested with [illegible] and is decided [illegible] of the first [illegible] diction, the [illegible] an appeal [illegible] competent **C** [illegible] Roy **551**

——— **s. 97** [illegible] *not appealed* [illegible] *of, whether*

A preliminary decree is final if no appeal is filed against it.

In a mortgage suit the parties agreed to a particular rate of interest, such rate being in excess of the rate given in the bond. The Court passed a preliminary decree embodying this rate of interest and no appeal was filed against the decree, but when the mortgagee applied for a decree absolute, the mortgagor objected to the rate of interest as being in excess of the rate claimed in the plaint and questioned the jurisdiction of the Court in allowing such rate:

Held, that the Court had jurisdiction to increase the rate of interest, that it was at liberty to make an order for the payment of interest at any rate that seemed suitable, and that as no appeal had been filed against the preliminary decree, the order fixing the rate of interest could not be questioned in any subsequent proceeding. **Pat** BENUDHAR PANDA *v.* KANGOI KRISHNA CHANDRA DAS, 4 P. L. J. 306 **738**

——— **s. 97**—*Preliminary decree, when can be passsd—Specific performance, suit for—Decree, conditional, whether preliminary.*

A decree in a suit for specific performance of a contract, though conditional in form, is not a preliminary decree A preliminary decree can only be drawn up in those cases for which express provision is made in the Civil Procedure Code. **C** MOHENDRA CHANDRA GHOSAL *v* RAM RATAN TEWARI **442**

——— **s. 99**—Appellate Court—Admission of additional evidence without recording reasons—Irregularity **50**

——— **s. 99, O. XX, rr. 1, 2, 3**—*Judgment written by one Judge pronounced by another, validity of—Irregularity—Waiver.*

The provisions of the law relating to the delivery of judgments have been framed for the benefit of the parties litigant and their contravention is an irregularity curable by consent or waiver of parties.

After the conclusion of the hearing in a case the Judge reserved his judgment, which he afterwards wrote out, signed, dated and placed on the record. This judgment was delivered by another Judge, who was temporarily in charge of the Court:

Held, that although the judgment so delivered was pronounced, dated and signed in contravention of the specific provisions of the Civil Procedure Code, it was an irregularity which was waived by the parties not taking objection at the time of the delivery of the judgment.

Non-compliance with every rule of procedure does not necessarily destroy the validity of the whole proceedings. The purpose of the rule violated must be examined. If the act of the Court is without jurisdiction or infringes a rule prescribed on grounds of public policy, the proceeding becomes a nullity; if it is, on the other hand, only an irregular exercise of jurisdiction in contravention of rules [illegible] by the Legislature with a view to afford [illegible] to litigants, though the latter might [illegible] the benefit [illegible] is not entitled to [illegible] a reversal [illegible] merits has not affected [illegible] mere fact that [illegible] be [illegible] matter relates to the [illegible] does not

necessarily show that what has been done is a nullity the effect depends upon the nature, scope and object of the particular provision which has been violated. **C** FORT GLOSTER JUTE MANUFACTURING CO. v CHANDRA KUMAR DAS 29 C. L. J 458 **405**

——— s. 99, O. XXXIV, r. 1 - *Limitation Act IX of 9 8), s 22, scope of Mortgage, suit on, against some of several heirs of mortgagor, maintainability of—Non-joinder of parties, effect of.*

A mortgagee brought a suit to enforce his mortgage by sale of the mortgaged properties against some only of the heirs of the mortgagor. On objection being taken that the suit was bad for non joinder of the other heirs, the mortgagee refused to join them as the period of limitation as against them had expired:

Held, that the effect of the non-joinder of some of the heirs of the mortgagor was that the mortgagor lost his right to enforce the mortgage charge against that part of the security which was represented by the shares of the excluded heirs, but that the mortgagee was still entitled to enforce his charge against the rest of the property and there was no bar to the jurisdiction of the Court to entertain the suit as framed

Per *Pratt, J.* - Section 99 of the Civil Procedure Code refers to misjoinder of parties, but misjoinder includes non-joinder.

The test both under Order XXXIV, rule 1, of the Civil Procedure Code and section 22 of the Limitation Act is the same, *viz.*, was the suit properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded? **B** SABDURALLI *v.* SADASHIV SUPDE, BOM. L. R. 3 9 **223**

——— s. 100—*Appeal, second—Issue not framed in trial Court or first Appellate Court, whether can be decided in second appeal*

A Court of second appeal is within its rights, in cases where the appropriate issue has not been framed but in which there is sufficient evidence on the record for deciding that issue, in raising and deciding such issue itself **P** DAMUSA *v* ABDUL SAMAD, 1 A. L. J 700 1 N. L. R. 97: 3 M L. (1919) M. W N. 05 1 Bom L. R. 0 **177**

——— s. 100 *Bengal Tenancy Act (VIII B C. of 885), s 0A (3 — Appeal, second, grounds for —Appellate Court entertaining appeal where none lies - Jurisdiction—Questions of law and fact, distinction between*

The right of appeal from the decision of a Special Judge to the High Court given by section 0A (3) of the Bengal Tenancy Act is limited, by the provisions of section 00 of the Civil Procedure Code, to the grounds specified in that section, and the functions of the High Court are completely circumscribed by these provisions, which were enacted for the express purpose of securing some measure of finality in cases where the balance of evidence, verbal and documentary, arises for decision.

Where, therefore, the real dispute between the parties cannot be brought within any of the grounds stated in the section and the appellant's objection to the judgment is that the Judge has misweighed the evidence, the High Court is not competent to entertain the appeal; if it does so, and interferes with the judgment appealed against, such interference is without jurisdiction

Questions of law and fact are sometimes difficult to disentangle The proper legal effect of a proved fact is essentially a question of law, so also is the question of the admissibility of evidence and the question whether any evidence has been offered on one side or the other but the question whether a particular fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact. **P** NAFAR CHANDRA PAL *v.* SHUKUR SHEIKH, 46 C 189; 2 C. W. N. 45 9 W. 552 **760**

——— s. 107 (2)—Appellate Court, whether can allow withdrawal of suit **579**

——— s. 109—*Probate and Administration Act (V of 1881), s 86—Order passed by High Court upon appeal under s. 86—Appeal to Privy Council, whether permissible*

An order passed by the High Court upon an appeal made to it under section 86 of the Probate and Administration Act is final and is not open to further appeal to the Privy Council **L B** PO KIN *v* MA SEIN TIN, 0 L. B. R 22 PUR L T. 57 **356**

——— s. 110—*Appeal to His Majesty in Council —Subject-matter of suit, value of, less than Rs. 0,0 0 —Value, increase in, during pendency of suit, effect of.*

The value of the subject matter of a suit was stated in the plaint to be s , 50 fter decision of the suit and of an appeal by the High Court, an application was made for leave to appeal to His Majesty in Council, on the ground that at the date of the application the value of the property had increased and was now close on s ,0 :

Held, that the fact that the value of the property had increased since the decision of the appeal would not be sufficient to bring the case within the provisions of section 0 of the Civil Procedure Code, which required that the value of the subject-matter of the suit in the Court of first instance must be Rs 0,0 or upwards and the value of the subject-matter in dispute on appeal to His Majesty in Council must be the same or upwards **P** at ASH MOHAN LAL *v* RAM MOHAN LAL, 9 9 PAT 4 **975**

——— s. 1 5 **873**

——— s. 115—*Application for entering satisfaction, withdrawal of—Duty of Court Permission, grant of, for withdrawal Revision by High Court.*

When once a Court is seized of an application to enter up satisfaction of a decree, it is bound to make an enquiry and see whether the decree has been satisfied and it will not be justified in allowing the application to be withdrawn.

The permission to withdraw in such a case is a grave irregularity warranting the interference of the High Court in revision

Where injustice is done in the exercise of jurisdiction, the High Court should interfere. **M** SOMU PATHAR *v.* RENGASAWMI REDDIAR, 3 M. L. J. 252 **411**

——— ss. 115, 149—*Order requiring plaintiff to pay additional Court-fee Revision, whether lies—Remedy, other, open to plaintiff, effect of*

An order under section 0 of the Civil Procedure Code requiring the plaintiff to pay additional Court-fee is not open to revision under section 115 of

the Code, inasmuch as there is another remedy available to the plaintiff *viz*, in case of dismissal of his suit for non-payment of the additional Court-fee, he has a right of appeal. C GOBINDU DAS NATH v NITYA KALI DASI 581

——— S. 115—Revision—Right of fair trial, denial of—Irregularity 189

——— S. 115—Small Cause Court deciding question of title—Revision—High Court, whether can interfere 512

——— S. 144 *Restitution—Attaching creditor, whether representative of decree-holder*

A and *B* obtained a joint decree against certain persons in execution of which certain properties of the judgment-debtors were put to sale. *A* applied to be substituted in place of his co-decree-holder, *B*, on the ground that he had purchased the latter's share in the decree. This application was rejected by the executing Court but was allowed on appeal. In the meanwhile a creditor of *B*, who held a decree against him, attached and withdrew *B*'s share of the sale-proceeds in execution of his decree against *B*. *A* then applied for restitution of the money thus withdrawn by the attaching creditor of *B*:

Held, that the attaching creditor not having been a party to the decree obtained by *A* and *B* or to the substitution proceedings and not being a representative of *B*, the provisions of section 144 of the Civil Procedure Code were inapplicable to the case, and the application for restitution must, therefore, fail. C KATI DAS NATH BOSE v. SARAT CHANDRA, 29 C. L. J. 360 375

——— S. 144—*Restitution—Auction-sale Decree-holder purchaser—Decree set aside—Judgment-debtor, whether entitled to restitution*

Where a decree-holder himself purchases land in execution of his decree, he must lose the benefit of the purchase on the reversal of the decree under which the sale took place. An assignee from such a decree-holder or a person with whom the land is settled by such decree-holder purchaser is in no better position.

A landlord in execution of a rent-decree purchased the demised land and settled it with a third person on the rent decree being reversed the tenant judgment-debtor claimed restitution under section 144, Civil Procedure Code, without, however, making the person with whom the land had been settled by the landlord decree-holder a party to the proceedings:

Held that the tenant judgment-debtor was entitled to restitution and to mesne profits for the period during which he had been kept out of possession, although the person with whom the land was settled by the landlord decree-holder had not been made a party, as no objection on the ground of non-joinder was taken at the proper time in the Court of first instance. C SAGORE MANDAL v. GOPIBUDDI SARDAR, 29 C. L. J. 486 93

——— SS. 148, 149—*Order requiring plaintiff to pay additional [illegible]—Appeal, whether lies—Remedy, other [illegible]—Effect of* 51

——— S. 152, [illegible] *parties, whether* [illegible]

Section [illegible] of the Code of Civil Procedure is confined to the correction of clerical [illegible] by the Court itself, and has no connection with the

mistakes of parties. A RAM CHANDER SARUP v MAZHAR HUSSAIN, U P L R. H. C. 69 55

——— O. I, r. 8—*Representative suit—Permission obtained in trial Court—Appeal—Permission from Appellate Court, whether necessary.*

Once the permission of the Court is obtained to the bringing of a suit in a representative capacity under Order I, rule 8 of the Civil Procedure Code, there is no necessity to get any further permission in the Court of Appeal. P RAM DIYAL v MUHAMMAD KAJU SHA, 46 P. R. 99 437

——— O. I, r. 3—*Misjoinder of causes of action and parties—Multifariousness, test of.*

The question of multifariousness can only be decided on an allegation made in the plaint. The real test in determining whether a suit is bad for multifariousness or not is to see whether there is a common question to be tried between the parties on the facts disclosed in the plaint.

Where a suit was brought for recovery of a sum of money on the basis of two *rokkas* with an allegation that all the defendants were benefited by the loan, although one of the *rokkas* was executed by two and the other by one only of the several defendants:

Held, that the suit was not bad for multifariousness. Pat ISWAR DAS MARWARI v. RAGHUNANDAN MAHTON 609

——— O. II, r. 3 (1)—*Causes of action, joinder of Different causes of action against same defendants, whether may be joined in one suit Contribution, suit for*

There is nothing in law to prevent two causes of action against the same defendants being joined in one suit.

The superior landlord of the plaintiff and the defendants, who were co-sharers in certain tenures, brought two suits for rent and obtained two decrees jointly against them. The decrees were executed and the tenures were put up to sale. Thereupon the plaintiff paid the entire decretal amount and sued the defendants for contribution, claiming against each of them a specific sum according to his share:

Held, that, although the two decrees were for two different sums and the plaintiff satisfied them separately on two different occasions, the causes of action, which were different, could be joined in one suit for contribution. C BIRENDRA KISHORE MAITRYA v. PADMA LOCHAN 826

——— O. VI, r. 17—Amendment of plaint, when can be allowed 435

——— O. VI, r. 17—*Amendment of plaint, when can be allowed Good faith of plaintiff.*

Ordinarily, the amendment of a plaint ought not to be allowed where the application for amendment is not made in good faith.

An application made at a late stage of the suit, merely to get an advantage over the other side in the course of arguments on a preliminary issue and raising a plea which clearly is an afterthought, is not an application made in good faith, as the effect of granting the application might be to take away from the defendants the benefit they have gained, and [illegible] unjustly [illegible] PURNIMAL JEWELLAL FIRM OF v. SECRETARY OF STATE FOR INDIA, 13 S. L. R. 1 57

Civil Procedure Code—1908—contd.

——— **O. VI, r. 17**—*Honest mistake of fact—Amendment of plaint, whether permissible.*

The plaintiff in a suit for pre-emption included in his plaint some land not actually sold but taken by the vendee in exchange for an equal area of the land sold. On finding his mistake he applied to amend his plaint so as to include the actual lands sold:

Held, that the plaintiff may well have been misled as to the identity of the lands which he could claim and there was no sufficient reason why he should not be allowed to correct his mistake. **L** SHANKAR LAL *v.* ARJMAND KHAN 757

——— **O. VII, r. 6,** *scope of.*

Order VII, rule 6, of the Civil Procedure Code applies to cases in which the suit as laid in the plaint is *prima facie* barred by limitation. **L** KHANDU LAL *v.* FAZAL 956

——— **O. VII, r. 11 (c)**—*Period fixed for payment of deficit Court-fee, extension of—Court, power of.*

Under Order VII, rule 11 (c), Civil Procedure Code, a Court has power to extend the period originally fixed by it for the payment of deficit Court-fees. Such extension may be granted by the Court even more than once. **C** NASIR MANDAL *v.* SATISH CHANDRA GHOSH 154

——— **O. IX, r. 3** 189

——— **O. IX, r. 9**—*Dismissal in default—Application to set aside, dismissal of—Application to restore application, whether lies.*

Where an order is made under Order IX, rule 9, of the Code of Civil Procedure, and an application to set aside that order is also dismissed in default, a further application under Order IX to set aside the dismissal of the first application will not lie. **Pat** RAMGULAM SINGH *v.* SHEO DEONARAIN SINGH, 4 P. L. J. 287 152

——— **O. XIV, r. 3**—*Issues, framing of—Court, duty of Matters to be considered.*

The sole guides to a Court in framing issues for trial in a case are not the pleadings of the parties: issues should be settled on the pleadings and after hearing the Pleaders. **C** BASINI DASI *v.* KRISHNA LAL 1007

——— **O. XVII, rr. 2, 3, s. 115, O. IX, r. 3**- *Suit dismissed or decreed—Duty of Court to specify provision of law applicable—Dismissal for default—Appeal, second, whether lies—Revision—Jurisdiction, failure to exercise, what amounts to.*

Plaintiff obtained two adjournments for the purpose of amending his plaint. He applied for a third adjournment but this was refused and the Court passed the following order:—"No steps taken. Suit dismissed for default" The plaintiff then applied to have the suit restored, but the Court declined to do so. The District Judge declined to interfere on the ground that no appeal lay to him. Against this order the plaintiff filed a second appeal in the High Court, and also invoked the aid of that Court on the revision side:

Held, (1) that a second appeal did not lie;

(2) that as the order dismissing the suit did not indicate whether or not the conditions necessary for the exercise of the Court's powers under rule 2 of Order XVII of the Civil Procedure Code were present, the order was bad in law:

Civil Procedure Code—1908—contd.

(3) that upon the Court expressing its unwillingness to grant a further adjournment, it was open to the plaintiff to continue the suit upon the plaint without amendment and it was the duty of the Court in that case to proceed at once to frame issues and to continue the trial.

A Court which dismisses or decrees a suit under the provisions of Order IX or Order XVII of the Civil Procedure Code has a duty cast on it by the law to specify clearly under what provision of the law it has acted. **Pat** NAURANG RAM SAHU *v.* BHAKHORI MANDAR, 4 P. L. J. 277 189

——— **O. XVII, r. 3**—*Party unable to proceed with case—Procedure—Court, duty of.*

Where a litigant finds that he is unable from any cause to proceed further with his case, it is the business of the Court to dispose of the case upon the materials before it and not to dismiss it for default. **A** SUKHU KOERI *v.* RAM LOTAN, 17 A. L. J. 849 850

——— **O. XX, rr. 12, 18**—*Partition suit—Preliminary decree omitting directions for future mesne profits—Enquiry at time of passing final decree, whether permissible—'Further directions' in r. 18, meaning of.*

In a partition suit directions for the ascertainment of and enquiry into mesne profits should be embodied in the preliminary decree Where the preliminary decree is silent as to them, such directions cannot be given in the final decree.

Per *Ayling, J.*—The principle of Order XX, rule 12, Civil Procedure Code, should be applied to preliminary and final decrees in partition suits under rule 18.

The final decree in a partition suit should be passed as in the cases specifically dealt with by rule 12 of Order XX of the Civil Procedure Code. The further directions in rule 18 of the Code must be understood as relating to the further enquiry which is found necessary and the final decree contemplated, though not specifically referred to, in rule 18, should be restricted in exactly the same way as the final decree referred to in rule 12.

Per *Krishnan, J.*—The words 'further directions' in Order XX, rule 18, Civil Procedure Code, are wide enough to include a direction for enquiry into mesne profits, but under the rule the direction should be in the preliminary decree It is not necessary to pray in aid rule 12, which does not properly apply, by its own force, to a partition suit. However, in making an enquiry into profits ordered under rule 18 the provisions of rule 12 (1), clauses (*b*) and (*c*), and clause (3) will be kept in view as guiding the Court in such an enquiry. **M** GULUSAM BIVI *v.* AHMADSA ROWTHER, 42 M. 296; 9 L. W. 54; (1919) M. W. N. 284 140

——— **O. XXI, rr. 2, 3**—*Attachment by decree-holder of decree held by judgment-debtor—Satisfaction of decree attached, application for entering of—Application opposed as collusive and fraudulent—Burden of proof—Application, withdrawal of—Duty of Court—Permission, grant of, for withdrawal—Revision by High Court.*

Where a decree-holder attaches a decree held by his judgment-debtor and an application by the latter for entering up satisfaction of such decree is opposed by the attaching creditor on the ground

that it is collusive and fraudulent, the onus lies on him to prove the fraud and not on the judgment-debtor to prove the *bona fides* of the certificate.

When once a Court is seized of an application to enter up satisfaction of a decree, it is bound to make an enquiry and see whether the decree has been satisfied and it will not be justified in allowing the application to be withdrawn.

The permission to withdraw in suit a case is a grave irregularity warranting the interference of the High Court in revision.

Where injustice is done in the exercise of jurisdiction, the High Court should interfere. **M** SOMU PATHAR *v.* RENGASAWMI REDDIAR, 35 M. L. J. 252 **411**

——— **O. XXI, r. 2 (3)**—*Adjustment of decree out of Court—Court, whether can recognize adjustment without certification.*

Under rule 2 (3) of Order XXI of the Civil Procedure Code, a Court cannot recognize the payment and adjustment of a decree out of Court unless such payment is certified to it, although the question of payment is a question which the Court executing the decree must, under section 47 of the Code, inquire into and decide **S** ALLAHRAKHIO ABDULLA *v.* LADKIK SACHOO, 13 S. L. R. 71 **567**

——— **O. XXI, r. 57**—*Attachment, determination of*—Sapurddar, *Liability of, extent of.*

A *sapurddar* of attached property has no warrant or justification in making over the property to the judgment-debtor upon an attachment of the property coming to an end by virtue of Order XXI, rule 57, of the Civil Procedure Code. Inasmuch as the property is made over to his care by the Court, he is responsible to the Court for its production and if he is unable to produce it when called upon to do so, he is liable to pay its value. **P** DARBARI MAL *v.* KANSHI, 60 P. R. 1919 **653**

——— **O. XXI, r. 62**—*Attachment subject to mortgage, effect of.*

The effect of an order under Order XXI, rule 62, of the Civil Procedure Code, directing the continuance of an attachment subject to a mortgage is that, the purchaser at the auction-sale only buys the judgment-debtor's right of redemption. **L B** PO SO *v.* BA ZAN, 12 BUR. L. T. 43 **580**

——— **O. XXI, r. 63**—*Attaching creditor, suit by, form of.*

There are no restrictions as to the nature of the suit to be brought by the attaching creditor under Order XXI, rule 63, Civil Procedure Code. That the plaint only asks in terms for a declaration that the property is liable to sale in execution of the decree is immaterial **M** KOTTARATHIL PUTHIYAPURAYIL POKKER *v.* BALATHIL PARKUM CHANDRANKANDI, 25 M. L. T. 47; (1919) M. W. N. 39, 9 L. W. 138; 42 M. 143; 36 M. L. J. 231 **714**

——— **O. XXI, r. 66, App. E, Form 29**—*Execution of decree—Publication of sale—Omission to state time of confirmation of sale—Irregularity—Sale, [illegible]*

Order XXI, rule 66, read [illegible] Appendix E of the Civil Procedure [illegible] of the commencement [illegible] should be specified.

The omission to state [illegible] of sale in a proclamation for sale of [illegible] property is a material irregularity which entitles the judgment-debtor to have the sale set aside, provided he proves that loss has been caused to him by the irregularity.

Proof of such loss may consist either of direct evidence in the narrow sense or of evidence of facts which warrant an inference that the irregularity was the cause of inadequate price.

Even if no objection is specifically raised in this connection in the lower Courts, the irregularity is one which would vitiate the sale and would be set aside in second appeal. **N** NARHAR *v.* BUTI, 15 N. L. R. 125 **864**

——— **O. XXI, r. 66 (4), s. 73 (b)**—*Execution of decree—Property subject to mortgage, whether can be attached and sold—Procedure.*

Property subject to a usufructuary mortgage is liable to be attached in execution of a decree against the mortgagor and the decree-holder has a right to bring to sale his judgment-debtor's right or equity of redemption; but unless the mortgagee consents, the decree-holder has no right to bring the property itself to sale, all he can sell is the residual right of the mortgagor, that is, the right to recover the property on payment of the mortgage-money.

Procedure for execution against property under mortgage explained. **U B** OVAANNA PERUMAL *v.* MAUNG MYIN, 3 U. B. R. (1919) 139 **750**

——— **O. XXI, rr. 69, 71, 84, ss. 47, 115**—*Contract Act (IX of 1872), s. 6—Execution of decree—Sale—Bid, nature and effect of—Death of highest bidder—Revocation of bid—Procedure, subsequent—Order for fresh auction—Declaring next lower bidder as purchaser, illegality of—Re-sale, order for, on default of payment of deposit—Jurisdiction, wrong exercise of—Appeal, maintainability of—Revision.*

A bid at a sale in a Court-auction is merely an offer or, in the language of section 6 of the Contract Act, a proposal. It is the highest bidder that is regarded as having made the final proposal which may or may not be accepted by the auctioneer. Every bid that is made does not remain in abeyance pending acceptance by the auctioneer. Where a higher bid is made, all preceding lower bids are impliedly refused.

Where the highest bidder dies, the proper course for the Court is to direct a fresh auction, and not to treat the next highest bidder as the auction-purchaser.

Such an order is illegal and amounts to a wrong exercise of jurisdiction by the Court and is, therefore, open to interference by the High Court in revision under section 115, Civil Procedure Code.

The bidder who is affected by the illegal order is not 'a party' to the suit within the meaning of section 47, Civil Procedure Code, and cannot appeal against the order.

At an auction-sale, which was held for several days, one *R* made the highest bid, after which the sale was adjourned. Before the date of the adjourned sale *R.* died, and the Court, instead of directing a fresh auction, held the petitioner, who was the next preceding bidder, to be the purchaser and directed him to make the deposit in two days. On his failing to do so, the Court directed a re-sale of the properties,

Civil Procedure Code—1908—contd.

Against this order the petitioner filed a revision petition in the High Court, and also presented an appeal:

Held, (1) that the order for re-sale was illegal and *ultra vires* and consequently void;

(2) that the petitioner was not a representative of either the judgment debtor or the auction-purchaser within the meaning of section 47, Civil Procedure Code, and, therefore, no appeal lay at his instance against the order;

(3) that, as the order was one passed without jurisdiction, the High Court could interfere under section 115, Civil Procedure Code.

Per *Oldfield, J.*—Order XXI, rule 71, Civil Procedure Code, has reference to the defaulting purchaser, and is concerned only with the legal relation created by a purchase assumed to be regularly made, not with the consequence of its repudiation by the bidder.

Per *Seshagiri Aiyar, J*—Every bid at an auction is not a contract or a subsisting offer which can be converted into a contract at the option of the purchaser at any moment of time. When a Court adjourns a sale fixed for a certain day to another date, with a view to get a higher offer for the property, it must be regarded not to have intended to accept the previous offer. This result would follow even if there are no higher offers **M** RAJAH OF BOBBILI *v.* AKKELLA SURYANARAYANA RAO GARU, 37 M. L. J. 274 **805**

——— O. XXI, rr. 85, 86—*Execution of decree—Sale—Decree-holder auction-purchaser, duty of—Failure to pay balance of purchase-money into Court, effect of.*

The provisions of rules 85 and 86 of Order XXI of the Civil Procedure Code are mandatory. These rules impose an obligation upon a decree-holder purchaser to bring into Court whatever balance may be due on foot of the purchase-money, after deducting the amount of the decree. If the decree-holder fails to comply with the rules, the property is liable to be re-sold. **Pat** RAMENDRA NATH *v.* HIKAIT KUER **316**

——— O. XXI, r. 89, s. 115—*Execution of decree—Sale—Judgment-debtor who has parted with property to stranger, whether can apply to set aside sale—Jurisdiction—Revision—High Court, interference by.*

A judgment-debtor who has, subsequent to the sale of his property in execution of a decree, parted with the property to a third person, can, nevertheless, apply under rule 89 of Order XXI of the Civil Procedure Code to set aside the sale.

The question whether a judgment-debtor is entitled to make an application under Order XXI, rule 89, of the Civil Procedure Code is one of jurisdiction, and a decision of the Court below upon the question is subject to the revisional jurisdiction of the High Court under section 115 of the Code. **Pat** DHANWANTI KUER *v.* SHEO SHANKAR LALL, 4 P. L. J. 340 **873**

——— O. XXI, rr. 90, 92—*Execution of decree—Sale—Objections, when can be made—Fraud, plea of—Specific assertions necessary—Application to set aside sale, when competent—Appeal, second, whether maintainable—Revision—High Court, power of interference of—Limitation Act (IX of 1908), ss. 5, 18, Sch. I, Art. 166.*

Civil Procedure Code—1908—contd.

Objections to an execution sale on the ground of fraud can only be made under rule 90 of Order XXI of the Civil Procedure Code, prior to the confirmation of the sale.

Fraud should be specifically set out with all the necessary details so as to enable the opposite party to meet a specific set of assertions.

One *B.* obtained a decree against *H.* the decretal amount being made realisable from the latter's property in the event of non-payment. *B.* having sued out execution, the house of *H*, was sold on the 19th December 19 6 and on the 27th January 1917 the sale was confirmed in favour of one *B R*, who was granted the usual certificate on the 12th February 1917. On the 1st November 1917 *H* filed an application for the cancellation of the sale on the ground that it had been effected fraudulently and that the proceedings had been irregular. The Munsif dismissed the application as time-barred and as having been made after the decree had been satisfied. On appeal the District Judge, holding that the application was competent and within time, remanded the case for enquiry into the allegations made by *H.* The auction-purchaser *B. R.* preferred a second appeal against this order:

Held, (1) that the sale having been confirmed, it could not be attacked except by a separate suit;

(2) that the Munsif having acted under rule 92 of Order XXI, Civil Procedure Code, no second appeal was competent;

(3) but that the Appellate Court had power to interfere on revision;

(4) that the application, having been made more than 30 days after the date of the sale, was time-barred under Article 166 of the Limitation Act;

(5) that time could not be extended under section 5 of the Limitation Act and in order to avail himself of section 18 of the Act the applicant must show that he was by fraud kept from the knowledge of his right to apply for the sale to be set aside;

(6) that the applicant having failed to establish this was not entitled to any relief. **P** BASHI RAM *v.* HASSAN MUHAMMAD **447**

——— O. XXI, r. 90—*Hindu Law—Execution of decree—Sale—Reversioner, whether entitled to apply to set aside sale.*

A reversioner to a Hindu widow's estate is entitled to apply to set aside a sale under Order XXI, rule 90 of the Civil Procedure Code. **Pat** BRIJ KISHORE LAL *v.* PRATAP NARAIN, 4 P. L. J. 360; (1919) PAT. 303 **359**

——— O. XXI, rr. 91, 92, 93—*Execution of decree—Sale—Suit for refund of purchase-money by auction-purchaser, maintainability of—Refund of purchase-money, when allowable.*

A suit brought by a purchaser at a sale in execution of a decree for the refund of a portion of the purchase-money is not maintainable where it is found, as required by Order XXI, rules 91, 92 and 93 of the Civil Procedure Code, that the judgment-debtor had a saleable interest in the property sold

It is only where a sale is set aside under rule 92 of Order XXI of the Code that the auction-purchaser can obtain an order for the refund of the purchase-money under rule 93. **P** BHAGWAN DAS *v.* ALLAH BAKHSH, 52 P. R. 1919 **595**

——— O. XXI, r. 93 *-Execution of decree—Sale—Auction-purchaser deprived of property by paramount claimant, remedies of—Suit to recover purchase-money, maintainability of.*

A purchaser at a Court-sale in execution of a decree, who is afterwards deprived of the property purchased by him by a person claiming title paramount, cannot recover his purchase-money by suit from the person to whom it has been paid. **O** RAM DAYAL *v.* RAMPAL SINGH, 6 O. L. J. 160; 22 O. C. 42 **95**

——— O. XXI, r. 95—*Execution of decree—Property in possession of judgment-debtor—Delivery of possession, how to be made—Symbolical possession, whether operates to save limitation—Limitation Act (IX of 1908), Sch I, Art 144.*

In a suit for possession of certain immoveable property filed on 3rd July 1913, the plaintiffs alleged that their father had purchased the property at an auction sale, and that a receipt for possession was given to the bailiff on 3rd July 1901. It was found that the property had all along been in the possession of the defendants, who were not disturbed in their possession on the date of the receipt :

Held, that the provisions of Order XXI, rule 95, of the Civil Procedure Code not having been complied with, the suit was barred by time. **B** SHRIDHAR MADHAVRAO *v* GANPATI PUNJA GODSE, 21 BOM. L. R. 357: 43 B. 559 **72**

——— O. XXI, rr. 97 to 103, *scope of—Decision as to possession, how far final—Suit to establish title—Limitation Act (IX of 1908), Sch. I, Art.* 11.

Rules 97 to 103 of Order XXI, Civil Procedure Code, contemplate that the decision in favour of a party, not being a judgment-debtor, under rule 99 of the Order is conclusive so far as the question of possession is concerned, unless and until a suit is brought, by the party against whom the order is made, under rule 103, and such a suit must be brought within one year from the date of the order. **L** CHAIL BEHARI LAL *v.* KIDAR NATH. **787**

——— O. XXII, r. 1—Right to sue, survival of **76**

——— O. XXII, r. 9—*Limitation Act (IX of 1908), Sch. I, Arts.* 171, 176—*Death of plaintiff—Abatement, order of, before expiry of six months—Application for setting aside order of abatement within sixty days of order, whether maintainable.*

Where an order abating a suit was made two days before the expiry of six months from the death of the plaintiff, and an application for setting aside the order of abatement made within 60 days of that order was dismissed on the ground that it was not made within six months of the death of the plaintiff:

Held, that the application was within time and that the suit should be continued after making the necessary substitution. **C** PRIYA SUNDARI *v.* GOLABDI **534**

——— O. XXII, r. 10—*Assignment of interest during pendency of suit—Substitution of assignee's name—Assignment disputed—Court, power of, to decide dispute.*

There is nothing in the Civil Procedure Code to indicate that the provisions of Order XXII, rule 10 of the Code are applicable only to cases of mimitee'

assignment, creation or devolution of interest. A Court has power to enquire into and decide the question of the assignment, creation or devolution of interest, where any such assignment, devolution or creation is disputed **C** ENDAY ALI *v.* BENODINI DUTT, 29 C. L J. 362 **233**

——— O. XXIII, r. 1—*Order giving leave to withdraw suit, whether decree—Appeal, whether lies.*

An order under Order XXIII, rule 1, Civil Procedure Code, not being a decree, is not appealable, although a portion of the order may require the plaintiff to pay costs. **O** SITA RAM DAS *v.* MAHENDRA PRATAB SINGH, 6 O L. J. 151 **69**

——— O. XXIII, r. 1, O. XLIII, r. 1, s. 2 (2)—*Order giving plaintiff leave to withdraw suit, whether decree—Appeal, whether lies.*

An order passed under Order XXIII, rule 1, Civil Procedure Code, permitting the plaintiff to withdraw his suit, does not come under the definition of "decree" as given in clause 2 of section 2 of the Civil Procedure Code, nor is it included in the list of appealable orders given in Order XLIII, rule 1, and is consequently not appealable. **L** PINDI DAYAL *v.* KISHUN KUNWAR **766**

——— O. XXIII, r. 1—*Withdrawal of suit, leave for, whether can be granted after leave to amend has been refused.*

Where a Court has refused an application to amend a plaint, it ought not to allow the plaintiff to withdraw the suit with liberty to institute a fresh suit, as if in such a case permission is granted, it would practically be the same as if the Court had allowed the application for amendment of the plaint already refused. **S** LUDHOMAL PURTOMAL, FIRM OF *v.* SECRETARY OF STATE FOR INDIA, 13 S. L. R. 1 **570**

——— O. XXIII, r. 1 (2) s. 107 (2)—*Appeal—Appellate Court, whether can allow withdrawal of suit*

Although section 107 (2) of the Civil Procedure Code confers upon an Appellate Court the same powers and imposes the same duties, as nearly as may be, as those of a Court of original jurisdiction, an Appellate Court has no power under Order XXIII, rule 1 (2), of the Code to allow a suit to be withdrawn in appeal, as distinguished from the appeal itself, with liberty to institute a fresh suit, as to do so would be tantamount to setting aside the decree in the suit. **S** WADERO RASOOLBUX *v.* ALLAHBUX, 13 S L. R. 72 **579**

——— O. XXIII, r. 3—*Agreement between parties to suit to abide by decision in another proceeding—Adjustment of suit—Estoppel—Evidence Act (I of 1872), s.* 115.

An agreement between the parties to a suit to abide by the decision which may be made in another proceeding amounts to an adjustment of the suit when that decision is actually passed within the meaning of Order XXIII, rule 3, Civil Procedure Code.

Quære—Whether the parties are estopped from contending that they are not bound by the agreement. **M** SREENIVASA CHARIAR *v* KUMARA PHATHACHARIAR, 8 L. W. 470; 24 M L. T. 356; (1918) M. W. N. 746 **540**

Civil Procedure Code—1908—contd.

——— O. XXIII, r. 3—*Compromise—Decree based on compromise relating to property not in suit, validity of—Jurisdiction of Court.*

A decree based on a compromise, in so far as it relates to property extraneous to the suit, is without jurisdiction and is inoperative. **P** KARTAR SINGH *v.* INDAR SINGH, 31 P. R. 1919 **273**

——— O. XXVI, r. 9—*Commission for local investigation, whether can be issued after evidence closed.*

A commission for local investigation cannot be issued after the evidence is closed and the case is ready for judgment. **O** SUNDAR LAL *v.* SITA RAM **399**

——— O. XXXII, r. 4—*Minor not properly represented in suit—Appeal—Appellate Court, power of, to set aside decree.*

Where it appears to an Appellate Court on examination of the record that a minor has not been properly represented in the suit, it cannot allow the decree to stand, even though there has been no appeal by the minor, which in the absence of proper representation it was obviously impossible for him to present. **C** ERFANUDDIN MOLLA *v.* BADAN SHEIKH **563**

——— O. XXXIV, r. 1—Mortgage suit—Parties—Decree, binding force of **563**

——— O. XXXIV, rr. 2, 4, App. D, form No. 4—*Mortgage-decree—Interest subsequent to date fixed for redemption, whether payable on principal, interest and costs—Rate of interest.*

Where by the preliminary decree in a mortgage suit a date is fixed for redemption and the property is ordered to be sold on default, subsequent interest is to be calculated on the principal, interest and costs found to be due on the date fixed and not on the principal sum alone, and such further interest is ordinarily to be calculated at 6 per cent. but the Court has a discretion in the matter. **M** VENKATACHALLAPATHI AIYAR *v.* THARVASI SERVAL, 36 M. L. J. 288; 42 M. 465 **67**

——— O. XXXIV, r. 3—*Foreclosure suit—Preliminary decree, non-compliance with—Final decree not passed—Mortgagor, whether entitled to redeem.*

If the preliminary decree in a foreclosure suit is not complied with, the mortgagors have no absolute right to pay the redemption money and avoid foreclosure merely on the ground that a final decree has not been passed. **Pat** RATNAKAR GOUNTIA *v.* CHAMRA SATPASTY, 4 P. L. J. 347 **881**

——— O. XXXIV, r. 4—*Mortgage decree—Order in which properties should be sold—Decree-holder, right of.*

Under Order XXXIV, rule 4, of the Civil Procedure Code, it is the duty of the Court in making a mortgage-decree to order that the mortgaged property or a sufficient portion thereof be sold. This gives a right to the Court making the decree to declare what portion of the mortgaged properties shall first be sold, but that discretion is not to be arbitrarily exercised and is subject to the general principle that the Court cannot prejudice the rights of the mortgagee if he has not himself done any act which prejudices the rights of those having equities against the mortgagor. It is to give effect to this principle that the provisions relating to marshalling and contribution have been enacted.

In the absence of a direction in the decree to the contrary, this discretion vests in the execution Court.

Unless there are any equities requiring marshalling and contribution, the decree-holder has the fullest right to bring to sale whichever property he wishes first to sell.

Per *Jwala Prasad, J.*—If a mortgage-deed specifically says that the properties on default of payment of the mortgage-money would be sold in a particular order, it would not be open to the decree-holder to change that order in seeking to enforce the re-payment of his money. If there is no specific mention of the order in which the properties are to be proceeded against for the enforcement of the loan, the hands of the decree-holder would not be fettered. **Pat** JATADHARI SINGH *v.* BALDEO LAL, 4 P. L. J. 207 **444**

——— O. XXXIV, rr. 5, 6—*Mortgage, suit for enforcement of—Relinquishment of claim on portion of hypotheca—Decree for sale of other portions—Deficiency—Personal decree, application for, maintainability of—'Mortgaged property,' 'such sale' in rr. 5, 6, meaning of.*

The words 'mortgaged property,' in Order XXXIV, rule 5 (2), mean all the items mortgaged and the words 'such sale' in rule 6 mean the sale of the entire hypotheca.

A mortgagee suing for the enforcement of his mortgage, who wilfully relinquishes his claim on some of the items of the hypotheca and obtains a decree for the sale of the remaining items, cannot, in the event of the proceeds being insufficient to satisfy the decree amount, apply for a personal decree under Order XXXIV, rule 6, Civil Procedure Code. **M** ARUNACHALA VELAN *v.* VENKATARAMA AYYAR, 9 L. W. 538; 26 M. L. T. 192 **84**

——— O. XXXIV, r. 14—*Decree for money—Charge on immoveable property—Execution of decree—Property charged, whether can be sold.*

A decree was made by consent on the Original Side of the High Court in an account suit. The first part of the decree directed payment by the defendant to the plaintiff of a certain sum of money, and the second part of the decree was as follows:—

"The Court with the like consent doth declare that the plaintiffs have a first charge and a lien on the land, hereditaments and premises, situated at, etc."

The Court to which the decree was transferred for execution held that the property could not be sold in execution in the absence of a direction in the decree as to the enforcement of the charge. The plaintiff appealed to the High Court contesting this view:

Held, that the decree-holder had the right to bring the property charged to sale in execution proceedings, and that the declaration in the decree as to the charge on the property in favour of the decree-holder in order to secure re-payment of the amount of the decree had the effect of protecting him against any transfer of the property by the judgment-debtor, and not of reducing or modifying the right which the plaintiff had got in virtue of

the direction that the defendant should pay the amount. **B** AMBALAL BAPUBHAI *v.* NARAYAN TATYABA, 21 BOM. L. R 698 929

——— O. XXXIX, r. 1—*Injunction restraining third person from alienating property not in dispute, validity of.*

An injunction restraining the alienation of property *pendente lite* can only be legally issued to a person who is a party to the suit and in respect of property in dispute. Where, therefore, in an insolvency proceeding an injunction was issued to a secured creditor, who had been paid off out of the sale-proceeds of the insolvent's estate, restraining him from alienating *his* property till the final decision of certain objections:

Held, that there was no warrant in law for such injunction. **P** SANT LAL *v.* ISHAR DAS, 46 P. L. R. 1919 108

——— O. XL, r. 1—*Receiver, suit by or against, without leave of Court—Leave subsequently obtained, whether can validate proceedings.*

If an action is commenced by or against a Receiver without any leave obtained from the Court, the defect can be cured by subsequent leave obtained from the Court to continue the action, and if a proper case is made out the Court will, if so satisfied, subsequently allow the suit to continue and will not dismiss it.

Where a Receiver commenced an action without first having obtained leave from the Court appointing him and subsequently took permission to continue the action:

Held, that as it was open to the Court at any time to validate the proceedings in the suit by subsequent leave, the original defect was cured by the leave which the Receiver subsequently obtained from the Court. **C** RUSTOMJEE DHUNJIBHAI *v.* FREDERIC GAEBELE, 23 C. W. N. 426; 46 C 352 486

——— O. XLI, rr. 17, 19—*Appeal—Pleader without instructions—Procedure.*

Where the Pleader for an appellant intimates to the Court that he has no instructions to argue the appeal, the proper course for the Judge is to dismiss the appeal under Order XLI, rule 17, of the Civil Procedure Code, so that the appellant may have an opportunity of applying for re-admission of his appeal under Order XLI, rule 19. **Pat** MANGAR SINGH *v.* BHARAT PRASAD 46

——— O. XLI, r. 19—*Appeal, dismissal of, for default—Re-admission—Sufficient cause*—Bona fide *mistake of Pleader.*

An act of negligence or a mistake on the part of an appellant's Pleader cannot be regarded as a sufficient cause within the meaning of the law, to set aside an order dismissing an appeal in default of appearance. At the same time, it is discretionary with the Court to pass an order of restoration, if it considers that a case for such an order is made out although the case may not amount to a "sufficient cause".

Thus, where an appellant was notified that his appeal would be heard on the 16th July, but his Pleader by an error noted in his diary the date of hearing as the 17th July and on that date appeared, and learnt that the appeal had been dismissed in default on the previous day and immediately applied for restoration of the appeal,

Held, that as the default was not intentional and was due to an error on the part of the appellant's Pleader, the case was one in which an order for the restoration of the appeal should be made. **P** GAURAN *v.* BRIJ RAJ SARAN, 53 P. R. 1919 607

——— O. XLI, r. 22—*Cross-objections, whether can be preferred against co-respondents.*

Plaintiff instituted a suit upon a mortgage-deed, purporting to have been executed by four males and two ladies and to convey an 8-anna share out of 16 annas in 3 villages and certain house property and a grove, the share of the ladies in the property being 2/5ths of the whole and of the male executants 3/5ths of the whole; the suit was for realisation of the mortgage-debt from an 8-anna share of the defendants in a single village and also from the house and the grove. The trial Court, finding that the execution of the deed by the ladies was not proved, gave a decree against the male executants for the sale of an 8-anna share on the ground that, after deducting the share of the ladies, they owned between them more than an 8-anna share out of the entire 16 annas. The defendants against whom the decree was passed appealed, the plaintiff and the ladies being made respondents. The plaintiff filed a petition of cross-objections, contending that execution was proved against the ladies. The defendants-appellants objected that the plaintiff was not entitled to challenge the order of the Court below dismissing the suit against the ladies, by way of a petition of cross-objections:

Held, that it was open to the plaintiff, as respondent to the appeal, to support the decree of the Court below, in so far as that decree ordered the sale of a share of 8 annas, upon a ground that had been decided against him by the trial Court, namely, upon the allegation that the document in suit had been executed by the ladies, and that as soon as an appeal was filed on the plea that in any event only 3/5ths out of an 8-anna share should be ordered to be sold, the plaintiff had a ground for asserting his original claim, and it was within the competence and discretion of the High Court to permit the petition of cross-objections to be heard, even as against those defendants to the suit who were arrayed as respondents to the appeal. **A** FATIMA BIBI *v.* RAM NARAIN SAHU, 16 A. L. J, 587; 40 A. 536 646

——— O. XLI, r. 22—*Respondent, whether can support decree on ground decided against him.*

It is open to a respondent in an appeal to support the decree on any of the grounds decided against him in the lower Court without preferring a cross-appeal. **Pat** RAGHUNATH KURMI *v* DEO NARAIN RAI, (1919) PAT. 393 981

——— O. XLI, r. 25—*Appeal—Issue not tried by lower Court—Remand.*

Where a case is badly conducted in the lower Court and an important point has not been put in issue, the Appellate Court would be justified in remanding the issue for trial. **P** HAR KISHEN SINGH *v.* LAHORE BANK, LD, 64 P. R. 1919 712

——— O. XLI, r. 27, s. 99—*Appeal—Additional evidence, admission of—Reasons, power to record, effect of.*

Civil Procedure Code—1908—contd.

Where in such a suit the plaintiff was partially successful in the Court of first instance and the defendant preferred an appeal and in the Appellate Court produced a *robakari* (a public document) to show when the sale became final and conclusive and the Appellate Court accepted the document but recorded no reasons for doing so:

Held, that the Appellate Court was right in admitting this additional evidence in the appellate stage, and that its omission to record reasons was an irregularity which was cured by section 99, Civil Procedure Code. **C** MURALI DHAR ADITYA *v.* THAKUR DAS MONDAL **50**

—— **O. XLI, r. 27, O. XLVII, r. 1**—*Appeal, second—Judgment delivered in former suit, whether can be admitted as additional evidence—Review—Procedure.*

A suit for rent, in which the matter in dispute was the rate of rent, was decided by the lower Appellate Court on 1st March 1917 without knowing that a judgment in a former suit between the same parties had been delivered by the High Court in second appeal on the day previous, by which the Court decreed the rate of rent claimed by the plaintiff. The plaintiff wanted to have that judgment of the High Court admitted in the second appeal which he preferred against the decision of the lower Appellate Court:

Held, that the proper course for the plaintiff was to have applied to the Judge of the lower Appellate Court for a review of his judgment on the ground of discovery of new and important matter, but that he could not have the whole proceedings set aside and get additional evidence admitted in second appeal. **C** JADAV CHANDRA MOULIK *v.* MANIK SARKAR, 29 C. L. J. 313 **652**

—— **O. XLI, r. 30**—*Appeal heard and judgment reserved—Order not communicated to parties—Limitation Act (IX of 1908), s. 5—Limitation for second appeal, commencement of—Extension of time—Sufficient cause.*

An appeal was argued before a District Judge on 24th May. Judgment was reserved and was ultimately issued under date the 2nd July. It appeared that the provisions of Order XLI, rule 30, of the Civil Procedure Code were not complied with and that no intimation was sent to the parties of the pronouncement of the order. It was not till the 13th October that the appellant's Pleader discovered what the decision of the Court was and thereupon he promptly communicated with his client, applied for copies and filed an appeal in the Chief Court on the 26th of November:

Held, (1) that, under the circumstances, time should be taken to run only from 13th October and that, therefore, the appeal was within limitation;

(2) that in any event the facts disclosed constituted sufficient cause within the purview of section 5 of the Limitation Act and justified an extension of the period prescribed. **P** LALLI *v* SAIN DITTA, 27 P. R. 1919 **239**

—— **O. XLI, r. 31**—*Appeal—Appellate Court, duty of, to consider evidence—Pleadings—Court, whether can set up new case.*

It is the duty of the Appellate Court to consider the evidence on the record and where this is not done, the judgment is liable to be set aside in second appeal.

A Court of Appeal cannot set up a case for any of the parties which is not put forward in the pleadings. **L** MAULA DAD *v.* BEGAM **751**

—— **O. XLI, r. 31**—*Appellate Court—Judgment, contents of.*

A mere general statement that on a perusal of all the evidence in the case the Court is satisfied as to a certain set of facts is not a sufficient judgment within the meaning of the law. **Pat** MANGAR SINGH *v.* BHARAT PRASAD **46**

—— **O. XLI, r. 31**—*Appellate Court—Judgment, contents of—Failure to weigh evidence—Procedure, error of.*

The failure by an Appellate Court to weigh all the evidence and to come to a satisfactory conclusion on the evidence before it, amounts to an error of procedure which vitiates the judgment given by that Court. **Pat** RANGU MANDAL *v.* CHATTERNATH CHOWDHURY **11**

—— **O. XLI, r. 31**—*Appellate Court, power of, to modify decree.*

An Appellate Court has power to pass any decree which ought to have been passed or to make any further decree as the case may require in favour of any of the parties **Pat** RAGHUNATH KURMI *v.* DEO NARAIN RAI, (1919) PAT. 393 **981**

—— **O. XLI, r. 33**—*Dower, suit to recover—Decree apportioning liabilities of various properties—Appellate Court, power of, to pass proper decree.*

Where in a suit for recovery of a specific sum of money as dower, the Court had no materials before it to apportion the liabilities of various properties but, nevertheless, directed that the sum be recovered from these properties in a certain proportion:

Held, that the decree should not have contained this direction, and that the High Court had power to pass a proper decree by expunging from the decree of the lower Court the direction with regard to the manner of the realisation of the decretal amount. **L** AFZAL KHAN *v.* MAHTAB BIBI **819**

—— **Sch. II**—Arbitration—Reference to arbitrators, including presiding Judge, legality of—Applicability of Sch. II—Award by majority—Decree following on award, whether binding **827**

—— —— **para. 1**—*Arbitration, reference to*—Ex parte *defendant, whether 'party interested'—Reference, application for, without exonerating* ex parte *defendant—Jurisdiction of Court to refer—Award, validity of.*

An *ex parte* defendant is a 'party interested' within the meaning of paragraph 1 of Schedule II, Civil Procedure Code.

A Court has, therefore, no jurisdiction to refer the subject-matter of a suit to arbitration on the application of some of the parties where one of the defendants, who is interested in the subject-matter and who is *ex parte*, has not been exonerated and an award passed on such reference is void. **M** POLITA PAVANA PANDA *v.* NARASINGA PANDA, 36 M. L. J. 538; 42 M. 632 **155**

Civil Procedure Code—1908—contd.

——— Sch. II, para. 17—*Arbitration—Agreement to refer dispute to arbitration—Refusal of one arbitrator to act—Power to appoint another—Failure of arbitrators to give award within specified time—Agreement, whether can be filed in Court.*

An agreement to refer a dispute to arbitration does not become incapable of performance by the refusal of one of the arbitrators to act, where there is a distinct provision authorising a party to appoint another arbitrator in his place.

The mere fact that the award is not given within a specified time is not a sufficient reason for refusing to file the agreement in Court, especially where there is a provision in the agreement allowing an extension of time. L SRI RAM *v* SORABJI **636**

——— paras. 17, 22, s. 89 (1)—*Specific Relief Act (I of 1877), s. 21—Arbitration—Agreement to refer dispute—Suit by party to agreement, maintainability of Stay of suit—Procedure.*

Sub-section 1 of section 89 of the Civil Procedure Code, read with paragraph 22 of the Second Schedule of the Code, makes the concluding provision of section 21 of the Specific Relief Act inapplicable to all arbitration agreements and awards governed by the Schedule.

Where the parties to a dispute agree to refer it to arbitration and subsequently one of them brings a suit to enforce his rights, the defendant can neither seek specific performance of the arbitration agreement nor set it up as a bar to the suit brought against him in contravention of the agreement. His remedy is to apply for a stay of the suit under paragraph 18 of Schedule II to the Civil Procedure Code and the burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration, and not on the defendant to show that no such reason exists.

After the suit is stayed, it is open to either party to apply under paragraph 17 (1) of the Second Schedule of the Code for a reference to arbitration, and the Court can make an order under clause 4 of the paragraph. C DINABANDHU JANA *v.* DURGA PRASAD JANA, 29 C. L. J. 399, 23 C. W. N. 716 **80**

——— para. 20—*Award dissolving marriage and directing payment of money by one of the parties—Application to file award to enforce payment of money—Jurisdiction of Small Cause Court—'Subject-matter of award,' meaning of—Irregularities in procedure of arbitrators, waiver of, by parties.*

A Small Cause Court has no jurisdiction to file an award under Schedule II, paragraph 20, Civil Procedure Code, which, though it directs payment of money within the pecuniary limits of its jurisdiction, goes on to declare the dissolution of marriage between the parties.

The jurisdiction of a Court to file an award depends on the reliefs awarded by the award. It is not open to a party to confer jurisdiction on a Court by asking for only one relief granted by the award and getting the award filed under paragraph 20, where the other reliefs granted are beyond the competence of the Court.

The expression 'subject-matter of the award' in the paragraph means the whole matter dealt with and decreed by the award, and not any particular portion which affects any particular party.

Irregularities in the procedure adopted by an arbitrator may be waived by the parties, provided they know of the irregularities and waive them with such knowledge. M RETHAMALI SERVAI *v.* RAMASAMI SERVAI, 10 L. W 57 **53**

——— Sch. III—*Execution proceedings before Collector—Dismissal for default—Collector, power of, to restore case—Jurisdiction, want of, whether can be cured by consent of parties.*

A Collector has no jurisdiction to restore an execution case to his file after it has been dismissed by him in default of the decree-holder. Subsequent proceedings in respect of the case in the Collector's Court are, therefore, void.

Where certain questions have been removed from the jurisdiction of a Court, they cannot be brought under jurisdiction on the plea of the Court having jurisdiction to do what justice may require for the parties before it.

A defect of jurisdiction cannot be cured by consent of parties. N DALCHAND *v* NARAYAN **237**

Companies Act (VII of 1913), s. 202—*Liquidation proceedings—Court, whether can rectify mistake.*

A Judge conducting liquidation proceedings is not precluded from recalling a wrong order and rectifying a mistake. P RALLA RAM *v.* AMRITSAR MUTUAL RELIEF FUND, LD, 13 P. L. R. 1919 **723**

Company Law—*Liquidation of Company—Allotment of shares, application for—Invalid allotment—Revocation before ratification, effect of—Shareholder, liability of.*

The liquidator of a Bank sued one *M.* for recovery of a certain sum of money on the basis of a promissory note alleged to have been executed by him and one *S.* jointly. It was alleged that *M.* and *S.* applied for the allotment of certain shares in the Bank, which shares were allotted by the Managing Director on the 28th June 1911 and notice of the allotment was given to *M.* and received by him on the 5th January 1912. On the 18th January *M.* repudiated the allotment and denied having made any application It appeared that on 20th November 1908 two Directors of the Bank had made a delegation of the power of allotting shares to the General Manager, and that, subsequently, on the 27th November 1908 these two one representing a third Director by proxy) together with a third, purported to confirm the decision of the previous week It appeared further that neither of these two Directors had paid their allotment money by that date :

Held, (1) that under the circumstances no proper meeting of the Directors could be said to have been held and that there was no valid delegation of the power of allotting shares;

(2) that, consequently, there was no valid allotment of the shares to the defendant and, therefore, there was no consideration for the promissory note.

(3) that, in any case, it was open to the defendant to revoke his application for the allotment of any

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shares, provided the revocation was anterior to the date of any valid allotment or ratification by the Board of Directors;

(4) that no valid ratification of the invalid allotment before revocation could be said to have been proved;

(5) that, under the circumstances, the defendant was not liable. **L** BANK OF PESHAWAR, LD *v.* MADHO RAM **812**

Compromise of dispute relating to succession, validity of **919**

——— entered into under mistake, whether can be set aside **955**

Compromise decree—*Decree wrongly passed, whether nullity—Jurisdiction of Court—Party consenting to decree, right of, to impeach decree—Estoppel—Evidence Act (I of 1872), s. 115.*

A consent decree wrongly passed owing to some legal or technical defects is not a nullity *ab initio*. The Court has jurisdiction to pass a right as well as a wrong decree and if it decides wrongly, the wronged party can only take the course prescribed by law for setting matters right.

A party to a consent decree which the Court had jurisdiction to pass or any one deriving title under him is estopped from going behind the terms to which he has voluntarily submitted on the ground that the decree was wrongly passed. **M** KALIANA-RAMA AIYAR *v.* SIVARAMA CHETTIAR **439**

Confession of co-accused, *evidentiary value of—Corroboration, nature of.*

Heaton, J. (*Scott, C. J.* concurring)—The rule as to the use to be made of the confession of a co-accused is, that a man ought not to be convicted solely on such confessions, nor upon such confessions together with evidence of the ordinary kind which is trivial or unimportant. But where there is a body of evidence and circumstances enough to support a conviction if the evidence is accepted, such confessions may be taken into consideration together with the evidence and the circumstances.

Shah, J.—Before acting upon such confessions the Court should insist upon independent corroboration from other evidence in the case in material particulars, particularly as to the identity of the accused.

The evidence, which is supposed to afford independent corroboration, must be in itself reliable and not doubtful evidence, which is treated as reliable in consequence of the confession; otherwise it will not be independent corroboration.

Scott, C. J.—Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. **B** EMPEROR *v.* SABITKHAN BAHADURKHAN, 21 BOM L. R. 448; 20 CR. L J. 497 **657**

Contract—Void and illegal contracts, distinction between—Collateral transactions, how affected—Lottery, validity of—Money won in lottery, suit to recover, maintainability of—Limitation **530**

Contract Act (IX of 1872), s. 2 (d)—*Security-bond, execution of, for debt due on promissory note—Forbearance to sue for period not specified, whether good consideration.*

A forbearance to sue a debtor on his promissory note is a good consideration for the latter executing a security-bond for payment of the debt, and the creditor can maintain a suit on the security-bond.

It is not necessary that there should be an agreement for forbearance for any definite or particular time It is enough if an implied request by the debtor for forbearance for a time can be inferred. **M** SRINIVASA RAGHAVA *v.* RENGANATHA IYENGAR, 25 M. L. J. 347; 26 M. L. J. 618 **963**

——— **ss. 5, 6, 7**—*Proposal and acceptance—Revocation, when complete.*

In a suit for recovery of a certain sum of money as damages for alleged breach of contract to supply 500 bags of sugar, it appeared that in reply to the plaintiffs' letter of the 1st February 1915 the defendants intimated their rates, whereupon the plaintiffs telegraphed on the 4th February their acceptance subject to their approval of the samples which they asked the defendants to send, and confirmed the telegram by a letter of the same date. The samples were sent and reached the plaintiffs on the 11th, on which date the defendants sent a telegram to the plaintiffs saying that they could not hold stock after that evening and asking them to wire instructions This telegram was not delivered to the plaintiffs as the address they gave had not been registered. On the same date, the defendants sent the plaintiffs a letter in confirmation of the telegram. On the 12th February the plaintiffs sent earnest-money and wrote to the defendants that they would send instructions the next day. The defendants, on the same date, wrote informing the plaintiffs that they could not hold stock for them and refused the earnest-money sent by the plaintiffs:

Held, (1) that, there had been no unqualified acceptance by the plaintiffs of the defendants' offer up to the time when the latter sent their telegram on the 11th February;

(2) that, inasmuch as the defendants' telegram did not reach the plaintiffs in consequence of the latter's own misrepresentations about their telegraphic address, the plaintiffs must be deemed in law to have received information of the defendants' revocation of their proposal on that date;

(3) that, consequently, the plaintiffs' claim could not succeed. **P** RAMPUR SUGAR STATE FACTORY *v.* DIWAN CHAND-ISHAR DAS **860**

——— **ss. 16, 74**—Interest, compound—Undue influence—Penalty—Court, power of, to interfere **496**

——— **s. 20**—*Mistake of fact—Compromise entered into under mistake, whether can be set aside.*

Plaintiff and defendant entered into a compromise in respect of a litigation which both of them believed to be pending, although, as a matter of fact, at that time the litigation had ended in a decision in favour of the plaintiff Neither party took advantage of the other in respect of the transaction:

Held, that the case fell within the terms of section 20 of the Contract Act and that the plaintiff was entitled to a declaration that his rights under the decree were not affected by the compromise. **C** ANANDA CHANDRA DAS *v.* KALI DAS, 29 C. L. J. 523 **955**

——— **s. 23**—*Agreement by spiritual adviser to bring about adoption of particular person legality of*

—Public policy—Money paid under agreement, whether can be recovered.

The Courts in India will not assist a party to recover back his money paid in respect of a contract which is tainted with criminality or immorality, even though the contract has not been performed.

An agreement by the priest or spiritual adviser of a Hindu lady to use his influence to bring about the adoption by the lady of a particular person is illegal, immoral and opposed to public policy and any money paid under the agreement cannot be recovered **Pat** RAGHUBAR DAS MAHANT *v.* NATABER SINGH; 4 P. L. J. 542 **280**

——— **s. 23**—Lottery, legality of—Suit to recover from agent money won in lottery, maintainability of **530**

——— **s. 23**—*Money bond—Contract for labour in lieu of interest for specified term, whether slavery—Public policy Bond, whether enforceable.*

A stipulation in a bond whereby the debtor contracts to work for a specified term in lieu of payment of interest is not opposed to public policy and is enforceable. There is little difference between such contract and one of apprenticeship. **M** PONNUSAMI *v.* PALAYATHAN, 10 L. W. 202; (1919) M W. N. 534 **252**

——— **s. 23**—*Public policy—Contract to pay money after performance of marriage, validity of.*

Where a contract provides that when a marriage has been arranged and performed the parent of either the boy or the girl who is a party to the marriage shall pay a certain sum of money, the contract is not void *ab initio* as being opposed to public policy. **A** JAGDISHWAR PRASAD *v.* SHEO BAKHSH RAI, 1 U. P. L. R. H. C.) 119 **856**

——— **s. 30**—*Limitation Act (IX of 1908), Sch. I, Art. 89—Void and illegal contracts, distinction between—Collateral transactions, how affected—Lottery, validity of—Money won in lottery, suit to recover, maintainability of Limitation*

The difference between agreements that are void and agreements, that are illegal lies in the effect which their peculiar character imparts to collateral transactions If an agreement is merely void and not illegal, the plaintiff can recover from a third party money which the latter has received on his behalf under the void agreement, the contract under which the money was received for the principal not being affected by the collateral agreement under which the money was payable If an agreement is illegal, *i. e.*, prohibited by law under a penalty, the plaintiff cannot recover, as his claim is founded on an illegal act, and the receipt of the money is itself an illegal act.

The law forbids the holding of a lottery or sweep, but it is not illegal to receive prize money won in a lottery or sweep, and if such money is received by a person as agent for the winner he is bound to account for the money to his principal, and section 30 of the Contract Act will not operate to bar a suit against the agent to recover money so received by him. Such a suit must be brought within the period of limitation contained in Article 89 of Schedule I to the Limitation Act, and the cause of action arises when payment to the principal is refused. **L B** HORMASJI *v.* PO HMYIN, 12 BUR L T. 9 530

——— **s. 38**—*Tender, conditional, whether valid—Interest, whether ceases to run Landlord and tenant—Interest, high rate of, stipulated in* kabuliyat *—Tenant, whether liable to pay stipulated rate*

Plaintiff brought a suit to recover rent of land in a town to which the provisions of the Transfer of Property Act, and not the Bengal Tenancy Act, applied Defendant tendered the rent and demanded a receipt stating that the holding was a *kaimi raiyati* one. This was refused, and payment was declined Plaintiff thereupon brought this suit in which he also claimed interest:

Held, that plaintiff was entitled to sue for rent and interest: that the defendant's offer was conditional and was, therefore, not a good tender, and the consequences imposed by section 38 of the Contract Act did not follow: that the defendant was liable for the payment of interest at the rate mentioned in the *kabuliyat*, as it was not shown that the agreement to pay was entered into under coercion or undue influence **C** AMAR KRISHNA SEN *v.* CHANDRA KUMAR SEN **793**

——— **s. 39,** *applicability of.*

Section 39 of the Contract Act applies only to a state of things where there is a series of executory promises on both sides, and so soon as one part of the obligation has been performed by a complete transfer of the property in question, that section ceases to have any application. **M** KANDASAMI PILLAI *v.* RAMASAMI MANNADI, 36 M. L. J. 313; (1919) M W. N 19 ; 4 M 203 **507**

——— **s. 60**—*Appropriation of payment towards interest*

Where payments are made in liquidation of a debt, and the amount due on account of interest largely exceeds the amount paid, the creditor is justified in appropriating such payments towards interest **C** BISWANATH BHATACHARJEE *v* GOVINDA CHANDRA DAS, 29 C. L J. 30 ; 23 C. W. N 534 **88**

——— **s. 65**—*Contract—Performance becoming impossible owing to act of executive authorities—Damages, suit for, maintainability of—Principle applicable.*

A contract which at the outset is not void, but performance of which becomes impossible owing to an act of the executive authorities which could not have been foreseen at the time the contract was entered into, is governed by the principle "that the loss must lie where it has fallen," section 65 of the Contract Act being inapplicable, and money advanced under the contract before the date of the interruption cannot be recovered. **P** DEVI DAYAL *v.* BAINI RAM, 42 P. R. 1919 **412**

——— **ss. 69, 70** **57**

——— **s. 70,** *scope of—'Lawful payment', meaning of—Payment made on behalf of another, whether can be recovered.*

A payment is said to be "lawful" within the meaning of section 70 of the Contract Act, if it is shown to have been made in good faith or was not an unlawful payment, and the person making the payment did not intend the payment to be gratuitous, but expected compensation for it. What is lawful payment will depend on the facts of each particular case. Where a payment is made against the protest of the person on whose behalf it

Contract Act—contd.

purports to have been paid, it would not be covered by the section. **M** VENKATAKRISHNAMA CHARLU *v.* ARUNACHALAM PILLAY, (1919) M. W. N. 244; 9 L. W. 435 **857**

——— **ss. 74, 16**—*Interest, compound—Undue influence—Penalty—Court, power of, to interfere.*

The Courts in India are precluded from relieving a debtor with regard to interest, unless the case comes within the purview of section 16 or section 74 of the Contract Act.

Where a bond provides for payment of interest at a certain rate with yearly rests and does not stipulate for payment of an increased rate from the date of default in payment nor does it in any way vary the rate of interest on account of such default, section 74 of the Contract Act has no application to the case. **Pat** KAMLA PRASAD *v* RAM CHANDRA PRASAD NARAIN SINGH, (1919) PAT 365 **496**

——— **s. 74**—*Mortgage—Compound interest, whether penalty.*

A stipulation in a mortgage-bond for interest at the rate of one per cent per mensem, with a provision for the payment of compound interest, cannot in any way be regarded as a penal provision. **C** KAILASH CHANDRA *v.* LATIFANNESA KHATUN **556**

——— **s. 74**—*Penalty—Landlord and tenant—Kabuliyat fixing rent—Enhancement of rent on failure to take fresh settlement, whether penalty.*

In a *kabuliyat* granted for a term of years, the rent was stated to be Rs but an abatement of Rs. 26 was allowed for the term of the *kabuliyat*, it being provided that on expiry of the term there would be a fresh settlement, and that, so long as the fresh settlement was not made, the rent was to be Rs. 76 For some years after the expiry of the term of the *kabuliyat*, the landlord accepted Rs 50 as rent, and then sued to recover the balance:

Held, that he was not entitled to do so, as the stipulation to pay a higher rate of rent was in its nature penal and was never intended to be acted upon .. KALIKESH CHANDRA CHATTOPADHYA *v.* JAHARULLAH MANDAL **984**

——— **s. 74** *'Penalty,' meaning of—Agreement to re-pay larger amount than that borrowed, covering principal and interest for specified period—Payment of interest in advance—Unconscionable bargain—Court, power of, to award equitable relief.*

An agreement by a borrower, in return for a smaller sum to re-pay a larger one on a given day representing the original principal and interest, is not contrary to law.

In such a case the Court cannot award relief under section 74 of the Contract Act as the transaction is not penal in its nature.

The word 'penal' in section 74 of the Contract Act has a bearing only when there is a main contract and a subsidiary contract providing for some more drastic consequences in the event of the breach of the original and main contract. It is totally inapplicable to a term of the original contract or consequence of the original contract not owing to breach but owing to fulfilment.

Defendant executed a pro-note to plaintiff for Rs. 10,000 promising to re-pay the amount with interest at 24 per cent. per annum. On the same day he gave a letter to plaintiff in which he agreed to discharge the said loan by monthly payments of Rs. 500, for which he executed 20 *hundis*, one to be cashed each month. The amount paid by plaintiff in cash was only Rs. 6,000. In a suit to enforce the pro-note:

Contract Act—concld.

Held, that the transaction, though oppressive, was not penal within the meaning of section 74 of the Contract Act. **M** SUKKULAL SOWCAR *v.* TIRUMALA ROW, 24 M. L. T. 420 **295**

——— **s. 74**—*Stipulation for enhanced interest on default of payment on specified day—Mortgage money, application of, to debts bearing higher interest—Penalty.*

Where under the terms of a mortgage bond, the principal amount was payable on a certain day with interest at 9 per cent per annum and in default with interest at 12 per cent and it was found that the mortgage consideration was applied in satisfaction of debts bearing interest at 12 per cent. and more:

Held, that the provision for payment of enhanced interest was not a penalty. **M** VENKATACHALLAPATHI AIYAR *v.* THARVASI SERVAI, 36 M. L. J. 288; 42 M. 465 **67**

——— **s. 184**—Minor, whether can act as agent in marriage **533**

——— **ss. 247, 248**—*Partnership—Minor, whether can become partner—Liability of minor partner—Firm, liability of, for debt contracted by partner*

As a minor cannot make any contract at all, he cannot really enter into a contract of partnership. But under section 247 of the Contract Act a minor can be admitted to the benefits of a partnership and, though he cannot be personally liable, the share of such minor in the property of the firm is liable for the obligations of the firm.

To make a firm liable for a debt it is not necessary that the money should have been borrowed in the name of the firm. It is sufficient if the debt was taken by one of the partners for the firm and was appropriated to it

The liability of a minor member of a joint family in respect of a family trade under section 247 of the Contract Act does not depend upon the powers of the *karta* or the guardian, but upon the question whether the minor was admitted to the benefits of the partnership, and his liability under the section is limited to his share of the partnership properties. His liability under section 248 of the Contract Act depends upon the fact of his having been admitted to the benefits of the partnership and his not having repudiated the partnership on attaining the age of majority. He cannot repudiate the partnership merely by saying so, unless he relinquishes the properties of the partnership received for him by his guardian But his retention of those properties will not make him personally liable for the obligations of the partnership unless it is proved that he retained them with full knowledge of the facts. **C** KRISHNADHAN BANERJI *v.* SANYASI CHARAN, 29 C. L. J. 280; 23 C. W. N. 500 **597**

Contribution, *doctrine of, applicability of—Setting up wrong defence, whether tort—Joint wrong-doers.*

There is nothing wrong in a defendant putting the plaintiff to proof of the facts necessary to prove his claim by denying in the written statement the existence of such facts. It is for the plaintiff to prove his case and if his proof fails, the defendant will succeed even if the facts are capable of proof to the knowledge of the defendant.

The rule of non-contribution between joint tort-feasors exists in this country, but it applies only in cases where the parties are wrongdoers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act.

Where several defendants, jointly and in collusion with each other set up a defence which they know cannot be substantiated in fact and which fails and costs are decreed against them jointly, there is a right of contribution in favour of the defendant who discharges the joint liability for costs under the decree. **Pat** MAHABIR PRASAD *v.* DARBHANGI THAKUR, (1919) PAT 289; 4 P. L. J. 486 **697**

Co-sharer *–Tenant inducted into land by one co-sharer—Right of other co-sharers to sue for compensation for use and occupation.*

A co-sharer landlord is not entitled to recover compensation for use and occupation from a tenant inducted into the land by another co-sharer landlord. **Pat** SAT NARAYAN SINGH *v.* ANANT PROSAD, 20 CR. L. J. 271 **31**

Court-fees—Extension of time for payment of deficit, power of Court to grant **154**

Court Fees Act (VII of 1870), s. 7 (ii), (iv) (c) *—"Other sums payable periodically", meaning of—Suit for assessment of rent and for recovery of specific sums of money as damages for use and occupation, nature of—Court-fees payable.*

In construing a Statute the general rule is that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. Consequently, in construing section 7, clause (*ii*), of the Court Fees Act the expression "other sums payable periodically" must be limited by the specific words that precede it.

A suit for assessment of rent and for recovery of a specific sum of money as damages for use and occupation is in the nature of a suit to obtain a declaratory decree where consequential relief is claimed, and the amount of Court-fees payable on such a suit should be computed according to clause (*iv*) *c* of section 7 of the Court Fees Act. **Pat** KALI CHARAN ROY *v.* KESHO PRASAD SINGH, 4 P. L. J. 561 **15**

——— s. 7 (IV) (c) Suit for declaration that decree is not binding having been obtained by fraud—Court-fee payable **536**

——— s. 7 (10) (c) *—Mortgage suit—Declaration that property was not subject to certain lien, prayer for—Court-fee payable.*

Plaintiff brought a suit to recover money due on a mortgage-bond by sale of the mortgaged properties; it was also prayed that as defendant No. 3 had a deed of conditional sale reciting a mortgage prior to plaintiff's mortgage, the property might be sold subject to defendant No. 3's mortgage, or that he might be granted an opportunity to redeem. The suit was decreed and the property was ordered to be sold subject to the mortgage of defendant No. 3. The plaintiff appealed against the latter part of the decree, praying for its modification "by removing the condition as to priority of the deed of defendant No 3 and its redemption by the appellant" He valued the appeal for purposes of jurisdiction at Rs. 14,000, the amount of defendant No 3's mortgage, but he paid a Court-fee of Rs. 10 only for the declaratory relief that defendant No. 3's bond had no priority of charge over his own:

Held, that the relief sought was not declaratory, but sought to obtain an order that the property be sold free of the lien declared by the trial Court, and that, therefore, *ad valorem* Court-fee must be paid on the value of the lien which it was sought to destroy **Pat** PREMSUKH DAS *v.* SHAH GOPI SARAN, 4 P. L. J. 328 **786**

——— s. 12 (2) *—Appeal, dismissal of—Respondent, whether can be called upon to make up deficiency in respect of Court-fee payable in lower Court.*

When the High Court dismisses an appeal from whatever cause, it ceases to have seisin of the appeal or case and is powerless to call upon the respondent to pay any deficiency due by him in respect of Court-fees payable in the lower Court, and consequently has no jurisdiction in such circumstances to restrain the respondent from executing the decree obtained by him **Pat** RADHIKA RAMAN *v.* JANKI KUER, (1919) PAT. 276; 4 P. L. J. 472 **756**

——— s. 17 *—Landlord, suit by, against several sets of tenants, for declaration that they pay* batai *and not cash rents—Court-fee payable.*

Where a landlord sues a number of tenants, each having a separate interest in his particular holding, for a declaration that their lands are held under the *batai* system and that they are wrongly recorded as paying cash rent, he must pay a Court-fee of Rs. 10 in respect of each set of tenants **Pat** LACHMAN SAHU *v.* ABDUL KARIM, 4 P. L. J. 299 **767**

Covenant *running with land—Covenant for renewal, nature of—Transfer of property, whether carries right of renewal.*

A covenant for renewal being a covenant running with the land, where a grantee of land for a term of years with the right of renewal transfers his right in the property, the benefit of the right of renewal goes with the transfer unless there is an express or implied intention in the document of transfer to the contrary. **L B** JOGENDRA LALL CHOWDHURY *v.* MT ASHA, 9 L. B. R. 268 **360**

Criminal Procedure Code (Act V of 1898), ss. 4 (p), 166 *–Police Officer present at station house, meaning of—Illegal search, suit for damages for—Search by person in charge of station during permanent incumbent's absence, legality of—Liability of person assisting Police Officer lawfully making search.*

Under section 4 (*p*) of the Code of Criminal Procedure, if a person is deputed to be in charge of a Police Station, the fact that he is doing duty elsewhere does not deprive him of his capacity of station house officer.

The words 'present at the station house' in section 4 (*p*) of the Criminal Procedure Code do not have the effect of depriving an officer of his functions if he happens to go out of the station house.

Criminal Procedure Code—contd.

A search by a person, therefore, who is appointed to do the duties of a station house officer but who happens to be out of the station at the time is not illegal.

A person assisting a Police Officer lawfully engaged in making a search is not liable in damages for an illegal search. **M** ASAN ALLIAR *v.* MASILAMANI NADAR, 36 M. L. J. 252; 42 M. 448; (1919) M. W N. 452; 25 M. L. T. 274; 20 CR. L J. 422 **193**

——— **s. 106**—*Security to keep peace—"Offences involving a breach of the peace," meaning of—Penal Code (Act XLV of 1860), s. 504, conviction under—Order requiring security to keep peace, legality of.*

A breach of the peace or a probable breach of the peace being an ingredient of the offence made punishable by section 504 of the Penal Code, it is not illegal to direct a person convicted under that section to furnish security to keep the peace under section 106 of the Criminal Procedure Code.

Per *Heaton, J*—The words "other offences involving a breach of the peace" in section 106 of the Criminal Procedure Code are applicable where there actually has been a breach of the peace, and also where the definition of the offence involves a breach of the peace

Per *Pratt, J.*—The phrase "other offences involving a breach of the peace" includes offences which are offences because a breach of the peace has occurred or because a breach of the peace is likely to occur. **B** SYED YACOOB *v.* EMPEROR, 21 BOM. L. R. 270; 20 CR. L. J. 513; 43 B. 554 **783**

——— **s. 107**—*Security to keep peace—Order requiring security in certain sum—Subsequent order requiring security in greater sum, legality of.*

Once a Magistrate has directed the furnishing of security in a certain sum by the accused in proceedings under section 107 of the Criminal Procedure Code, the proceedings come to an end and he has no jurisdiction to alter his order.

Where one month after passing an order requiring the accused to furnish security in a certain sum to keep the peace, the Magistrate directed the accused to furnish security in a larger sum:

Held, that the order was *ultra vires*. **A** RAJ KUMAR DAS *v.* EMPEROR, 17 A. L. J. 335; 20 CR. L. J. 486 **470**

——— **s. 109**—*Security for good behaviour from Vagrants and suspected persons—Suspicion, whether enough—Order based on suspicion, legality of.*

The only persons to whom the provisions of section 109 of the Criminal Procedure Code apply are those who take precautions to conceal their presence within the local limits of a Magistrate's jurisdiction or persons who have no ostensible means of subsistence and who cannot give a satisfactory account of themselves To justify an order under that section there must be a good basis of fact; mere suspicion is not enough.

Three respectable citizens of Delhi were met at night by the Police between Meerut City and Meerut Railway Station and a burglar's jemmy was also found somewhere near on the ground:

Held, that these facts did not justify the passing of an order under section 109 of the Criminal Procedure Code. **A** GHULAM JILANI *v.* EMPEROR, 17 A. L. J. 452; 20 CR L. J. 401 **161**

——— **ss. 110, 439**—*Enquiry under s. 110—Joint trial—Association of accused, proof of—Failure to examine evidence, effect of—Court, duty of—Revision.*

The law requires that when proceedings are taken against more persons than one for a joint trial under section 110, Criminal Procedure Code, proof should be given that they were associated together in the matter under enquiry.

The petitioners were ordered to furnish security under section 110, Criminal Procedure Code, on evidence which was not merely meagre and vague but was accepted by the trying Magistrate without any critical examination In appeal, the trial Court's order was upheld but in the Appellate Court's judgment no reference was made to evidence on important points:

Held, that the order passed by the lower Courts could not be sustained, inasmuch as the procedure adopted by them was not at all satisfactory. **C** NEZAMADDI *v.* EMPEROR, 23 C. W. N 458, 20 CR. L. J. 551 **839**

——— **s. 110**—*Notice omitting to specify nature of evidence—Cross-examination of witnesses—Accused taken by surprise.*

Where in a notice to an accused person under section 110 of the Criminal Procedure Code it is not possible to give detailed information as to the nature of the evidence which the prosecution intend to adduce at the trial, the omission to give such details is not an irregularity sufficient to vitiate the proceedings. If the evidence takes the accused by surprise, he has a right to ask the Magistrate for sufficient time, after the evidence has been disclosed to commence his cross-examination. But where cross-examination is indulged in at great length and a large number of witnesses is cross-examined, the accused cannot object that he was taken by surprise. **Pat** DOHRA AHIR *v* EMPEROR, 20 CR. L. J. 436 **260**

——— **ss. 110, 125**—*Security for good behaviour—Jurisdiction of District Magistrate to cancel bonds, nature of—Reference to High Court—Revision.*

Section 25 of the Criminal Procedure Code does not confer appellate or revisional jurisdiction upon a District Magistrate enabling him to cancel a bond executed in pursuance of an order under section 110 of the Code, upon an application made to him in this behalf. The proper course in such a case is for the District Magistrate to submit the case to the High Court with a recommendation that the bond be cancelled, if he is of opinion that this should be done **A** SHANKER LAL *v.* EMPEROR, 20 CR. L. J. 489. 17 A. L J 840 **473**

——— **s. 133**—*Obstruction, order directing removal of—Findings necessary to confer jurisdiction—Bona fides of claim*

In proceedings under section 133, Criminal Procedure Code, it is necessary to establish, *first*, that the act complained of is a nuisance or an obstruction; and, *secondly*, that it was committed in a public place which may lawfully be used by the public

The question of the *bona fides* of a claimis a question of fact which has to be inquired into like any other question of fact **Pat** TENI PERSAD SINGH *v.* SARJOO SINGH. 20 CR. L J. 556 **844**

——— **s. 145**—*Proceedings under s. 145—Order of Civil or Criminal Court, evidentiary value of.*

In investigating the question of actual possession in a proceeding under section 145 of the Criminal Procedure Code, any previous order of a Civil or Criminal Court relating to the property in dispute may throw light upon the matter, but the evidentiary value to be attached to any such piece of evidence depends upon the particular circumstances of each case. If one of the parties to the proceedings was in actual possession of the property in dispute and lost that possession by the execution of a decree of the Civil Court, then it lies heavily on him to show that he has since regained possession But if he was not a party to the civil decree and if it is not shown that either of the parties to the civil decree was in actual possession, then the former civil proceedings would be of no evidentiary value against him. **N** SHANKER *v.* BHYAJI, 20 CR. L. J. 445 **269**

——— ss. 145, 435, 439—*Proceedings under s.* 145—*Revision—High Court, power of interference of.*

Proceedings under Chapter XII of the Criminal Procedure Code are not proceedings within the meaning of section 435 of the Code and cannot, therefore, be called up by the High Court under that section.

Semble.— The High Court has no power under section 107 of the Government of India Act to revise proceedings taken under Chapter XII of the Criminal Procedure Code. **A** SAKHAWAT ALI *v.* EMPEROR, 17 A. L. J 321; 20 CR. L. J. 449; 41 A. 502 **337**

——— ss. 145, 146—*Proceedings under s* 145, *whether can be struck off—Procedure.*

Where proceedings under section 145 of the Criminal Procedure Code have once been started, the Magistrate has no jurisdiction to strike them off. He must pass an order either under section 145 or under section 146 of the Code. **Pat** TRILOCHAN DAS *v.* JOGESHWAR DAS, 20 CR. L. J. 464 **352**

——— ss. 145, 476—Sanction to prosecute and order directing prosecution in same proceeding, validity of **173**

——— ss. 145, 435, 439—*Title and possession, question of, decided by Civil Court—Proceedings under s.* 145, *whether competent—Jurisdiction of Criminal Courts—Revision—High Court, power of interference of.*

Where a Civil Court has decided the question of *title* to property which forms the subject of proceedings under Chapter XII of the Code of Criminal Procedure, and has directed that possession thereof be given to a particular person, the Criminal Court has no jurisdiction to initiate fresh proceedings under section 145 in respect of the same property. Such a proceeding is without jurisdiction and is liable to be quashed in revision by the High Court.

Proceedings under section 145 of the Criminal Procedure Code must be in intention, in form and in fact proceedings under Chapter XII of the Code by a Magistrate duly empowered to act under that chapter.

Where an order under section 145 of the Code of Criminal Procedure was passed by a Magistrate whose jurisdiction was open to doubt and as a result of proceedings which were not in intention, form or fact proceedings under Chapter XII of the Code:

Held, that the proceedings were illegal and were liable to be set aside in revision. **A** BRAHMA NATH *v.* SUNDAR NATH, 17 A. L. J. 434, 20 CR L. J. 410 **170**

——— s. 147, proviso—*Jurisdiction, basis of—Exercise of right within three months, proof of.*

An order under section 147 is without jurisdiction if it is made in the absence of any finding that the right in dispute was exercised within 3 months anterior to the enquiry.

In order to vest a Court with jurisdiction to deal with a matter under section 147 of the Criminal Procedure Code it must appear that where the right to do such thing is exerciseable at all times of the year, the right has been exercised within three months next before the institution of the enquiry, or where the right is exerciseable only in particular seasons or on particular occasions, the right has been exercised during the last of such seasons. **Pat** BABU KHAN *v.* RAJ KISHORE PERSHAD, 20 CR L. J. 558 **846**

——— ss. 177, 206, 526 (1), 531, 532—*Enquiry by Court having no local jurisdiction—Defect, whether curable—Commitment to High Court in respect of offence over which Sessions Court has jurisdiction—High Court, original criminal jurisdiction of, territorial extent of—Power of High Court to transfer to High Court Sessions trial of offences committed outside Madras town—Convenience*

The policy of the Criminal Procedure Code, as shown by sections 531 to 538, is to uphold, in most cases, orders passed by a Criminal Court which was lacking in local jurisdiction or which had committed illegalities or irregularities, unless failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities.

Where a commitment is made to the High Court Sessions over which the Sessions Court of a Division has local jurisdiction, the High Court can, on grounds of expediency and convenience, direct the trial to proceed in the High Court itself

Per *Sadasiva Aiyar, J*—The High Court, in its original criminal jurisdiction, has power to try cases committed to it by the Muffasal Magistracy, and the commitment is not void by reason of the fact that a Sessions Court in the Muffasal has local jurisdiction in respect of the offence in respect of which the committal is made. **M** GANAPATHY CHETTY, *In re*, 20 CR L. J. 454; 37 M. L. J. 60; 26 M. L. T. 68, 10 L. W. 263 **468**

——— ss. 190, 200, 537—*Complaint—Cognizance of case Failure to examine complainant, whether irregularity or illegality.*

Section 190 of the Code of Criminal Procedure which lays down the conditions requisite for initiation of proceedings must be read with section 200 of the Code.

The cognizance of an offence by a Magistrate on complaint is not complete until he has examined the complainant on oath

The omission to examine a complainant under section 200 of the Criminal Procedure Code is not a mere irregularity which can be cured by section 537 of the Code but is an illegality which vitiates the entire proceedings. **Pat** MANGU KOERI *v.* EMPEROR, 20 CR. L. J. 481 **465**

Criminal Procedure Code—contd.

——— ss. 190, 192—*Process issued to witnesses of complainant, effect of—Transfer of case—Non-cognizable offence—Jurisdiction of Magistrate to take cognizance on Police report—Procedure.*

The fact that a Magistrate before transferring a complaint under section 192, Criminal Procedure Code, for enquiry and disposal issues processes upon the witnesses of the complainant, does not materially alter the nature of the transfer, nor does it affect his jurisdiction.

A duly empowered Magistrate may take cognisance of a non-cognizable offence on a Police report under section 190 (*b*), Criminal Procedure Code, but in that case he must immediately summon the accused. He cannot hold a judicial enquiry under section 202, Criminal Procedure Code. **Pat** EQBAL KHAN *v.* EMPEROR, 20 CR. L. J. 413 **173**

——— ss. 192, 202, scope of—Transfer of case—Transferring Magistrate, power of, to interfere with case after transfer—Grounds for transfer—Local enquiry directed to be made by Subordinate Magistrate—Order, validity of **668**

——— ss. 195, 197, 531, 537—*Commitment to Sessions Court without sanction to prosecute in case where sanction required—Sessions Court, jurisdiction of, to acquit, for want of sanction—Applicability of ss.* 531, 537.

An order of commitment to the Sessions Court cannot be quashed on the ground that the Magistrate took cognizance of the complaint without the sanction required by sections 195 and 197 of the Criminal Procedure Code. Sections 531 and 537 of the Criminal Procedure Code apply to such cases, and their applicability is not affected by the fact that objection to want of sanction was taken at the earliest possible opportunity.

Semble.—A Sessions Court has power to acquit the accused in a case committed to it on the ground of want of sanction. **M** SESSIONS JUDGE OF TANJORE, *In re*, 35 M. L. J. 259; 20 CR. L. J. 581 **674**

——— ss. 195, 487—*Penal Code (Act XLV of 1860, s. 188—Disobedience to order promulgated by public servant—Magistrate, whether can try offence for disobedience of his own order.*

No Magistrate can take cognizance of an offence under section 188 of the Penal Code except in the manner prescribed by section 195, Criminal Procedure Code, even where the offence arises out of a disobedience of the Magistrate's own order.

A Magistrate whose order has been disobeyed cannot, under section 487, Criminal Procedure Code, try the person guilty of the disobedience. **C** MRITUNJOY GOU *v* EMPEROR, 23 C. W. N. 520; 29 C. L. J. 382; 20 CR. L. J. 557 **845**

——— s. 195—*Sanction to prosecute—Enquiry, mode of—Discretion of Court—Sanction, when not to be granted.*

Although no hard and fast rule can be laid down as to the manner in which an inquiry should be made under section 195 of the Criminal Procedure Code, it is necessary that the inquiry should be complete in every detail.

An inquiry confined to an examination of the accused and his witnesses is not sufficient. The inquiry should proceed on the allegations made by the party who asks for sanction and on the basis of materials placed by him before the Court, and the Court should abstain from pronouncing any opinion on the merits of the case. The Court has a wide discretion in the matter of granting or withholding sanction, but that discretion should be used with caution and discernment to further the ends of justice and not to permit the use of the penal law to satisfy private ends or personal spite. Where it appears that there is considerable ill-feeling between the parties, and there are grounds for believing that there is a likelihood of a misuse of the law, sanction ought not to be granted. **Pat** KALWA GOPE *v.* ANTONINI, (1919) PAT. 286; 20 CR. L. J. 541 **781**

——— s. 195—*Sanction to prosecute—Omission to name person to whom sanction granted, effect of.*

A sanction to prosecute which omits to specify the person, either by name or by office to whom sanction is accorded is bad in law, and consequently a trial held under such sanction is invalid. **P** BASHESHAR NATH *v.* EMPEROR, 18 P. R. 1919 CR.; 20 CR. L. J. 490 **474**

——— ss. 195, 476, *scope of—"Referred to in s.* 195," *meaning of—Order directing prosecution—Person proceeded against not party to suit, whether invalidates proceedings—Judge entertaining suspicion of commission of offence, whether can proceed against person suspected.*

The words "referred to in section 195," which occur in section 476 of the Criminal Procedure Code, are merely words descriptive of the class of offences with which a particular Court can deal. They do not mean that section 195 governs section 476 to any extent other than this.

Proceedings under section 476 are not invalidated by the mere fact that the accused was neither a party nor a witness in the original suit.

If an offence is brought to the notice of a Court in the course of a judicial proceeding, it has jurisdiction to proceed under section 476 of the Criminal Procedure Code, it being immaterial whether the persons concerned appeared before the Court or not.

Where a Judge entertains a suspicion that an attempt is being made to use as genuine a forged document, there is nothing to preclude him from proceeding against the persons concerned with regard to the forgery itself. **N** NARAYAN SHALIGRAM *v.* EMPEROR, 20 CR. L. J. 426 **202**

——— s. 196—*Penal Code (Act XLV of* 1860), *s.* 124A—*Sedition—Sanction by Government for prosecution, requisite of—Sanction by telegram—Proof that telegram was sent by Local Government, absence of—Presumption—Evidence Act (I of* 1872), *s* 88—*Supplementary sanction after filing of complaint, legality of.*

The sanction of a Local Government to prosecute a person for an offence under section 124A, Penal Code, communicated by telegram must be proved to have emanated from the Government. The Court is forbidden by the express provisions of section 88 of the Evidence Act to make any presumption as to the person by whom the telegram is sent.

A sanction given after the filing of a complaint does not fulfil the requirements of section 196, Criminal Procedure Code.

Criminal Procedure Code—contd.

The sanction must, in order to satisfy the section have been the act of the Local Government and not of a single member of such Government. **M** VARADARAJULU NAIDU *v.* EMPEROR, 20 CR. L. J. 455; 37 M L. J. 80 **343**

——— **ss. 200, 345**—Failure to examine complainant—Illegality—Non-compoundable offence—Compromise, whether can be sanctioned **840**

——— **s. 202**—*Failure to examine complainant, effect of.*

A Magistrate has no jurisdiction to dispose of a complaint without examining the complainant on oath antecedent to ordering an enquiry under section 202, Criminal Procedure Code, nor can this primary absence of jurisdiction be cured by examining the complainant subsequent to the enquiry. **Pat** EQBAL KHAN *v.* EMPEROR, 20 CR. L. J. 413 **173**

——— **ss. 202, 192,** *scope of—Transfer of case—Transferring Magistrate, power of to interfere with case after transfer—Grounds for transfer—Local enquiry directed to be made by Subordinate Magistrate—Order, validity of.*

The language of section 202, Criminal Procedure Code, seems capable of an interpretation consistent with the long standing practice under which a Magistrate receiving a complaint refers it to a Subordinate Magistrate for local enquiry and report.

Under section 192 of the Criminal Procedure Code, the transferring Magistrate cannot intermeddle with the case transferred, unless and until having power to do so, he recalls it to his own file.

The provisions of section 192 and section 202, Criminal Procedure Code, are separate and distinct and the powers conferred by one section do not curtail those conferred by the other.

Where the principal reason which moved a District Magistrate to transfer a case from the Court before which was it pending, without any inconvenience to the parties or any dissatisfaction on their part, to his own Court was that he desired to inform his mind as to the nature of the dispute between the accused and the complainant:

Held, that the transfer order was not proper and that the case should be restored to the file of the Court from which it had been transferred.

The practice of taking to the Criminal Courts disputes involving questions of right and title condemned. **C** AHRIT MAJHI *v.* EMPEROR, 29 C. L. J. 322; 23 C. W N. 623; 20 CR. L. J. 503 **668**

——— **s. 233,** *applicability of, to enquiries by committing Magistrates.*

An enquiry before a Committing Magistrate is not a trial and does not come within the prohibition contained in section 233, Criminal Procedure Code. **M** SESSIONS JUDGE OF TANJORE, *in re*, 45 M. L. J. 259; 20 CR. L. J. 514 **674**

——— **s. 247,** *applicability of, Plea of guilt and adjourned for judgment—Complainant, absence of, on adjourned date, effect of*

After a case was closed for the defence and arguments had been heard, the Magistrate adjourned it for judgment. On the adjourned date, instead of delivering judgment, the Magistrate acquitted the accused under section 247 of the Criminal Procedure Code on the ground that the complainant was absent without any reasonable excuse:

Held, that the case did not fall within the provisions of section 247 of the Code, inasmuch as the hearing of the case had already been concluded and the attendance of the complainant had not been specially directed. **C** GIRISH CHANDRA DAS *v.* BHUSAN DAS, 29 C. L. J. 337; 20 CR. L. J. 492; 23 C. W. N. 959 **476**

——— **s. 250**—*Penal Code (Act XLV of 1860), ss. 406, 467, charges under, dismissal of—Compensation to accused, order for, legality of.*

In discharging a person accused of offences under sections 406 and 467 of the Penal Code, the Magistrate, with powers under section 30 of the Criminal Procedure Code, directed the complainant to pay to the accused Rs. 100 as compensation:

Held, that in respect of the offence under section 467, which was triable by a Court of Session, the Magistrate had no jurisdiction to award compensation, and that in regard to the offence under section 406 the amount of compensation could not exceed Rs 50 under section 250, Criminal Procedure Code. **P** SHANKAR SAHAI *v.* EMPEROR, 15 P. R. 1919 CR; 20 CR. L J 495 **479**

——— **ss. 263, 367**—*Judgment in summary trial, contents of.*

The law requires that a Magistrate or a Bench of Magistrates in a summary trial should give a brief statement of the reasons for their finding. A judgment in a single line is not a judgment in accordance with the law. **Pat** JANKEY RAI *v.* EMPEROR, 20 CR. L. J. 431 **207**

——— **ss. 345, 200**—*Failure to examine complainant—Illegality Non-compoundable offence—Compromise, whether can be sanctioned.*

A complaint was made to a Magistrate against several persons of the offence of theft. The Magistrate, without examining the complainant upon oath, held a local investigation and found that an offence in the nature of theft had been committed During the course of the investigation the parties agreed to a compromise which was sanctioned by the Magistrate. The accused failing to abide by the terms of the compromise, the complainant applied to have the order sanctioning the compromise set aside and for permission to proceed with his original petition of complaint:

Held, that the proceedings of the Magistrate were altogether irregular and improper, inasmuch as the offence complained of was not compoundable, and he, therefore, had no jurisdiction to entertain or sanction the compromise entered into between the parties, or even to permit the same to be filed. **Pat** GURU PRASAD SAHU *v.* AJODHYA NATH PATHI, 20 CR. L. J. 552 **840**

——— **ss. 350, 528**—*Transfer of case—Case, whether should be heard de novo.*

Section 350 of the Criminal Procedure Code is not limited to cases in which Magistrates succeed one another in Court, but applies also to cases transferred from the file of one Magistrate's Court to that of another under section 528 of the Code.

In cases transferred under section 528 of the Criminal Procedure Code, it is desirable that the

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Magistrate who succeeds the Magistrate originally trying or enquiring into the case should commence the hearing *de novo*. **L B** GANGA CHETTY *v.* EMPEROR, 12 BUR. L. T. 5; 20 CR. L. J. 496 **480**

——— **s. 360**—*Evidence Act (I of 872), s. 80—Deposition not read over to witness in presence of accused or his Pleader, effect of—Proof of deposition.*

Accused was a witness in a Sessions trial, at the close of which the Sessions Judge directed his prosecution for giving false evidence. He was brought to trial, but it was found that his deposition in the Sessions Court was not read over to him in the presence of the accused or his Pleader as required by section 360 of the Criminal Procedure Code. The Magistrate held the deposition to be inadmissible in evidence and discharged the accused. Subsequently the District Magistrate took up the case, set aside the order of discharge and ordered further inquiry under section 437 of the Criminal Procedure Code. Accused moved the Chief Court in revision:

Held, that the deposition should not have been treated as a nullity merely because of the irregularity in not reading it over to the deponent in the presence of the accused or his Pleader: it could be proved by other evidence, as, *e g.*, by evidence that the witness admitted it to be correct when it was read over to him, and the evidence of the Judge or Magistrate who recorded it. **L B** TUN YA *v.* EMPEROR, 10 L. B. R. 16; 20 CR. L. J. 506 **666**

——— **s. 367**—*Judgment, contents of—Failure to comply with provisions of section, effect of.*

An accused person is entitled to have an independent judgment of the trying Court, and such judgment must be prepared in accordance with, and contain the particulars required by, section 367 of the Criminal Procedure Code, otherwise it is no judgment at all.

Where a Second Class Deputy Magistrate, thinking that a severer punishment should be inflicted on the accused than what he was authorised to award under the Code, recorded his full opinion and forwarded the proceedings under section 349 to the Sub-Divisional Magistrate, and the latter convicted the accused and wrote the following judgment, "I have perused this judgment, I agree with the findings arrived at by the learned trying Magistrate and convict all the eleven accused persons for being members of an unlawful assembly with the common object of committing theft as stated in the charge:"

Held, that upon the test laid down by section 367 of the Criminal Procedure Code this was not a judgment at all. **Pat** THAKUR SINGH *v.* EMPEROR, 20 CR. L. J. 444 **268**

——— **ss. 367, 263**—Judgment in summary trial, contents of **207**

——— **s. 369**—*Revision, judgment passed in—Review, whether competent—High Court, power of.*

The High Court has no power to review its judgment pronounced in revision in a criminal case. **Pat** NAND KISHORE LAL *v.* EMPEROR, 20 CR. L. J. 447 **271**

——— **s. 403**, *applicability of—Discharge of accused—Re-trial, whether permissible.*

Section 403 of the Criminal Procedure Code applies only to cases of acquittal or conviction, and has no application to a case in which an accused person has been discharged. **A** PARMESHWARI DAS *v.* JAGAN NATH, 20 CR. L. J. 403; 17 A. L. J. 867; 1 U. P. L. R. (H C.) 98 **163**

——— **ss. 403, 435, 436**—*Penal Code (Act XLV of 1860), ss. 363, 365, 366, 368—Kidnapping, trial and acquittal on charge of—Trial, subsequent, for offences under ss. 363, 368, legality of*

Accused was tried under section 363 of the Penal Code and was acquitted. Upon an application by the complainant, the Sessions Judge directed fresh inquiry to be made to ascertain whether offences under section 366 or 368 or any other section of the Penal Code had been committed by the accused:

Held, that the order directing further inquiry should not have been made, inasmuch as kidnapping is an essential element in offences under sections 365, 366 and 368, and the accused having already been acquitted of that offence, he could not be put on trial twice for the same offence, nor could he be convicted under sections 365, 366 or 368, unless and until the prosecution established that he had committed the offence of kidnapping. **Pat** MUHAMMAD SALEH *v.* EMPEROR, 20 CR. L. J. 526 **683**

——— **ss. 403, 413**—*Joint trial—Appealable and non-appealable sentences—Non-appealable sentences, whether can be appealed against*

Per *Atkinson, J.*—Where two or more persons are jointly tried together for the same offence and one is convicted and awarded an appealable sentence, and the others are convicted and awarded non-appealable sentences, and the convict entitled by virtue of his sentence to appeal does appeal, the law does not warrant under such appeal the right to re-open the trial as an appeal in favour of those who have been convicted and awarded non-appealable sentences: in other words, those latter have no right of appeal and, so far as they are concerned, the correct procedure is to refer the matter to the High Court for its consideration in the exercise of its revisional jurisdiction.

Per *Jwala Prasad, J.*—In such cases the accused who are awarded non-appealable sentences have the right of appeal along with the accused who have received an appealable sentence. **Pat** PHEKU JHA *v.* EMPEROR, (1919) PAT. 265; 20 CR. L. J. 545; 4 P. L. J. 435 **833**

——— **s. 403 (4)**—*Trial for assault before Village Headman—Subsequent trial for hurt before Magistrate, legality of—Burma Village Act (III of 1889, s. 9.*

A person, having been tried and convicted by a Village Headman under the Burma Village Act for assault, cannot be tried for assault by a Magistrate, but he is liable subsequently to be tried by a Magistrate for the causing of hurt upon the same facts, the Village Headman not being competent to try the offence of voluntarily causing hurt. **U B** MI CHIT *v.* MI NYUN, 3 U. B. R. 135; 20 CR. L. J. 553 **773**

——— **s. 428**—*Additional evidence, when may be taken by Appellate Court.*

An Appellate Court has jurisdiction, under section 428, Criminal Procedure Code, to take additional evidence or direct additional evidence to be taken to supply a formal defect, but the power has to be

Criminal Procedure Code - contd.

exercised with great care and only when the Court is satisfied that the case is one of formal proof only.

Per *Sadasiva Aiyar, J.*—The power of an Appellate Court to take additional evidence under section 428, Criminal Procedure Code, should be exercised against an accused person only in very exceptional cases. **M** VARADARAJULU NAIDU *v.* EMPEROR, 20 CR. L. J. 455; 37 M. L. J. 80 **343**

——— **s. 435** **686**

——— **s. 435**—*Additional District Magistrate whether subordinate to District Magistrate—Order directing further enquiry into case disposed of by Additional District Magistrate, legality of.*

An Additional District Magistrate, as such, is not subordinate to the District Magistrate in Burma nor is his Court inferior to that of the District Magistrate within the meaning of section 435 of the Criminal Procedure Code.

Where, therefore, a District Magistrate purporting to act under section 435 of the Criminal Procedure Code, called for a case in which the Additional District Magistrate had discharged the accused and ordered further inquiry before another Magistrate:

Held, that the District Magistrate was not legally competent to make such an order. **L B** EMPEROR *v.* NAWAB ALI, 12 BUR. L. T. 56; 20 CR. L. J. 494 **418**

——— **s. 436** **686**

——— **s. 439**—*Revision—High Court, power of interference of.*

The High Court has ample power under section 439 of the Criminal Procedure Code to deal with a case reported to it for orders, or which otherwise comes to its knowledge. **Pat** PHEKU JHA *v.* EMPEROR, (1919) PAT. 265; 20 CR. L. J. 645; 4 P. L. J. 435 **833**

——— **s. 439**—*Revision—Jurisdiction, want of, effect of.*

Although the Judicial Commissioner will ordinarily not interfere in revision in a proceeding under section 145, Criminal Procedure Code, he will do so where a Magistrate has acted without jurisdiction. An order placing a person in possession in proceedings under section 145 of the Criminal Procedure Code who has been long out of possession is an order made without jurisdiction and is, therefore, liable to be set aside in revision. **N** SHANKAR *v.* BHAYAJI, 20 CR. L. J. 445 **269**

——— **s. 476**—*Bihar and Orissa Public Demands Recovery Act (IV of 1914)—Certificate Officer, whether Court—Order directing prosecution, legality of.*

A Certificate Officer, when acting in the discharge of his duties under the Bihar and Orissa Public Demands Recovery Act, 1914, acts as a Court, and while so acting he is a Revenue Officer presiding over a Revenue Court and as such is competent to make an order under section 476 of the Criminal Procedure Code. **Pat** MATHURA PRASAD SINGH *v.* EMPEROR, 20 CR. L. J. 529; (1919) PAT. 746; 4 P. L. J. 475 **769**

——— **ss. 476, 145**—*Sanction to prosecute and order directing prosecution in same proceeding, legality of—Appeal, whether lies.*

There cannot in the same proceeding be a sanction under section 195, Criminal Procedure Code, and an order for prosecution under section 476, Criminal Procedure Code.

Criminal Procedure Code—contd.

A Sessions Judge has no jurisdiction to deal in appeal with an order of a lower Court passed under section 476, Criminal Procedure Code. **Pat** EQBAL KHAN *v.* EMPEROR, 20 CR. L. J. 413 **173**

——— **s. 476,** *scope of—Magistrate making enquiry requiring help of Police—Reference to District Magistrate, legality of—Delay in instituting proceedings, effect of.*

A case came before an Assistant Collector on appeal against the decision of the Revenue Court of a *mamlatdar*: the Assistant Collector being suspicious that a forged *kabuliyat* had been used by the plaintiff, an *inamdar*, called on him for an explanation which he received along with a report by the *mamlatdar*. The Assistant Collector then applied for the assistance of the Criminal Investigation Department from the District Magistrate, and a full report was submitted to him by the Deputy Superintendent of Police. He then referred the matter for inquiry to the nearest First Class Magistrate, which resulted in both the *inamdar* and the *mamlatdar* being committed to the Court of Session where they were convicted, the former under sections 209, 471, 219 and 109 of the Penal Code, and the latter under sections 466 and 219 of the Code. On appeal to the High Court it was objected—(*a*) that even if the offence was brought under notice in the judicial proceedings of the Assistant Collector as regards the *inamdar*, it was not so brought to notice as regards the *mamlatdar*, (*b*) that the whole of the preliminary inquiry should have been made by the Assistant Collector who, after his reference to the District Magistrate, was *functus officio* and consequently his order under section 476 of the Criminal Procedure Code was without jurisdiction, (*c*) that there was delay in proceeding under section 476 and the delay was fatal:

Held, (1) that under section 476 of the Criminal Procedure Code it was the case which was to be sent for inquiry to the nearest Magistrate and not necessarily all the offenders who might be concerned in the commission of the offence, the subsequent clause of the section referring only to such offender or offenders as might at that time be known and be within the grasp of the inquiring officer;

(2) that the reference to the District Magistrate did not deprive the Assistant Collector of jurisdiction, as the reference was made merely to that officer as the executive controller of the Police and not to him in his judicial capacity as the District Magistrate;

(3) that although it was expedient that speedy action should be taken, there was nothing in the section itself or in the reasons for its enactment to hold that officers acting under it were bound to make their inquiry in the actual course of the judicial proceeding, or so shortly thereafter as to make it a continuation of those proceedings; the section was enacted not with the intention of protecting offenders against public justice from prosecutions by the Courts, but to facilitate, wherever and whenever those offences might come to notice, such prosecutions by Courts. **S** WAMAN DINKAR *v.* EMPEROR, 20 BOM. L. R. 908; 20 CR. L. J. 433; 43 B. 309 **257**

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——— **ss. 476, 195,** scope of—"Referred to in s. 195," meaning of—Order directing prosecution —Person proceeded against not party to suit, whether invalidates proceedidgs—Judge entertaining suspicion of commission of offence, whether can proceed against person suspected **202**

——— **s. 487**—Penal Code (Act XLV of 1860), s. 188—Disobedience of order—Magistrate whose order has been disobeyed, whether can try offence **845**

——— **s. 522** *Penal Code (Act XLV of* 1860), *s.* 350 - *Restoration of property, order for—Criminal force, use of, whether necessary.*

An order under section 522, Criminal Procedure Code, directing the restoration of immoveable property can only be made where dispossession is effected the use of criminal force as defined in section 350 of the Penal Code. **P** HARI CHAND *v* EMPEROR, 16 P. R. 1919 CR; 20 CR L. J. 488 **472**

——— **s. 526**- *Transfer of case—stopping cross-examination of complainant, whether ground for transfer—Criminal trial—Court, duty of.*

It is very important for Magistrates to remember that lawyers in charge of cases of accused persons have a large discretion in the way they should conduct the defence of accused persons. The position of accused persons is at all times of grave anxiety and Courts trying criminal cases should be specially on their guard not to do anything which may have the effect of increasing their anxiety.

Where a trying Magistrate stopped the cross-examination of the complainant in a case because in his view the complainant had been fully cross-examined for one hour:

Held, that the Magistrate was guilty of an act of indiscretion which could reasonably lead the accused to believe that they would not get a fair trial at his hands and that the case should be transferred to the Court of some other Magistrate **Pat** YUSUF *v.* BUNI LAL MANDAL, 20 CR. L J 559 **847**

——— **s. 528**—*Transfer—Magistrate having little time to dispose of case, whether good ground for transfer.*

Although a District Magistrate has very wide powers of transfer conferred upon him by section 528 of the Code of Criminal Procedure, he must in the exercise of these powers act in a judicial manner and not capriciously or arbitrarily.

The fact that a Magistrate before whom a case is pending is also the Treasury Officer and has very little time at his disposal by virtue of his duties as a Treasury Officer is not a sufficient reason for directing a transfer of the case from his Court. **Pat** GHULAM MOHIUDDIN *v.* EMPEROR, 20 CR. L J. 402 **162**

——— **ss. 531, 537,** applicability of—Commitment to Sessions Court without sanction to prosecute **674**

——— **s. 532,** *scope of - Want of territorial jurisdiction in Committing Magistrate, effect of—Committal, order for, whether liable to be quashed.*

Section 532 of the Criminal Procedure Code does not deal with cases in which the defect in the committal order arises from want of territorial jurisdiction. **M** RATHINAM PILLAI, *In re*, 20 CR. L. J. 416 **176**

Criminal trial—*Failure to produce prosecution witness—Presumption.*

Where the prosecution fail to produce an important witness, the Court is justified in making the presumption that if he were produced his evidence would not be favourable to the prosecution. **P** EMPEROR *v.* AMOLAK RAM, 20 CR. L J. 519 **679**

Custom - *Adoption* - Illatom *adoption, validity of, where son or brother is alive.*

The custom of taking an *illatom* son-in-law is the same in the Kamma caste and in the Reddi caste.

There is no analogy between adoption proper, the object of which is primarily religious, and *illatom* affiliation, the object of which is secular only, and the rules of Hindu Law do not apply to the latter, which is regulated solely by custom.

Illatom affiliation is valid even though the affiliator has a son or an undivided brother living **PC** NALLURI KRISTNAMMA *v.* KAMEPALLI VENKATASUBBAYYA, 17 A. L. J. 662; 37 M L J. 1; 26 M. L. T. 25; 23 C. W. N 10 0; 30 C. L. J. 145; 10 L. W. 93; 21 BOM. L. R. 906; (1919) M. W. N. 551 **I**

——— *Alienation—Occupancy rights, creation of, whether amounts to alienation.*

The creation of an occupancy tenancy amounts to a permanent alienation of the land, inasmuch as the rights created derogate from the full title of the landlord. **P** BHAGWANA *v.* BALIK RAM, 37 P R. 1919 **408**

——— *Gift to stranger—Donee dying childless—Land, whether reverts to family of donor—Person not having* locus standi *to question gift, whether can set up invalidity of gift.*

Where land is gifted to a perfect stranger who is not in any way related to the family of the donor, there can be no reversion of the land gifted to the donor's family on the failure of the donee's line.

A person who has no *locus standi* to question the validity of a gift, is precluded from disputing its validity on any ground whatever. **P** DASA *v* HIRAN, 47 P R. 1919 **441**

——— *Marriage—Rathi Rajputs of Kangra District—Janjharara marriage, whether valid.*

Among Rathi Rajputs of the Kangra District a *janjharara* marriage is valid. **P** GOBINDU *v* EMPEROR, 10 P. R. 1919; CR 20 CR L. J. 554 **842**

——— Noakhali—*Transfer of Property Act (IV of* 1882, *s* 108 *j*—*Landlord and tenant—Lands granted for purpose of erecting houses—Transfer of* osat raiyati *holding—Landlord, consent of, whether necessary.*

In Noakhali and its neighbourhood with regard to lands granted for the purpose of erecting houses on, there is a local usage or custom prohibiting the transfer of an *osat raiyati* holding without the consent of the landlord. **C** HEMAPROVA MOZUMDAR *v.* DEBENDRA NATH **953**

——— Shamilat—*Co-sharer cultivating portion of shamilat—Remedy of other co-sharers.*

Where a co-sharer cultivates a part of the common land, the other co-sharers can apply for partition but are not entitled to an injunction restraining the co-sharer from cultivating the land. The fact that a fair is held on the land every year when the land is free from crops and that it is reserved for camps of officers on tour does not affect the matter. **P** AHMAD *v.* SUNDAR SINGH, 35 P. L. R. 1919 **567**

Custom—concld.

——— *Succession—Full brothers, whether exclude half-brothers*—Kaliar *Jats of Mauza Kaliaranwala, Tahsil and District Mianwali.*

Among Kaliar Jats of Mauza Kaliaranwala, Tahsil and District Mianwali, in succession among brothers, half brothers are excluded by full brothers. **P** KHUDA YAR *v.* AHMAD, 33 P. R. 19 9 **298**

——— *Succession—Mother and step-brother—Hindu Jats of Ludhiana District.*

Among Hindu Jats of the Ludhiana District a widowed mother is entitled to succeed to the estate of her childless son in the presence of a step-brother. **P** PARTAB SINGH *v.* JAI KAUR, 43 P. R. 1919 **417**

——— *Village common land—Appropriation by small section for particular use, whether permissible.*

It is not permissible to convert a *takia* built on *shamilat* into a mosque, thereby diverting the property from the purpose for which it was given and depriving a considerable section of the community of its use **L** MAULA BAKHSH *v* DASONDHI **853**

Dead person, suit against—Legal representatives, substitution of **160**

Dharmadayam inam—*Crown grant for charity, for upkeep of mosque and feeding poor—Construction of document—Alienation, temporary, by trustee—Lease and mortgage of endowed property—Performance of services—Resumption of* inam, *right of—Suit for possession—Limitation Act (IX of 1908), Sch. I, Arts.* 14, 144.

Dharmadayam inams granted by the Crown for charitable objects, on condition of certain services being performed, cannot be resumed merely because the trustee has made a temporary alienation of the endowed properties, so long as the services mentioned in the deed of grant are performed, even though less efficiently, and the endowed property is not wholly lost to the charity.

A grant of some villages was made by a Nawab of the Carnatic for the upkeep of a mosque, for performing the usual festivals and for feeding travellers and poor men. The grant was not in the nature of a personal *inam* but was a charitable or *dharmadayam inam* and was to subsist so long as the service was performed. The British Government confirmed the grant and exempted the villages from payment of Government revenue. The trustee having leased one of the villages for 12 years and usufructuarily mortgaged another for 20 years, the Government resumed the *inam*. The services, however, continued to be performed. The plaintiff trustee sued Government for possession of the villages more than a year after the order of resumption was passed:

Held, (1) that a temporary alienation whereby the property was not altogether lost to the charity did not justify resumption:

(2) that as the object of the suit was to recover possession of the villages, whatever the form of the prayer, the order of resumption should be treated as a nullity.

(3) that the suit was in time under Article 144 of Scedule I of the Limitation Act;

Per *Abdur Rahim, J*—Any default in the performance of services, of however minor a character, would not come within the condition of the grant, 'so long as the service is performed'. What is contemplated by the said condition is that, if the

Dharmadayam Inam—concld.

charity fails altogether or substantially, for instance, through the disappearance of the mosque or of persons who would resort to the institution for prayer, etc. or if the charity is entirely discontinued, then the Government would be entitled to resume the grant. But the resumption is not justified where the services are still maintained, though not as efficiently as they ought to be, and some at least of the objects of the grant are of an unfailing character. **M** SECRETARY OF STATE FOR INDIA *v.* GULAM MAHABOOB KHAN, 9 L. W. 587; 37 M. L. J 71 **366**

Dismissal in default—Application to set aside, dismissal of—Application to restore application, whether lies **152**

Divorce Act (IV of 1869), ss. 12, 14, 17—*Petition for dissolution of marriage not opposed—Court, duty of, to make enquiry—Delay—Collusion.*

A decree for dissolution of marriage cannot be legally granted merely on the ground that the respondent does not oppose the petition.

The Court must satisfy itself that there was good reason for the delay, if any has occurred, in suing; that there was no connivance and that there has been no condonation **P** LEHNA MAL *v* HAKIM BIBI, 25 P R 1919 **235**

Easement, discontinuance of enjoyment of, effect of **372**

Estoppel. *See* EVIDENCE ACT, s 115.

——— Agreement to hold property as tenant—Ejectment, suit for—Objection that plaintiff is not sole owner of property, whether can be raised **548**

——— Tenant inducted into possession, whether can deny landlord's title—Rent, payment of, to third person, effect of **494**

Evidence Act (I of 1872), s. 21—*Admission, evidentiary value of.*

An admission by a party is of considerable weight as evidence against him, and may, if unexplained, be even decisive. **M** SANKARACHARYA SWAMIGAL *v.* MANALI SARAVANA MUDALIAR **876**

——— **ss. 35, 48**—*Statement of public servant, recital of, in public record, relevancy of, to prove particular grant by Government.*

A recital in a public record as to a statement made by a public servant with reference to a particular grant by the Government may be admitted, under section 35 of the Evidence Act, as proving that the public servant made the statement that he is stated to have made, if the fact that he made such a statement is a relevant fact. But such a recital would not be admissible under section 48 in a case where a specific right claimed by a particular individual, and not a general right, is being dealt with. **M** SANKARACHARYA SWAMIGAL *v.* MANALI SARAVANA MUDALIAR **876**

——— **s. 48**—Statement of public servant, recital of, in public document, admissibility of **876**

——— **s. 65, 66, 90, 114**—*Document more than thirty years old not produced—Secondary evidence, whether admissible.*

A defendant who is in possession of a document more than thirty years old, which he knows will be required in evidence, is bound to produce it. If he

Evidence Act—contd.

fails to do so, the plaintiff is entitled to give secondary evidence of the contents of the document without giving any notice to the defendant or to his Pleader calling upon him to produce the original, such notice being excused by section 66 (*a*) of the Evidence Act.

In a suit for redemption the defendant mortgagee was in possession of the deed of mortgage which was more than thirty years old, but he failed to produce it at the trial of the suit, and the plaintiff, in order to prove the mortgage, produced a certified copy of the deed:

Held, that the certified copy was admissible in evidence under section 65 of the Evidence Act, and that section 90 of the Act did not limit or confine the application of that section to cases where the original document is actually produced in Court. **A** DWARKA SINGH *v.* RAMA NAND UPADHYA, 17 A L. J. 711; 1 U. P. L. R. (H. C.) 81 **275**

——— **s. 80**—*Criminal Procedure Code (Act V of 1898), s. 360—Deposition not read over to witness in presence of accused or his Pleader, effect of—Proof of deposition.*

Section 80 of the Evidence Act contemplates that the deposition, which it is proposed to use as evidence, should have all the guarantees of authenticity which the law prescribes, one of them being that the Magistrate shall have signed it only after it has been read over to the witness in the presence of the accused or his Pleader, in order that the witness and the accused may have an opportunity of pointing out mistakes. **L B** TUN YA *v.* EMPEROR, 10 L. B. R. 16; 20 CR. L. J. 506 **666**

——— **s. 90**—*Document more than thirty years old not produced—Presumption as to execution and attestation—Failure of party to produce document.*

The presumption permitted by section 90 of the Evidence Act of the due execution and attestation of a document which is shown to be 30 years old may be made by the Court where that document cannot be produced but a certified copy of it is forthcoming. **A** DWARKA SINGH *v.* RAMA NAND UPADHYA, 17 A. L. J. 711; 1 U. P. L. R. (H. C.) 81 **275**

——— **s. 92**—*Oral evidence to contradict recital in deed, whether admissible.*

There is nothing in section 92 of the Evidence Act to exclude evidence of an oral agreement which contradicts, varies, adds to, or substracts from, not the terms of the contract, but some recitals in the contract itself. **Pat** MUKHI SINGH *v.* KISHUN SINGH **320**

——— **s. 92, proviso 3**—*Construction of lease—Condition precedent, proof of—Oral evidence, admissibility of.*

Having regard to proviso 3 of section 92 of the Evidence Act, it is open to a Court to find that an *ijara patta* granted by a landlord to a tenant was intended to be operative only in the event of the lessee being able to obtain possession of the leasehold property, and that such possession was a condition precedent to the attaching of any obligation upon the tenant to pay rent. **C** K. FIL-UDDIN *v.* SABDAR ALI, 29 C. L. J. 478 **918**

——— **s. 102**—*Unregistered bond, suit on—Consideration denied—Burden of proof—Fraud.*

In a suit upon an unregistered bond if the defendant denies consideration, the onus lies on the plaintiff to prove that the bond was executed for consideration.

In a case in which there is no dispute as to consideration, but the defendant raises the plea of fraud, according to illustration (*b*) to section 102 of the Evidence Act, the onus lies on him to prove the facts which amount to fraud. **P** NEKI RAM *v.* KHUSHI RAM, 39 P. L. R. 1919; 14 P. W. R. 1919 **579**

——— **s. 115**—Estoppel—Agreement between parties to suit to abide by decision in another suit **540**

——— **s. 115**—*Estoppel—Agreement to hold property as tenant—Ejectment, suit for—Objection that plaintiff is not sole owner of property, whether can be raised.*

M. held a house as the tenant of two brothers *D.* and *L.* The house was attached in execution of a decree obtained against *D.* alone. *L*, during the pendency of execution proceedings, applied for, and obtained, a preliminary decree for partition of the house, but before the decree was made the house was sold by auction and was purchased by *R.*, the predecessor-in-title of the plaintiff. After the sale, *M.* executed a *sarkhat* agreement to hold the house as a tenant in favour of *R.* and agreed to vacate the house, if required by *R.* to do so, on receiving a month's notice. He, however, refused to vacate the house when served with notice and the present suit was brought to eject him therefrom. He resisted the suit on the ground that the plaintiff was not the sole owner of the premises, and, therefore, had no title to sue for his ejectment:

Held, that in the presence of the *sarkhat* executed by *M.* in which he agreed to vacate the house if required to do so by *R.*, he was estopped from denying the plaintiff's title to get the house vacated. **A** MATHRA PRASAD *v.* GOKAL CHAND, 17 A L. J. 825; 1 U. P. L. R. (H. C.) 100 **548**

Exchange—Covenant for return of property exchanged in event of obstruction—Suit based on covenant—Limitation **939**

Execution of decree—Attachment, determination of—*Supurddar*, liability of, extent of **653**

——— *Attachment, whether subsists after dismissal of execution application.*

An attachment once made in the pursuance of an application for execution of a decree does not necessarily fall with the dismissal of the application for default af prosecution but may continue in full force thereafter, and a sale held under an attachment that made in the course of proceedings upon a previous application for execution is valid. **C** JAGADISH BHATTACHARJEE *v.* BAMA SUNDARI DASYA, 23 C. W. N. 608; 29 C. L J. 411 **972**

——— Decree for possession of property on payment of money without fixing time for payment—Limitation for execution **576**

——— Proclamation of sale—Omission to state time of commencement of sale—Irregularity—Sale, whether can be set aside **864**

——— Property in possession of judgment-debtor—Delivery of possession, how to be made—Symbolical possession, whether operates to save limitation **72**

Execution of decree—concld.

——— Sale—Auction-purchaser deprived of property by paramount claimant, remedies of—Suit to recover purchase-money, maintainability of **95**

——— *Sale—Auction-purchaser, position of.*

An auction-purchaser at a sale in execution of a decree is in no better position in respect of his purchase than the judgment-debtor whose right, title and interest he has purchased. So that where a judgment-debtor owns a portion of a house which is sold in execution, the auction-purchaser cannot set up a claim to the whole of the house. **P** JEEWNI *v.* MISRI, 45 P. L. R. 1919 **100**

——— Sale—Bid, nature and effect of—Death of highest bidder—Revocation of bid—Procedure **805**

——— *Sale—Death of judgment-debtor after attachment but before sale—Legal representatives not brought on record—Sale, validity of—Application to set aside sale—Objection not taken in application, whether can be taken in subsequent suit.*

Where a judgment-debtor dies after the attachment of his property and the property is sold without bringing his legal representatives on the record, the sale is not invalid.

An objection which can be, but is not, made a ground of attack in a proceeding to set aside an execution sale cannot be raised in a subsequent suit for setting aside the sale on the ground of irregularity. **C** JAGADISH BHATTACHARJEE *v.* BAMA SUNDARI DASYA, 23 C. W. N. 608; 29 C. L. J. 411 **972**

——— Sale—Judgment-debtor who has parted with property to stranger, whether can apply to set aside sale—Jurisdiction—Revision—High Court, interference by **873**

——— Sale—Objection allowed—Remedy of decree-holder—Separate suit, maintainability of **184**

——— Sale—Suit for refund of purchase-money by auction-purchaser, maintainability of—Refund of purchase-money, when allowable **595**

——— Suspension of execution—Revival of proceedings **64**

Fraud—Burden of proof **579**

——— *committed with plaintiff's connivance, effect of.*

Where a fraud has been committed with the connivance of the plaintiff, he is not entitled to invite a Court of justice to interpose actively in his favour with a view to extricate him from the difficulty in which he has placed himself. **C** BEHARY LAL *v* NARAIN MISRA, 29 C. L. J. 247 **127**

——— *decree obtained by—Suit for declaration that decree is not binding—Decree passed by superior Court—Jurisdiction of inferior Court to take cognisance of suit—Court-fee payable—Court Fees Act (VII of 1870), s. 7 (iv) (c).*

A suit to obtain a declaration that a decree passed by a Court was obtained by fraud and is not binding on the plaintiff can be laid in a Court of inferior jurisdiction to the Court which passed the decree, provided the subject-matter is otherwise within the jurisdiction of the Court in which the suit is instituted.

A suit for a declaration that a decree is not binding as having been obtained by fraud comes within section 7, sub-section (iv), clause (c), of the Court Fees Act and the Court-fee payable thereon is an *ad valorem* fee on the value at which the suit is valued in the plaint. **M** PILLA KARKADU *v.* VEDULA CHENDRAYYA, (1918) M. W. N. 562; 24 M. L. T. 254 **536**

Fraud—concld.

——— *party deprived of right through, remedies of.*

The question of the remedies open to a plaintiff where he has been deprived of his rights owing to the fraud of the defendant discussed and the remedy indicated **A** JHUMAK RAI *v.* BINDESHRI RAI, 17 A. L. J. 797; 1 U. P. L. R. (H. C.) 62 **125**

Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 101 (4)—*High Court, constitution of.*

Where a High Court is so constituted that not less than one-third of the Judges are Barristers and not less than one-third are members of the Covenanted Civil Serivce, the constitution is in accord with section 10 of the Government of India Act. **A** TEJPAL *v.* JHAGRU, 1 U. P. L. R. (H. C.) 38 **65**

——— High Court, power of, to interfere in revision with proceedings under Chap. XII, Criminal Procedure Code **337**

——— **s. 107**—*Right of fair trial, denial of—Remedy.*

An order of dismissal by a Court made without applying its mind to any provision of the law amounts not only to a refusal to exercise jurisdiction to which section 115 of the Civil Procedure Code would be applicable, but it is also a denial of the right of fair trial contemplated by the Government of India Act, 1915. **A** NAWANG RAM SAHU *v.* BHAKHORI MANDAR, 4 P. L. J. 277 **189**

——— **s. 107**—Small Cause Court deciding question of title—Revision—High Court, whether can interfere **512**

Grant, construction of—Grant to specific persons, described as servants of mosque, for expenses of lamp oil and for prayers for prosperity of Government—Trust, whether created **42**

——— of land to mosque—Summary settlement—Grant, continuance of, on payment of quit rent—Land sold to stranger—Government, whether can levy full assessment—*Sanad*, construction of **910**

Guardian and minor—*Guardian, powers of, extent of.*

The position of a guardian is that of a trustee in relation to his ward, he cannot embark on a new trade on behalf of the ward; at any rate, without the sanction of the Court. **C** KRISHNADHAN BANERJI *v.* SANYASI CHARAN, 29 C. L. J. 280; 23 C. W. N. 500 **597**

Guardians and Wards Act (VIII of 1890), ss. 4 (2), 7 (2), 41 (3), 45 (1) (c)—*De facto guardian, whether guardian under s 4 (2)—Statutory guardian, appointment of, effect of, on position of de facto guardian—Jurisdiction of Court to direct de facto guardian to deliver property to statutory guardian.*

A *de facto* guardian is a guardian within the meaning of section 4 (2) of the Guardians and Wards Act.

The appointment of a statutory guardian under the Guardians and Wards Act *ipso facto* removes a *de facto* guardian from guardianship under section 7 (2) of the Act.

Guardians and Wards Act—concld.

It is competent to the Court to require a *de facto* guardian under section 41 (3) to deliver the minor's property in his possession to a guardian appointed or declared under the Act. **M** WALLACE SITHA BOI *v.* WALLACE RADHA BOI, 36 M. L. J 189 **236**

——— **ss. 34, 45** - Guardian, appointment of, subject to furnishing security—Failure to furnish security, effect of—Accounts, failure to furnish—Guardian, liability of **88**

——— **s. 41 (3)** - *Death of ward—Power of Court to pass order directing guardian to hand over properties to minor's heir—'For any cause', 'property belonging to the ward,' meanings of.*

Where the powers of a guardian for the property of a minor cease, owing to the minor's death, the Court has jurisdiction, under section 41 *(3)* of the Guardians and Wards Act to pass an order directing the guardian to deliver the property of the minor to the latter's heir

The words "for any cause" in section 41 (3) of the Guardians and Wards Act are not confined to the causes mentioned in clauses (1) and (2) of the section and the death of the minor is also a "cause" which puts an end to the powers of the guardian within the meaning of the expression "any cause"

The expression "property belonging to the ward" in the same clause includes property which belonged to the person who was a ward though, by the cessation of his minority or by his death, he has ceased to be a ward **M** NATARAJA PILLAI *v.* SUBBARAYA PILLAI, (1918) M. W. N. 440 **529**

——— **ss. 45, 34**—*Guardian, appointment of, subject to furnishing security Failure to furnish security, effect of—Accounts, failure to furnish—Guardian, liability of.*

Where a person is appointed to be the guardian of the property of a minor subject to furnishing certain security and he enters into possession and management of the minor's property, the fact of his failure to furnish security would not exonerate him from disciplinary action on the part of the Court under section 45, clause (1) *b*, of the Guardians and Wards Act **A** JADDO TIWARI *v.* BARAM DEO SINGH, 17 A. L. J. 377 **88**

——— **s. 48**—*'Orders made under the Act' in s. 48, whether include requisition under s. 41 (3).*

Section 48 of the Guardians and Wards Act, which refers to 'orders made under the Act', does not cover the case of a 'requisition' under section 41 (3) of the Act. **M** WALLACE SITHA BOI *v.* WALLACE RADHA BOI, 36 M. L. J. 189 **236**

Halai Memons of Porebunder, *law applicable to—Succession—Hindu or Muhammadan Law—Custom—Domicile, change of, effect of.*

Halai Memons of Porebunder are governed by Hindu Law in matters of succession and inheritance.

A *Halai Memon* of Porebunder residing and carrying on business in Bombay who has not severed his connection with Porebunder, would be governed by the law applicable to *Halai Memons* of Porebunder and not by that governing Bombay *Memons*

Per *Scott, C. J.*—Permanent residence in Bombay does not necessarily import the Muhammadan Law of succession for one whose ancestors were converted from Hinduism. Severance from the domicile of origin and permanent residence in Bombay would,

Halai Memons—concld.

in the case of persons falling within the purview of the Indian Succession Act, effect change of domicile and with it a change of law, *e g.*, from French to Anglo-Indian or Portuguese to Anglo-Indian, but it would not change the law of succession for Hindus or Muhammadans. **B** MAHOMED HAJI ABU *v.* KHATUBAI, 21 BOM. L. R. 85 **513**

Hindu Law—Custom—Adoption—*Illatom* adoption validity of, where son or brother is alive **1**

——— Damdupat, *rule of, applicability of—Capitalisation of interest—Interest exceeding principal, whether can be recovered.*

Where in a suit to recover a sum of money, the amount it is sought to recover is, for the most part, made up of interest which largely exceeds the principal, and there is an agreement in writing whereby the debtor agrees to pay interest upon interest, there is nothing to prevent the Court from awarding the full sum claimed, both as a matter of natural inference from the agreement and as a matter of Hindu Law.

Per *Shah, J.*—The rule of *damdupat* requires that the interest in the course of one transaction shall not exceed the principal. But it does not prevent an agreement between the debtor and the creditor to capitalize interest at a stage when the interest does not exceed the principal. All the Smriti writers and the commentators are agreed that there must be an agreement between the debtor and the creditor to capitalize interest in order to justify the calculation of interest in future on the sum made up of the principal and the interest thus agreed to be capitalized. **B** KHIMJI BHIMSI *v.* CHUNILAL AMBAIDAS, 21 BOM. L. R. 4 9 **353**

——— *Debuttar—Endowment, general, for worship of God, validity of.*

Under the Hindu system of law a general endowment for the worship of God without giving the name of the deity for whose benefit the endowment is to take effect is void for uncertainty. **C** CHANDI CHARAN *v.* HARIBOLA DAS, 29 C. L. J 366; 23 C. W. N. 645 **215**

——— ——— Survivorship—Letters of Administration, whether can be granted to person who was member of joint Hindu family with deceased **651**

——— *Reversioner, interest of, nature of.*

Apart from any binding agreement having the force of a decree or operating as an estoppel, a Hindu reversioner holds no right or interest *in præsenti* in the property which a female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign, or to relinquish, or even to transmit to his heirs; and if he is a minor, his guardian cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. **O** SANKATA PRASAD *v.* KALI PRASAD, 22 O. C. 48 **545**

——— Reversioner, whether entitled to apply to set aside sale in execution **359**

——— **Adoption** - Patita, *whether can adopt—Adopted son, position of.*

A person who acquires a share in property by partition and afterwards becomes a "*patita*" by the commission of a crime of which he is found guilty, is not prohibited by the Hindu Law from adopting a son, and there is no disqualification in

such adopted son from inheriting to his father's property. **B** VAMAN GURURAO DESHPANDE *v.* KRISHNAJI TIMMAJI KULKARNI, 21 BOM. L. R. 427 **363**

——— **Alienation** *by female—Legal necessity —Money paid for one purpose diverted to another*

The fact that money advanced to a Hindu female for one legal necessity is used or diverted to some other purpose equally valid is not sufficient in itself to invalidate the transaction **A** JAGDISHWAR PRASAD *v.* SHEO BAKHSH RAI, 1 U. P. L. R. (H. C.) 119 **856**

———**Dayabhaga**—*Jointfamily*—Karta, *power of, to bind infant members by act—Trade, ancestral—Minor members, liability of*—Karta, *whether can start new trade* Karta *appointed guardian of minor member, powers of.*

An ancestral trade like other property is descendible upon the members of a Hindu undivided family, and in carrying on such a trade infant members of the undivided family are bound by all acts of the manager incidental to and flowing out of the carrying on of that trade, including loans contracted for the purposes of the trade.

The guardian of a minor has no power to start a new business on behalf of his ward so as to make him liable for debts incurred in carrying on such business.

The manager of a joint Hindu family has no power to start a new business so as to bind infant members of the family.

The powers of the *karta* of an undivided Hindu family in respect of a trade started after the death of the ancestor for the benefit of the joint family are not the same as those in respect of a trade started by the ancestor and carried on after his death by the *karta* of the joint family.

The embarking on a new and speculative trade by the *karta* of a joint family cannot be said to be for the benefit of the estate.

The powers of the guardian of a minor appointed under the Guardians and Wards Act of 1890 are more limited than those of the *karta* of a joint family in respect of the property of infant members.

If the *karta* of a joint Hindu family chooses to apply under the Guardians and Wards Act to be appointed guardian of a minor member and is so appointed, he comes under the control of the Court and can no longer exercise the powers of a *karta*. **C** KRISHNADHAN BANERJI *v.* SANYASI CHARAN, 29 C. L. J. 280; 23 C. W. N. 500 **597**

———**Gift** *by husband to wife in lieu of maintenance—Deed, conferring power of sale—Donee, estate taken by.*

A Hindu husband, while contemplating retirement from the world, executed a deed of gift to his childless wife in lieu of her maintenance. The deed recited: "I have gifted this day in lieu of maintenance the undermentioned house with rights of alienation by sale":

Held, that the deed conferred on the donee an absolute estate and not only a life-estate.

Per *Seshagiri Aiyar, J.*—A Hindu husband is bound to make provision for the maintenance of his wife before retirement from temporal affairs.

The grant of a power of sale in a deed of gift executed in favour of a Hindu female fully and sufficiently indicates the grant of an absolute estate.

Per *Spencer, J.*—Where words giving a power of alienation or absolute estate occur in a document, the ordinary presumption is that the grant is absolute in nature. **M** MUTHUVENKATANARAYANAN CHETTI *v.* ATHIPANDURENGA NAIDU, (1919) M. W. N. 103 **217**

——— **Guardianship**—*Step-mother, whether natural guardian—Sale by step-mother of minor step-son's property—Suit by minor to recover property—Limitation.*

A step-mother is not the natural guardian of her minor step-son under the Hindu Law.

An alienation of a minor step-son's property by a step-mother, therefore, stands on the same footing as an alienation by any *de facto* guardian.

A suit by a Hindu minor after attaining majority to recover possession of property sold by his step-mother during his minority is governed by Article 144 and not by Article 44 of Schedule I of the Limitation Act **N** VITHU *v.* DEVIDAS, 15 N. L. R. 55 **943**

——— **Joint family**—*Alienation by father —Antecedent debt, what is Pious obligation of sons to pay off father's debts, extent of.*

Where a Hindu father borrows money on the security of the joint estate and there is nothing to show that the money is advanced to him on his personal credit, the debt does not fall within the definition of antecedent debt and is not binding upon his sons. An obligation incurred by a father in order to be binding upon his sons must be one incurred antecedently to the transaction in suit and one incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be made available by such joint estate.

The doctrine of pious obligation of Hindu sons to pay off their father's debts is based on spiritual considerations apart from the ownership of any property and comes into operation only against the sons, or in case of their death, against the grandsons. Where the sons are alive, the pious obligation to pay the debts of their father lies upon them and not upon their sons. **A** RAM SINGH *v.* CHET RAM, 1 U. P. L. R. (H. C.) 52; 17 A. L. J. 706 **119**

——— ——— *Company shares held by father on behalf of family—Manager of family, right of, on death of father, to be registered share-holder.*

S, the head of a Hindu joint family, purchased some shares in the Muir Mills Co, on behalf of the family. Upon his death his son became the manager of the family and applied to be registered in the books of the Company as the holder of these shares.

Held, that the son and the remaining members of the family were entitled to the beneficial interest in the shares by right of survivorship upon the death of the father, and that under Articles 30 and 9 of the Articles of Association of the Company the son was entitled to be registered as the holder in lieu of his father of the shares in question. **A** PEAREY LAL *v.* MUIR MILLS CO, LTD, CAWNPORE, 17 A. L. J. 783; 1 U. P. L. R. (H. C.) 75 **322**

——— ——— *Debt contracted by father—Creditor, remedies of, whether affected by death of father—Pious duty of sons, extent of—Immoral or illegal debt—Burden of proof—Trustee failing to account for trust funds—Liability, whether immoral.*

Hindu Law—contd.

Under the Hindu Law a creditor's remedies against ancestral property are as extensive while the judgment-debtor is alive as after his death.

The pious obligation cast upon sons and grandsons by the Hindu Law to pay their father's debts admits of an exception where the debt was contracted for an illegal or an immoral purpose.

A Hindu father, acting as trustee under a Will, failed to account for some of the trust property, and a decree was obtained against him for the value of the property he had failed to account for:

Held, that the debt was neither illegal nor immoral and that the onus of proving that any criminality attached to the debt was upon the sons. **B** HANMANT KASHINATH *v* GANESH ANNAJI, 21 BOM. L. R. 435 **612**

——— ——— *Debt of father—Son, liability of—Burden of proof—Decree against father, whether evidence against son.*

To render a son liable for his father's debt, the creditor must prove the existence of a debt due by the father; the fact that there is a decree against the father, obtained in a suit to which the son was not a party, is not evidence against the son. **A** BHAGWANT *v.* TURSI RAM, 1 U. P. L. R. (H. C.) 48 **130**

——— **Joint family**—*Father becoming surety for stranger's crime—Suit against father—Decree—Sale of family property—Sons, liability of—Sons' share, whether affected by sale.*

The father of a Mitakshara family became surety for a stranger and pledged the family property against any money misappropriated by the latter in the discharge of certain duties. On a failure by the stranger to account for certain moneys entrusted to him, a suit was brought against the father and a decree obtained for the amount embezzelled. In execution of the decree the whole of the family property was sold, whereupon the sons brought the present suit for a declaration that by the auction-purchase the share only to which the father would have been entitled on partition passed by the sale:

Held, that the suit must succeed, as the debt incurred by the father in becoming security for another's crime was, in the eyes of Hindu Law, an illegal debt as affecting the liability of the sons therefor and could not be enforced against them. **Pat** SATYA CHARAN CHANDRA *v.* SATPIR MAHANTY, 4 P. L. J. 309 **791**

——— ——— *Father, power of alienation of, extent of—Antecedent debt—Necessity.*

Among Hindus governed by the Mitakshara Law a father has no sort of power to alienate family property, unless the alienation is made in consideration of a pre-existing debt or by reason of legal necessity. Any other alienation is not binding on the sons, or indeed upon anybody, and the sons are entitled to have the transaction set aside. **Pat** SUKURU MALI *v.* BRAHMAPURA BALBHADRA MAHAPRABHU, 4 P. L. J. 354 **896**

——— *Mortgage of ancestral property by father—Antecedent debt—Mortgagee, rights of, during father's lifetime.*

In the case of a mortgage by a Hindu father of ancestral property to satisfy antecedent debts, the mortgagee is entitled, during the father's lifetime, to proceed against the entire family property including the son's shares. In this connection, there is no difference between a sale and a mortgage, both are binding on the sons, if effected for satisfying an antecedent debt. **N** RATANCHAND *v.* SHEOCHARAN, 15 N. L. R. 88 **28**

Hindu Law—contd.

——— **Joint family**—*Mortgage—Interest, high rate of—Necessity—Burden of proof.*

It is incumbent upon a mortgagee suing to enforce his mortgage to prove not only the existence of family necessity, but that there was necessity for borrowing at an onerous rate of interest.

Where, therefore, a mortgage deed provided for the payment of interest at 24 per cent. per annum and compound interest with half yearly rests, and the mortgagee failed to prove that there was any necessity for borrowing at such high rate of interest and the Court reduced the rate of interest to 18 per cent. simple interest, and finding that at this rate the mortgagee had been repaid an amount sufficient to cover the principal and interest, it dismissed the suit:

Held, that the suit was rightly dismissed. **A** RAM KHELAWAN *v.* RAM NARES SINGH, 1 U. P. L. R. (H. C.) 97; 17 A. L. J. 736 **52**

——— ——— *Property in possession of one member—Presumption—Transferee from member, position of—Burden of proof.*

A transferee from a member of a joint Hindu family of property, acquired and standing in the name of his vendor, must show that the property was the separate property of his vendor, although there was no nucleus of ancestral joint family property.

The presumption that property standing in the name and in the possession of a member of a joint Hindu family is joint family property would arise even where there was in fact no nucleus of ancestral joint family. **C** GADADHAR BHATAK *v* SATISH CHANDRA GHOSE **854**

——— **Partition** *of self-acquired property by father among sons, effect of—Gift and partition, distinction between—Registration, whether necessary.*

A Hindu father can during his lifetime partition his self-acquired property among his sons.

The effect of such a partition, however, is different from that of a gift. A gift requires acceptance by the donee, whereas a partition is binding on the sons irrespective of their consent.

In the case of a gift of self-acquired property by the father any property not gifted remains the joint property of the sons on the father's death, the gifted property being the separate property of the son to whom it was given. The effect of a partition of the property is different; the sons become separate in all respects and do not remain joint.

The transaction by which a partition of self-acquired property is effected by a father among his sons is not a gift within the meaning of the Transfer of Property Act and cannot, under Hindu Law, be distinguished from a partition of joint ancestral property. It is not necessary for such distribution or partition to be effected by a registered deed. **N** LAXMAN *v.* TATYA, 15 N. L. R. 93 **93**

——— **Succession** *among* Sanyasis—*Will made by* Giri—Debutter, *creation of*—Shebait, *appointment and removal of*—Punch *removing*

shebait, *validity of—Probate and Administration Act (V of 1881), s. 90—Sanction for sale obtained by fraudulent misrepresentation—Sale, validity of*

One Amrita Giri, belonging to the religious sect of 'Giris' who are succeeded by *chelas* or disciples, died leaving a Will by which he dedicated all his properties to the deities, Salgram and Shiva Thakur, established by him. The Will stated that all the properties and the profits thereof would be *debutter* properties of the deities and provided for succession to the office of the *shebait*, who was to carry on the *sheba* and perform other acts mentioned in the Will according to the custom and usages of the family. It further provided that none of the *debutter* properties would be sold or subjected to any charge for any debts contracted by any *shebait* and that if any such thing happened, the same would be liable to be set aside by the next *shebait* executor according to law, that if any person who might be appointed to the office of the *shebait* acted arbitrarily or became extravagant or was found by the *panch* of the Giri community guilty of any grave offence he would be removed from the office of *shebait*, and some other *shebait* appointed in his place and the person so removed would not be competent to object to the same. After Amrita Giri's death succession to the office of *shebait* was according to the Will: the last person named therein executed a Will, by which he appointed the defendant No. 1 as *shebait* after his death. The defendant No. 1 succeeded to the office of *shebait* and obtained Probate of the Will, but he neglected the *debsheba* and other trusts of the *mutt*, led an immoral life, contracted debts and by fraudulent misrepresentation of facts obtained the sanction of the District Judge under section 90 of the Probate and Administration Act to sell some of the *debutter* properties and sold them to the defendants Nos. 2, 3, 6 and 7. The other Giris of the community, finding that the defendant No. 1 was misconducting himself and wasting the *debutter* properties, excommunicated him and by a *panchnama* removed him from the office of *shebait*, appointing the plaintiff instead. The plaintiff then brought this suit for a declaration that the properties in suit were *debutter*, that he was the *shebait* and also for recovery of possession of the properties sold by the defendant No. 1:

Held, (1) that the *debutter* created by Amrita was an absolute *debutter*;

(2) that the ordinary rules of inheritance in their entirety could not be applied to the 'Giris' who were *sannyasis*, for, although the succession was through *chelas*, any question as to preference between *chelas* must, in the absence of any provision made by the *guru*, be decided by the customs and usages of the community, and the representatives of the community were the proper persons to decide such matters;

(3) that the *panch* validly removed the defendant No. 1 from *shebaitship* and rightly appointed the plaintiff, who was the nearest *gaddinashin gotia* of the defendant No. 1, as the *shebait* according to the customary rules of the community under the powers conferred by the Will, though not clearly so stated in the *punchnama*;

(4) that as the defendant No. 1 obtained sanction by fraudulent misrepresentations under section 90 of the Probate and Administration Act to sell some of the *debutter* properties and as the alienees were not *bona fide* purchasers without notice of the fraudulent misrepresentations upon which the sanction had been obtained, the alienations should be set aside;

(5) that the expression "family" or "ancestral gods" in the will was not to be understood in the same sense as when applied to ordinary persons, but referred to the spiritual family and relationships of the sect to which the testator belonged. **C** AMRITA LAL SHAHA *v.* GOSSAIN GANPAT GIR, 23 C. W. N. 401 **884**

——— **Succession**—*Son of Kshatriya by Shudra woman, status of—Illegitimate sons, whether can succeed*

The son of a Kshatriya by a Shudra woman belongs to a caste higher than a Shudra called Ugra, and his illegitimate sons, therefore, cannot succeed to the property which belonged to him. **A** JWALA SINGH *v* SARDAR, 1 U. P. L. R. (H. C.) 67; 17 A. L. J. 734 **216**

———**Temple**—Hereditary *archaka*, suspension of, by temple trustee—*Interim* suspension pending enquiry—Enquiry not held for long period—*Interim* order treated as punitive till vindication of character in Law Court—Validity of order—Right of *archaka* to damages and restoration of office—Liability of temple funds. **869**

——— ———, *offerings made at—Transfer of right to receive offerings, validity of.*

The transfer of a right to receive gifts made by the worshippers at a temple to one of the *pujaris* in his office of officiating priest, is usually void as being against public policy, for the simple reason that if such transfers were permitted generally, there would be nothing to prevent the offerings at a shrine of one religion coming into the possession of a person of another religion. Such transfers are void unless they are proved to be according to custom or usage, when their validity will be judged according to the conditions of such custom or usage. **O** PARAGI *v.* GAURI SHANKAR, 6 O. L. J. 157 **86**

——— ——— Puja, *performance of—Proxy, performance by, for woman—Choice of proxy, whether limited to sharers entitled to performance by turns.*

Under Hindu Law a woman can get *puja* performed in a temple by a proper proxy.

The choice of the proxy is not limited to the other sharers who are entitled to perform *puja* in their turn. **M** BHEEMAPPA *v* TIMAKKA, 25 M. L. T. 149 **221**

——— ——— *Religious office*—Paricharaka, *sale of office of, to stranger, validity of—Public policy.*

Where the office of *paricharaka* is a religious office, the sale of the office to a person unconnected with the family that holds the office is void as being opposed to public policy. **M** RAJAM BHATTAR *v.* SINGARAMMAL, 6 M. L. J. 355 **979**

——— **Widow,** *unchaste, returning to virtue—Maintenance, whether can be allowed.*

An unchaste widow who returns to a life of virtue is, upon the general principles of Hindu Law entitled to bare maintenance from her decease

Hindu Law—concld.
husband's family. **O** DWARIKA PARSHAD *v.* MAHADEI, 6 O L. J. 166 **388**
Hundi. *See* NEGOTIABLE INSTRUMENTS.
Hyderabad Assigned Districts Land Revenue Code of 1896, Chap. XVIII—*Pre-emption—Sale-deed, price mentioned in, whether pre-emption price—Presumption.*

Under the Berar Land Revenue Code the price stated in the sale-deed is *prima facie* the price for pre-emption, unless it is shown that it has not been fixed in good faith. **N** SHAMRAO AMRUT *v* IMAM, 15 N. L. R 130 **731**
Indemnity bond, *suit on—Cause of action, when arises—Decree passed but not satisfied, whether entitles defendant to sue on bond—Mortgage decree.*

A executed a mortgage in favour of *B*. *B* died. *A* paid the mortgage-money to *C*, who claimed to be the heir of *B* and obtained from him an indemnity bond that in the event of any other person coming forward and claiming the money as *B*'s heir, *A* would be indemnified for any payment that he might be compelled to make. Subsequently certain other persons, alleging themselves to be the heirs of *B*, brought a suit against *A* claiming half the mortgage-money, and obtained a decree *A* without discharging this decree, sued *C* on the indemnity bond, and obtained a decree which provided that execution should not issue unless and until *A* had discharged the decree made against him. On appeal the Appellate Court dismissed *A*'s suit as being premature:

Held, that inasmuch as the decree which *A* had failed to discharge was a mortgage decree against his property, it was equivalent to payment and that, consequently, the suit was not premature, and *A* was entitled to the relief sought by him. **A** CHIRANJI LAL *v.* NARAINI, 17 A. L. J. 394; 41 A. 395 **158**
Injunction—Noise, whether sufficient cause for issue of injunction **728**
Insolvency proceedings—*Receiver in possession of property—Release of property, application for, dismissal of—Appeal, maintainability of, without impleading Receiver.*

The appellant was declared an insolvent under the Provincial Insolvency Act, and a Receiver was appointed who took charge of all the property belonging to the insolvent, including two houses. One of the houses was released for the residence of the Receiver and the other was ordered to be sold, whereupon the insolvent applied for the release of this house also as it was required for his residence. The application was disallowed and the insolvent appealed to the High Court without impleading the Official Receiver as a party:

Held, that the appeal must fail, inasmuch as the Official Receiver being in possession of the property of the insolvent was a necessary party to the appeal. **L** GHULAM MUHAMMAD *v.* KARTA RAM **971**
——— *Sale of insolvent's property—Order confirming sale—Appeal by insolvent—Auction-purchaser, whether necessary party.*

The auction-purchasers are necessary parties to an appeal by an insolvent against an order confirming an auction-sale of his property.

Where, therefore, the auction-purchasers were not made parties to such an appeal and it was not until a year afterwards that an application was made to implead them:

Held, (1) that the appeal as against them was time-barred;

(2) that the auction-purchasers not having been made parties in time, the appeal failed as against the other respondents also. **L** KHAIRA *v.* SALEM RAJ **935**
Insolvency proceedings—concld.
——— *Sale—Objections — Procedure—Court, duty of.*

Where several persons file objections to the attachment and sale of property in insolvency, it is the duty of the Court to consider these objections separately, as the failure to do so may result in a serious miscarriage of justice. **P** JUGAL KISHORE *v.* ISHAR DAS, 63 P. R. 1919 **695**
Interpretation of Statutes—*Act repealing earlier Act, effect of.*

Where an Act repeals a previous Act and provides that all orders issued under the repealed Act shall, so far as may be, be deemed to have been issued under the new Act, the provision is designed to safeguard the validity of orders, appointments, etc., issued under the repealed Act, and not to give retrospective effect to the new Act. **O** BASANT SINGH *v.* RAMPAL SINGH, 6 O. L. J. 248; 1 U. P. L. R. (J. C.) 45 **985**
——— *Fiscal Statutes.*

A fiscal enactment should, as far as possible, be construed in favour of the subject, and the construction most beneficial to the subject should be adopted. **Pat** KALI CHARAN ROY *v.* KESHO PRASAD SINGH, 4 P. L. J. 561 **15**
——— *Marginal notes to sections, value of.*

Marginal notes to the sections of an Act cannot be used for the purpose of construing the Act. **M** AIYALAM KESAVA CHETTY *v.* SECRETARY OF STATE FOR INDIA, 36 M. L. J. 224; 42 M. 451 **46**
Joint property—*Co-owners, right of enjoyment of—Ouster—Joint owner in exclusive possession of part of joint property, liability of.*

Each joint owner has a right to the possession of all the property held in common, equal to the right of each of his companions-in-interest and superior to that of all other persons. He has the same right to the use and enjoyment of the common property that he has to his sole property, except in so far as it is limited by the equal right of his co-sharers. In order to give rise to a cause of action against a co-sharer who is in sole possession of a joint property, it must be proved that his act has amounted to ouster or dissesin.

It is not easy to frame a formula which would cover all cases of ouster, but it may generally be stated that where there is an actual turning out or keeping excluded the party entitled to possession, there is an ouster. Any resistance preventing a co-sharer from obtaining effective possession is an ouster. Such resistance must be clearly and affirmatively shown and cannot be presumed from equivocal facts which may or may not have been designed to operate as an exclusion.

Where after the plaintiff had locked up certain granaries, warehouses and store rooms, his co-sharers: the defendants, put on additional locks but were ready to remove them as soon as the plaintiff would do so,

Joint property—concld.

Held, that there had been no ouster of the plaintiff by the defendants.

A tenant-in-common cannot be held liable to his co-tenants for damages for use and occupation of the joint property unless there has been waste or ouster. Where one tenant-in-common occupies a part of the joint property without the assertion of a hostile or exclusive title and without a claim by his co-tenants to be admitted into possession, he is under no obligation even to account. **C** DEBENDRA NARAYAN SINGH *v.* NARENDRA NARAYAN SINGH, 29 C. L. J. 504; 23 C. W. N 900 **976**

Judgment, in criminal case, contents of—
Failure to comply with provisions of law, effect of **268**

Jurisdiction *territorial - Contract in Ceylon for execution of* othi *deed in British India—Suit for damages in British Indian Court - Certificate of conformity by Ceylon Court, whether valid defence—Parties resident in Ceylon at date of issue of certificate, effect of—Conflict of Laws—Ceylon Insolvency Ordinance (VII of* 1853*), ss.* 124, 126.

Plaintiff and defendant, who were resident in Colombo, entered into a contract whereby defendant was to go to India and execute an *othi* deed to plaintiff on a certain date for a cash consideration of Rs. 1,000 and for Rs. 1,000 already due by defendant to plaintiff. In the event of breach defendant was to pay plaintiff Rs. 250 for damages with which the lands were to be charged. Defendant never came to India and did not register the document. He applied for insolvency in Colombo and got a certificate of conformity under section 124 of the Ceylon Insolvency Ordinance. The plaintiff thereafter instituted the present suit in a British Indian Court for Rs. 1,000 due to him as aforesaid and for damages for defendant's breach of contract:

Held, (1) that the cause of action for the plaint debt arose in Ceylon and the discharge granted by the Ceylon Court was a valid discharge of the debt everywhere, including British India;

(2) that even if the performance of the contract was to be in British India, that fact did not affect the validity of the discharge under the Ceylon Insolvency Ordinance. **M** MAGADHU PILLAI *v.* ASAN MUHAMMADHU, 9 L. W. 535; 26 M. L. T. 88 **38**

Jurisdiction of Civil and Revenue Courts. *See* AGRA TENANCY ACT, s. 167; U. P. LAND REVENUE ACT, s. 233 (*k*).

——— Partition—Plots belonging to one co-sharer assigned to another—Suit to recover possession of plots, maintainability of **554**

——— Partition, suit for, by tenant for fixed term, whether cognisable by Civil Court **645**

——— Thekadar, *person holding under*—Theka, *expiry of—Ejectment of tenant—Court, proper*

A Civil Court has no jurisdiction to entertain a suit for the ejectment of a person holding under a *thekadar*, on the expiration of the period for which the *theka* was granted **O** GOPAL *v.* JHANDAL, 6 O. L. J. 176; 22 O. C. 52 **402**

Jurisdiction of Small Cause Court—Question of title, decision of—Revision—High Court, interference by **512**

Khoti Settlement Act (I Bom. of 1880), s. 21—*Survey Records, entry in, as to occupation, whether conclusive.*

Section 21 of the Khoti Settlement Act makes conclusive certain decisions of the officer defined as the Recording Officer. What those decisions are is to be gathered from the preceding sections of the Act, and a perusal of those sections makes it clear that the mere entry of the name of some particular person as occupant of a plot is not included among those decisions of the Recording Officer. What are contemplated as conclusive are decisions as to the class of tenure and as to the complicated rights of the *khots*. **B** BHIVA BHIKA CHOKEKAR *v* BABU BALSHET BOBHATE, 21 BOM. L. R. 350; 43 B. 469 **7**

Land Acquisition Act (I of 1894), ss. 6, 9, 12, 18, 48—*Acquisition proceedings—Land required for Municipality—Municipality, whether can withdraw from proceedings—Investment of capital by owner, after notification, effect of—Delay in acquisition, whether affects validity of proceedings—Notice, failure to give, effect of—Award, nature of—Suit for declaration that proceedings are null and void, maintainability of.*

Where proceedings under the Land Acquisitien Act are taken on behalf of a Municipal Board, the Board has no power to withdraw from the acquisition. It is the Government alone that can withdraw from the proceedings:

Where after the publication of a notification for acquisition of certain land the owner of the land invests more capital in it, he does so at his own risk.

Mere delay in completing the acquisition of a piece of land does not invalidate the proceedings.

Where in acquisition proceedings the Collector wilfully and perversely abstains from giving the necessary notice to the owner of the land under section 9 (3) of the Land Acquisition Act, his proceedings cannot be considered *bona fide* and are inoperative in vesting the land in Government; but where, through mere inadvertence or mistake, a person interested has not had notice served upon him, the proceedings are not thereby invalidated.

Proceedings under the Land Acquisition Act resulting in an award are administrative and not judicial, and the award in which the enquiry results is merely a decision, binding only on the Collector, as to what sum shall be tendered to the owner of the lands, and if a judicial ascertainment of the value is desired by the owner, he can obtain it by requiring the matter to be referred by the Collector to the Court under section 18 of the Act.

The plaintiff, who was the owner of a plot of land was not entered in the *khewat* as such. Proceedings having been taken under the Land Acquisition Act for the acquisition of the plot, the Collector gave the notice required by section 9 (3 of the Act to the persons entered in the *khewat* as the owners of the plot but no notice was given to the plaintiff. When the award was made, however, the plaintiff filed a petition of objection that the compensation should be paid to him and not to the recorded owners of the plot and the amount of the compensation was consequently put to his credit in the Treasury. No notice had been given to him under section 12 (2) of the Act, and he made no application under

Land Acquisition Act—concld.

section 18 for a reference to the Court. He subsequently brought a suit for a declaration that the acquisition proceedings were null and void for want of proper notices, etc:

Held, that the suit was not maintainable and that the plaintiff should have availed himself of the procedure laid down in section 18 of the Land Acquisition Act. **A** SECRETARY OF STATE FOR INDIA *v.* QAMAR ALI, 16 A. L. J. 669 **501**

——— **ss. 23, 24**—*Compensation, determination of—Landlord and tenant—Occupancy rights—Method of computation.*

Where occupancy or other rights are claimed in land notified to be acquired under the Land Acquisition Act, the correct rule to be observed is to value the land in the first instance, including all interests in it, and to apportion the amount so ascertained among the parties interested according to their interests.

The difference between the market-value and the value of the tenant's interest represents the landlord's interest. **M** RAJAH OF PITTAPURAM *v.* REVENUE DIVISIONAL OFFICER, COCANADA, 36 M. L. J. 453: 42 M. 644 **656**

Landlord and tenant—Division of holding —Proof Presumption **956**

——— *Ejectment suit—Denial of landlord's title—Relationship of landlord and tenant not established—Suit, subsequent, for ejectment, whether competent*—Res judicata.

Where in a suit for ejectment it is found that the land in dispute belongs to the plaintiff and that a previous suit for ejectment was successfully resisted by the defendants on the ground that they were not tenants of the plaintiff, the defendants are not entitled to remain upon the land and the plaintiff is entitled to *khas* possession. **Pat** KALI PROSAD *v.* MAHABIR **307**

——— *Ejectment, suit for—Tenant setting up perpetual lease—Burden of proof—Lease for clearing land—Presumption—Estoppel against ejectment, when may be pleaded—Improvements, compensation for, when can be claimed.*

Where in a suit for ejectment the right of the landlord depends upon a lease granted for clearing a jungle, settling a village in the village area, and settling agricultural tenants on the land, and the lessees plead that they cannot be ejected without being compensated for improvements and *a fortiori* that they cannot be ejected at all and must be regagrded as perpetual lessees, the onus is on them to prove the truth of their allegations.

If the lessees have made only such improvements as were necessary for opening of the village, they cannot be said to have been induced to believe that their tenure would be permanent, and the presumption is that it is not permanent. If permanent works, beyond those agreed upon at the time of the lease, are constructed, and the landlord encourages their erection in circumstances which would lead the lessees to believe that they are accepted as permanent tenants, the new erections would raise an equitable estoppel against ejectment. **N** BHUNESHWAR *v.* LAL BAHADUR SING **360**

——— *Encroachment by tenant Suit for possession of land encroached upon—Burden of proof.*

Landlord and tenant—contd.

Where a suit is brought to recover possession of a plot of land from a tenant on the allegation that the land was not included in the holding but, being contiguous to it, was encroached upon by the tenant, the onus is upon the plaintiff to prove that the land sued for is outside the land demised to the tenant. **C** NARENDRA NATH SANYAL *v* EMAMAN **785**

——— *Estoppel—Tenant inducted into possession, whether can deny landlord's title—Rent, payment of, to third person, effect of.*

A tenant inducted into possession of land by one person cannot alter the character of his possession and make it adverse to the landlord by going over to another person and paying rent to him. **C** ABDUL HAKIM MIA *v.* PANA MIA MIAJI **494**

——— Interest, high rate of, stipulated in *kabuliyat* —Tenant, whether liable to pay stipulated rate **793**

——— *Joint family—Notice to quit given by some members of family, validity of—Sub-tenant, whether liable to pay rent to landlord—Lease for eleven months—Tenant holding over—Notice, term of—Transfer of Property Act (IV of 1882), s. 116.*

A house belonging to one *H*, a Hindu, was leased by his son *B* to defendant No. 1 on the 20th October 1914 for eleven months. Defendant No. 1 sub let the house to defendant No. 2, and on the 13th March 1915 a notice was sent on behalf of *B* and his brother *G.* to defendant No. 2 asking him to vacate the house by 1st April, and stating that if he failed to do so he would be charged rent at an enhanced rate. The house not being vacated, *B* and *G.* brought a suit for ejectment and arrears of rent, their sons being afterwards added as plaintiffs:

Held, (1) that *B* being the sole lessor of the house, it was not necessary for his sons to join in the notice of ejectment;

(2) that even if it could be said that the sons of *B.* and *G.* were co-parceners with their fathers, still *B.* and *G.* were competent as leading members of the family to give the notice of ejectment, especially as the sons, with the exception of one, were all minors;

(3) that the addition of a clause informing the defendant that if he did not vacate the house by the date mentioned he would have to pay enhanced rent, did not alter the fact that the notice was a notice to quit;

(4) that the lease being for eleven months only on the expiry of that term the tenancy became a monthly tenancy, and the notice given was, therefore, sufficient;

(5) that the defendant No. 2 having recognised the plaintiffs as his landlords by paying rent to them, he was liable for the rent due to them. **P** MUHARRAM ALI *v.* BANSI LAL, 34 P. R. 1919 **121**

——— Kabuliyat, *construction of—Rent, annual—Presumption—Tenant holding over—Ejectment—Notice to quit, period of—Transfer of Property Act (IV of 1882), ss. 106, 116.*

A *kabuliyat* executed in September 1866 and reserving a yearly rent payable by monthly instalments contained the following clause: "On the expiry of the term of my *pattah* I shall be liable to pay the rent of which assessment notice will be served by you, and I shall pay the same. If

I do not pay the said rent you may settle with somebody else":

Held, (1) that the landlord was entitled to settle the land with others if the tenant refused to pay the rent which he might be called upon to pay on the expiration of the term of one year, but that the clause did not take away the right of the landlord to eject the tenant after service of notice to quit according to law, even if the landlord did not choose to exercise the right to call upon the tenant to pay additional rent and settle the land with others in the event of the tenant refusing to pay such rent;

(2) that the rent reserved in the *kabuliyat* being a yearly rent, the tenancy could be presumed to be a yearly tenancy;

(3) that the *kabuliyat* having been executed prior to the coming into force of the Transfer of Property Act, it was not governed by the provisions of the Act and that the question of the period of notice must be decided with reference to the circumstances of the case.

In cases not governed by the Transfer of Property Act there is no fixed period of notice, and the question has to be decided according to the rules of justice, equity and good conscience having regard to all the circumstances. C SHAMSOONESSA BIBI v. SATYA SEBAK GHOSAL, 29 C. L. J. 394; 23 C. W. N. 641 **415**

——— *Kabuliyat* fixing rent—Enhancement of rent on failure to take fresh settlement, whether penalty **984**

——— Kabuliyat, *recital in, as to landlord's possession, value of—Encroachment by tenant, effect of—Landlord, whether entitled to benefit of encroachment.*

A recital in a *kabuliyat* executed by a tenant that his landlord is in possession of a piece of land is not sufficient evidence of the latter's possession, unless the executant of the *kabuliyat* is examined in Court and in his deposition makes the same statement as that to be found in the *kabuliyat*.

An encroachment made by a tenant upon the contiguous land of another enures for the benefit of the landlord from the moment the tenant takes possession, and not from the time when the tenant executes a *kabuliyat* in respect of that land in favour of his landlord. C RAKHAL CHANDRA GHOSE v. MOHENDRA NARAIN SEN **797**

——— Kaimi raiyati, *meaning of.*

Kaimi raiyati does not necessarily import fixity of rent, and such a holding is not transferable and, consequently, is not liable to attachment and sale in execution of a decree for money. C ANANDA CHANDRA PAL v ASRAB BHANU **852**

——— *Lease*- Kayam saswatham *lease—Denial of landlord's title, effect of—Forfeiture—Derivative title, disclaimer of, effect of—Disclaimer, whether works forfeiture—Lease executed before enactment of Transfer of Property Act—Pre-requisites to forfeiture—Ejectment, suit in—Transfer of Property Act (IV of 1882), s. 111 (g).*

A *kayam saswatham*, or permanent tenancy, can be forfeited by denial of the landlord's title

A denial of a derivative title will work a forfeiture as much as the denial of the original landlord's title.

If a tenant, honestly doubtful and not intending to identify himself with a third party who sets

up a title in himself against the real landlord merely puts his alleged derivative landlord to the proof of the latter's title before recognizing him as such, such conduct may not work a forfeiture of the tenancy and may not constitute such a disclaimer of the title of the landlord as would work a forfeiture.

In cases of leases executed before the Transfer of Property Act came into force or of agricultural leases, a separate act by the landlord indicating his intention to act upon a forfeiture that has been incurred is not a necessary pre-requisite for the maintainability of a suit in ejectment. M VE KATACHARIAR v. RANGASWAMI AYYANGAR, 9 L. W. 282; 25 M. L. T. 223; 26 M. L. J. 532; (1919) M. W. N. 536 **709**

——— *Lease, renewal of—Notice of intention to take renewal, whether necessary Renewal conditional on observance of covenant—Breach of covenant, effect of.*

Where an unconditional covenant for renewal of a lease expressly requires the lessee to notify to the lessor his intention to take a renewal before the determination of the term, the lessee loses his right if he fails to give notice in time. But, under special circumstances, the lessee may get relief against failure to give notice in time.

Where renewal of a lease is made conditional on the observance of certain covenants by the lessee and not otherwise, such observance is a condition precedent to the right of renewal and the right of renewal is not enforceable, if at the time for renewal there is a subsisting breach of covenant. C RAM LAL DUBEY v. SECRETARY OF STATE FOR INDIA, 29 C. L. J. 314 **690**

——— Lease—Rent payable yearly, whether makes lease from year to year—Notice to quit, service of, mode of **44**

——— *Mortgage by tenant—Rent decree in favour of landlord Mortgage decree in favour of mortgagee—Purchasers, contest between—Priority.*

In a contest between the purchaser of the tenant's interest in execution of a mortgage decree and the purchaser in execution of a rent decree obtained against the tenant, the latter has priority over the former and it is not necessary for him to annul the encumbrance in order to support the priority of his purchase under the rent decree. C KEDAR NATH SEN v. IDU KHAN **746**

——— Occupancy holding, sale of, in execution of money decree—Objection that rights are not transferable, whether tenable **139**

——— *Occupancy holding, whether can be sold in execution of money-decree—Landlord, consent of, effect of.*

An occupancy holding, or any part of it cannot be sold in execution of a decree for money obtained against the *raiyat* when the *raiyat* objects, even if the landlords consent to the sale. C BIPINI CHANDRA v JAGAT CHANDRA **962**

——— *Relinquishment of tenancy—Abandonment—Non-payment of rent, effect of*—Res judicata—*Rent suit—Decision on question of title, whether* res judicata

Where a *raiyat* goes away without giving notice from land which he has occupied and neither cultivates it nor pays rent, the landlord is justified in assuming that he has relinquished it and the

Landlord and tenant—concld.

raiyat has no right to ask to be re-installed on the ground that he never formally relinquished the land Mere non-payment of rent is not evidence of abandonment, but non payment of rent coupled with non-occupation of land is evidence of an intention to abandon it.

Where a suit for rent, in which the defendant denies the relationship of landlord and tenant and sets up the title of a third person who is not made a party to the suit, is dismissed and an adverse finding is given against the plaintiff's title, the decision cannot operate as *res judicata* on the question of title in a subsequent suit between the parties **C** GOBER SHEIKH *v.* ALIPUDDIN SHEIKH, 30 C. L. J 13 **356**

——— Ryot, *right of, to construct well on land appurtenant to house.*

A *ryot* has a right to construct a well in a portion of his house or on land in his possession as an appurtenance to his house. **O** SHEO SAHAI SINGH *v.* RAJASHWAR BALI, 6 O L. J 281 **1006**

——— Zemindari lands—Tank-beds, utilization of, as cultivable lands—Prevention of accustomed source of water supply to *ryots* owning lands under *aiyacut*—Other facilities for supply of water, existence of, effect of—Right to restore tank-bed for storage of water—Damage, absence of—Cause of action—Injunction—Specific Relief Act (1 of 1877), s. 54 **899**

Lease. *See* LANDLORD AND TENANT

———, agricultural—Failure of lessee to pay premium stipulated—Right of lessor to withhold possession—Right to possession under lease—Implied covenant. **507**

Letters of administration, *application for, by residuary legatee—Death of residuary legatee—Right to obtain grant, whether survives to heir.*

A residuary legatee under a Will applied for grant of Letters of Administration to the estate of the testator with the copy of the Will annexed and during the pendency of the application died leaving his son as his heir and legal representative. The latter applied to be substituted in the place of his deceased father and to be granted Letters of Administration with the copy of the Will annexed:

Held, that the right of the legatee to obtain a grant of administration was a personal right and this right did not devolve on his heir. **C** HARI BHUSAN DATTA *v.* MANMATHANATH DATTA, 45 C. 862 **76**

Limitation for second appeal, commencement of—Sufficient cause **239**

Limitation Act (IX of 1908)—Acknowledgments saving limitation, whether to be specially pleaded **283**

——— **s. 5.** *See* LIMITATION FOR SECOND APPEAL.

——— **s. 5**—*Appeal filed beyond time—Amendment of decree, application for, whether sufficient ground for extension of time.*

A defendant is not bound to appeal from a decree at a time when the plaintiff has, within the period of ninety days allowed for an appeal, already applied for amendment of the decree. In any event, an extension of time for appealing should in such a case be granted under section 5 of the Limitation Act. **P** HAR KISHAN SINGH *v.* LAHORE BANK, LD., 64 P. R. 1919 **712**

Limitation Act—contd.

——— **ss. 6, 7, Sch. I, Art. 144**—*Mortgage by Muhammadan—Death of mortgagor—Sale of equity of redemption by widow—Redemption, suit for, by son and daughters—Limitation.*

In 1895 a Muhammadan mortgaged certain property to the defendant. In 1901 the mortgagor being dead, his widow purported to sell the equity of redemption to the mortgagee. In April 1914 the son and daughters of the mortgagor filed a suit for redemption of the mortgage. It appeared that all the plaintiffs except one had attained majority more than three years prior to the institution of the suit:

Held, (1) that the sale of the equity of redemption by the mortgagor's widow could only operate to transfer her ⅛th share in the property:

(2) that the right to redeem being indivisible, neither of the plaintiffs who had attained majority more than three years before the institution of the suit was qualified to discharge or release the equity of redemption, and that, therefore, the suit, having been brought within three years of the date when the youngest plaintiff attained majority, was within time, having regard to the provisions of section 7 of the Limitation Act. **B** GULAM GOUS *v.* SHRIRAM, 21 BOM. L. R. 353, 43 B. 487 **79**

——— **s. 7,** *applicability of—Persons jointly entitled to property, dispossession of—Possession, suit for Limitation*

Where several persons jointly entitled to a certain property are dispossessed, and a suit is brought for recovery of possession, section 7 of the Limitation Act can have no application to the case if each individual plaintiff is entitled to sue for his individual share. **C** RAKHAL CHANDRA GHOSE *v.* MOHENDRA NARAIN SEN **797**

——— **s. 7**—*Muhammadan Law—Claim of heirs entitled to definite shares, whether joint cause of action*

In a Muhammadan family, where the heirs are entitled to definite shares as tenants-in-common the cause of action of such heirs in respect of the estate cannot be said to be a joint one for purposes of limitation. **M** ALLA PICHAI *v.* PAPPATHIAMMAL, 16 M L. J. 184 **748**

——— **s. 14**—*Time spent in proceeding in wrong Court, exclusion of—Pleader's advice, effect of—Due care, exercise of.*

The fact that a litigant acts on the advice of a Pleader is not of itself sufficient to entitle him to the benefit of the provisions of section 14 of the Limitation Act, unless the error is one into which he might have fallen notwithstanding the exercise of due care. **O** RAM SAHU *v.* IMDAD HUSAIN, 22 O. C. 39; 6 O. L. J. 294 **590**

——— **s. 15**—*Execution of decree—Suspension of execution—Revival of proceedings.*

A decree-holder applied on 30th August 1912 to execute his decree against the firm of *B L. J. K.* The judgment-debtor having been declared insolvent, the application was struck off the list on 1st October 1912 In the Insolvency Court a controversy arose as to whether *B. L.* was the sole proprietor or whether *J. K.* had also been adjudicated insolvent. On 3rd April 1916 the Court decided that *B. L.* was the sole proprietor of the firm and that he alone had been adjudicat-

Limitation Act—contd.

ed insolvent. On 19th April 1917 the decree-holder applied to execute the decree, but his application was dismissed as barred under Article 182 of Schedule I of the Limitation Act. On appeal:

Held, (1) that the proceedings in execution were not barred, inasmuch as the application of 30th August 1912 not having been disposed of, the later application was one to revive or carry through a pending execution suspended by no act or default of the decree-holder, and that proceedings could be taken against *J. K.*;

(2 that even if the second application could be regarded as a fresh application, then under section 15 of the Limitation Act the period between 1st October 1912 and 3rd April 1916, during which the execution had been stayed by order of the Courts should be excluded. **P** TARA CHAND GHANSHAM DAS, *v.* JUGAL KISHORE, 17 P. W. R. 1919 **64**

——— **s. 19**—Acknowledgment, letter denying liability, whether amounts to **570**

——— **s. 19**—*Acknowledgment of mortgage by mortgagor, effect of.*

An admission by a mortgagor of his liability under the mortgage, within the meaning of section 19 of the Limitation Act, carries with it an admission of all the remedies to which the mortgagee might be entitled under it. **O** BASANT SINGH *v* RAMPAL SINGH, 6 O. L. J 248; 1 U. P. L. R (J. C.) 45 **985**

——— **s. 19**—*Acknowledgment, what is—Sale to mortgagee—Mortgage acknowledged in sale-deed—Recital, whether acknowledgment of suit.*

The word "acknowledgment" in section 19 of the Limitation Act means a lawful acknowledgment given by a person able to bind himself by the acknowledgment as and when it is given.

The defendant No 1 by separate deeds mortgaged his property as follows:—

On 15th February 1892 to *B* (the plaintiff).

On 14th July 1892 to *C* (father of defendant No 2).

On 7th June 1894 to *D* father of defendants Nos 3 and 4).

On 31st July 1897 to *B* (the plaintiff).

On the 24th June 9 0 he sold the hypothecated property to *B* in lieu of his mortgage of 31st July 1897 and in the sale-deed acknowledged this mortgage. Prior to the execution of the sale-deed, *C* in 1908 and *D* in 1909 had obtained decrees on their mortgages and brought the property to sale, which was purchased by themselves. They received possession on the 6th February and 9th June 1914 respectively, thereby dispossessing *B*, who thereupon brought the present suit on his mortgage of 31st July 1897 to recover his mortgage-money by sale of the property. It was objected that the suit was barred by limitation but the plaintiff relied on the acknowledgment contained in his sale-deed:

Held, that the acknowledgment relied on for extending the period of limitation came within the language of section 19 of the Limitation Act and the suit was not barred by limitation. **A** ARBINDAKER RAI *v.* JAGESHAR RAI, 17 A. L. J. 763 **829**

——— **s. 20**—*Suit on pro-note barred on face of it—Payment pleaded to save bar—Special appropriation, absence of, effect of—Contract Act (IX of 1872), ss. 59, 60, 61.*

In a suit on a pro note which was barred on the face of it, the plaintiff alleged two different payments by defendant as saving the bar. The only debts due by the defendant on the dates of the payments were the suit note and another hypothecation bond. The note was the earlier of the two. The plaintiff had appropriated the payments generally towards defendant's debts:

Held, that no special appropriation towards the suit note was necessary and that the suit was in time **M** SANKARAM IYER *v* THIRAVIYA NADAN **240**

——— **s. 26**—*Easement, enjoyment of, discontinuance of, effect of—Right of way Suit for establishment of right of way—Burden of proof.*

In a suit to establish a right of way under section 26 of the Limitation Act the plaintiff cannot succeed merely by proof of enjoyment for 20 years; he must show also that such enjoyment ended only within two years before suit.

Where there has been no obstruction by the defendant and there is no suggestion that the plaintiff voluntarily abandoned or discontinued the exercise of a right of way, it is not necessary for the plaintiff to prove affirmatively 'actual user' of the way down to a date within two years before the suit. A person may be said to be in "enjoyment" of a right of way during a period of time, though he does not actually "use" the way every moment.

Mere non-user for a time of an easement which the owner might, if he pleased, enjoy during every hour of that time, but which for some good reason he does not care to enjoy, is not necessarily discontinuance of enjoyment of the right. The cessation of user is not an invariable indication of abeyance of the enjoyment of a right. **C** GOPAL CHANDRA SEN *v* BANKIM BIHARI RAY, 29 C. L J. 421 **372**

——— **Sch, I. Art. II** **787**

——— **Arts. 30, 31**—*Railway Company, suit against, to recover compensation for non-delivery of goods—Limitation.*

On 24th November 1913, plaintiff booked certain goods by the N. W. Railway consigned to himself: the goods were delivered to a third person under an indemnity bond by the Railway. In May 1915 the plaintiff brought the present suit, alleging that he had suffered monetary loss which he claimed with interest. He relied upon a letter from the Railway to himself, as an acknowledgment of liability operative under section 19 of the Limitation Act, in which he was informed that the delivery of the goods under an indemnity bond was perfectly correct and that his claim, which was against the person to whom the goods had been delivered and not the Railway, could not be entertained. The defence was that the suit was barred by limitation under Articles 30 and 31 of Schedule I to the Limitation Act:

Held, (1) that the suit, as framed, was one to recover compensation for non-delivery of goods and was governed by the period prescribed in Article 31, the cause of action being that the defendants had not performed their contract, not that they had performed their contract improperly so as to make it a case of misfeasance instead of one of non-feasance, and that, as the cause of action arose in December 1913 and the suit was not instituted till May 1915, it was clearly time-barred;

Limitation Act—contd.

(2) that the letter relied upon by the plaintiff from the Railway contained no acknowledgment of liability within the meaning of section 19 of the Limitation Act, but, on the contrary, amounted to a denial of liability **S** LUDHOMAL-PURTOMAL, FIRM OF *v.* SECRETARY OF STATE FOR INDIA, 13 S L. R. 1 **570**

——**Sch. I, Art. 44,** *applicability of*

Article 44 of Schedule I of the Limitation Act does not apply to an alienation by an unauthorised guardian and consequentiy to an alienation by a step-mother of property belonging to her minor step-son

Article 44 of Schedule I of the Limitation Act does not merely apply to sales but applies to all transfers of property. **N** VITHU *v.* DEVI DAS, 15 N. L. R. 55 **943**

—— —— **Art. 47**—*Trade-mark, infringement of—Damages, suit for—Limitation.*

The period of limitation applicable to a suit for damages for infringing a trade-name or a trade-mark —a trade-name or mark being an exclusive privilege— is contained in Article 40 of Schedule I to the Limitation Act **P** VARCADOS *v.* MCLEOD, 45 P R 1919 **434**

—— —— **Art. 61**—*Maintenance of child, arrears of, suit to recover—Limitation.*

A suit by a divorced wife of a Muhammadan for the maintenance expenses of her minor daughter falls within the scope of Article 61 of Schedule I to the Limitation Act, but the plaintiff is not entitled to recover anything prior to three years before the suit **B** ALI MAHOMED EID *v.* FATIMA MAHOMED EBRAHIM, 21 BOM L. R. 713 **963**

—— —— **Art. 75** **724**

—— —— **Art. 84** **941**

—— —— **Art. 89**—Suit to recover money won in lottery and received by agent—Limitation **530**

—— —— **Art. 113** **939**

—— —— **Art. 113**—*Contract, whether includes award.*

The word 'contract' in Article 113 of the First Schedule to the Limitation Act does not include "award." **C** TWEEDIE *v.* JOGESH CHANDRA ROY **999**

—— —— **Art. 115**—*Profits, account of, suit for, against* lambardar *by proprietors—Limitation, commencement of*

A suit by the proprietors of a village against a *lambardar* for an account of the profits of the village management must be brought within the period prescribed by Article 115 of Schedule I to the Limitation Act, and, inasmuch as the *lambardar* is the agent of the proprietors bound by an implied contract to render an account at the end of each agricultural year, the period of limitation commences to run on the date upon which the account should have been rendered under the implied contract. **Pat** ANANTARAM BOHIDAR *v* GANESHRAM BOHIDAR, 4 P. L J 704 **733**

—— —— **Art. 121**—*Sale under Bengal Act XI of* 1859—*Auction-purchaser, suit by, to avoid under-tenure—Limitation, commencement of—Burden of proof.*

Where in a suit brought by the auction-purchaser of an estate at a sale under Bengal Act XI of 1859 to avoid an under-tenure, the defendant raises the plea that the suit is barred under Article 121 of the Limitation Act, the plaintiff should produce evidence to show when, as a matter of fact, the sale became final and conclusive. **C** MURLI DHAR ADITYA *v.* THAKUR DAS MONDAL **50**

——**Sch. I, Art. 123**—*Suit to recover undistributed share of intestacy—Limitation*

The limitation applicable to a suit to recover an undistributed share in the estate of an intestate is contained in Article 123 of Schedule I to the Limitation Act **B** SHRINBAI *v.* RATANBAI, 21 BOM. L. R. 384 **209**

—— —— **Art. 132** **724**

—— —— **Art. 132**—*Loan of paddy, repayment of, suit for Charge on immoveable property —Limitation.*

A borrowed some paddy from *B* and agreed to repay the price thereof with interest at a certain rate within a specified period; as security for the price he mortgaged certain lands to *B* which, it was stipulated, *B* could attach and sell in the event of *A* failing to re-pay On *A*'s failure *B* brought the present suit, but it was dismissed on the ground that it was barred by limitation having been instituted more than six years after the due date of payment, and that Article 132 of Schedule I to the Limitation Act did not apply as no money was charged on the land:

Held, that there was a clear charge upon the land and that Article 32 was applicable to the case **C** INDRA NARAIN *v.* DIJABAR SAMANTA, 23 C. W. N. 949 **849**

—— —— **Art. 132**—*Mortgage - Hypothecation of properties as security for return of paddy borrowed or its money value—Limitation.*

Article 132 of Schedule I to the Limitation Act is applicable to a suit to enforce a mortgage bond by which certain immoveable properties are hypothecated as a security for the return of paddy borrowed or of the money value thereof. **C** MOHESH GHOSE *v.* UMESH CHANDRA GHOSE **241**

—— —— **Arts. 134, 144**—*Suit by trustee against co-trustee for joint possession—Limitation applicable.*

A suit for joint possession of trust property brought by a trustee against a co-trustee, who has alienated the trust property, and the person to whom it has been alienated is governed by the 12 years' rule of limitation and the article applicable thereto is Article 134 of Schedule I to the Limitation Act. **L** SHADI *v* ABDUR RAHMAN **755**

—— —— **Art. 134**—"*Transfer,*" *whether includes lease in perpetuity—Suit to recover possession of property bequeathed in trust*—Terminus a quo

The word "transfer" in Article 134 of Schedule I to the Limitation Act is wide enough to include a lease in perpetuity.

The period of limitation for a suit to recover possession of immoveable property conveyed or bequeathed in trust and afterwards transferred by the trustee for valuable consideration is prescribed by Article 134 of Schedule I to the Limitation Act, the period being reckoned from the date of the alienation. **P** ZAFAR ALI *v.* KISHEN CHAND **795**

—— —— **Art. 135**—*Mortgage-deed giving several options to mortgagee—Default made by*

mortgagor—Mortgagee, remedy of—Limitation, commencement of

Where a mortgage-deed gives the mortgagee more options than one for the purpose of realising his principal money or interest, he is quite at liberty to exercise any of those options at his will.

A mortgage-deed provided that interest would be paid every six months, and that in default of such payment the mortgagee might,

(*a*) allow the interest to run on, treating the unpaid interest as principal;

(*b*) take a bond from the mortgagor for the amount of interest accrued up to date;

(*c*) take possession of the mortgaged property;

(*d*) sue for sale of the mortgaged property in lieu of principal and interest then due;

and, further, that the mortgagee could also wait for the expiry of the period fixed in the deed for payment of the entire money and then take possession of the property. Nothing was paid by the mortgagor to the mortgagee and after the expiry of the said period the mortgagee sued the mortgagor for possession of the property:

Held, that the mortgagee's right to possession of the property could not be deemed to have determined within the meaning of Article 35, Schedule I to the Limitation Act, so long as he had given no intimation of any intention to adopt the remedy given in the third clause mentioned above. **O** BASANT SINGH *v.* RAMPAL SINGH, 6 O. L. J. 248; 1 U. P. L. R. (J C.) 45 **985**

——— Sch. I, Art. 136—*Possession, meaning of.*

The expression "out of possession," as used in Article 136 of Schedule I of the Limitation Act, implies that some person is in possession adversely to the vendor—some person holding in a character incompatible with the idea that the ownership remained vested in the vendor. The possession contemplated in the Article includes not merely actual possession but also such possession as a member of a joint family is presumed to have in the family property until excluded therefrom. **C** CHINTAMANI PRAMANIK *v.* HRIDAY NATH KAMILA, 23 C. L. J. 241 **123**

——— ——— Art. 142—*Declaration of title and possession, suit for—Possession and dispossession, allegation of Burden of proof—Submerged land—Presumption.*

Where in a suit for declaration of title to land and for recovery of its possession, the plaintiff alleges his prior possession and subsequent dispossession by the defendant, the burden is primarily upon the plaintiff to show possession and dispossession within 12 years of the institution of the suit, but the nature of the proof of possession must depend upon the nature of the case. If the land was wholly or partially subject to inundation, the plaintiff must be deemed to have been in possession of the submerged land during the period it was covered by water, no matter who was in possession at the date of the submergence. **C** KHEDON LAL *v.* RAJENDRA NARAIN SINGH, 29 C. L. J. 259 **70**

——— ——— Art. 143 **939**

——— ——— Art. 144 **943**

——— ——— Art. 148 **956**

——— Sch. I, Arts. 171, 176—Death of plaintiff—Abatement, order of, before expiry of six months—Application for setting aside order of abatement within sixty days of order, whether maintainable **534**

——— ——— Art. 181 **941**

——— ——— Arts. 181, 182—*Mortgage—Redemption, suit for—Decree for redemption—Application for extension of time for payment of money—Limitation.*

On the 17th January 1907 the plaintiff obtained a decree in a redemption suit directing him to pay a certain sum of money within six months and recover possession of the property. The decree also provided that in the event of the plaintiff making default, the defendant No. 1 could apply for relief under section 15B of the Dekkhan Agriculturists' Relief Act. Neither party took steps to execute the decree, and in 1915 the rights under the decree were assigned to the present respondent who, as representing the plaintiff, made an application on the 27th September 1915 requesting the Court to allow him to pay the money which the plaintiff was required to pay and to get possession of the property under the decree. The application was allowed by the Courts below, and the defendant appealed to the High Court:

Held, (1) that treating the application as one to extend time for the payment of the mortgage-debt, it was barred under Article 181 of Schedule I to the Limitation Act;

(2) that the right to apply for such extension did not accrue from day to day, and although a Court had power to enlarge the time fixed under the decree, it had no power to enlarge the time fixed by the Limitation Act;

(3) that if the application be treated as one for the recovery of possession of the property, it was an application for the execution of the decree, and as such it was time barred under Article 182 of Schedule I to the Limitation Act **B** VASUDEV VISHNU HASABNIS *v.* GOPAL PARASHRAM KULKARNI, 21 BOM. L. R 6-7 **924**

——— ——— Art. 182—*Execution application not mentioning uncertified payment out of Court, whether 'in accordance with law'—Civil Procedure Code (Act V of 1908), O. XXI, rr 1 (1, 2 (3).*

An execution application which omits to mention an uncertified payment towards the decree out of Court is, notwithstanding such omission, an application 'in accordance with law' within the meaning of Article 182 of Schedule I of the Limitation Act. **M** MARIMUTHU NAICKEN *v.* RAMASAMI PADAYACHI, 10 L. W. 66 **114**

——— ——— Art. 182—*Execution of decree—Decree for possession of property on payment of money without fixing time for payment—Limitation for execution.*

A decree directed that upon payment by the plaintiff of a certain sum of money "in any year in the month of *Jeth*" he was to receive possession of certain property The decree was passed on the 22nd January 1894, the money was deposited on the 15th June 1915 and an application to execute the decree was made on the 29th June 1916. The defendant objected that the application was barred by limitation:

Limitation Act—concld.

Held, (1) that the decree, being indefinite as to the date on which payment was to be made, was incapable of execution on the date on which it was passed and was, therefore, not governed, as to the period of limitation for its execution, by Article 182 of Schedule I to the Limitation Act;

(2) that the right to execute the decree could not arise unless payment was made and that the plaintiff was, therefore, entitled to execute the decree within three years of the date when he made the payment. **A** RUKMINA KUAR *v.* SHEO DAT RAI, 17 A. L. J. 841; 1 U. P. L. R. (H. C.) 118 **576**

Lottery, validity of Suit to recover money won in lottery, whether maintainable- Limitation **530**

Madras District Municipalities Act (Mad. IV of 1884), s. 53—*Exercising trade or calling within Municipality—Carriage by sea—Shipowner unloading cargo at port—Contracts not entered into at that port—Levy of profession tax on shipping agent in that port, legality of.*

A shipowner exercises his trade at all the ports at which his steamers habitually call to discharge or load cargo, which latter operation may involve entering there and then into contracts with shippers Where, therefore, the freight-earning contracts with shippers which enable profits to be earned by sea carriage are not entered into at a port by the ship's master or the local agent of the shipowner, but elsewhere, the shipowner cannot be held to exercise his trade at the port merely because he employs a shipping agent there to attend to other matters, such as issuing shipping orders and signing bills of lading pursuant to contracts already made and receiving payment of advance freight.

The test is, where, in substance, the business of making contracts is carried on and controlled.

The Clan Line Steamers, having their registered office at Glasgow, call at Cocanada to take in cargo for Europe and also unload any cargo consigned to Cocanada They are represented by a firm of sub-agents at Cocanada engaged by the Clan Line's Agents at Madras The sub-agents have no authority to contract with shippers and act only under instructions from the agents; they issue shipping orders to shippers, sign bills of lading for cargo supply and collect any freight that may be payable on the cargo unloaded at Cocanada. The question in this case being whether this was such an exercise of the trade of the Clan Line or carrying on business within the Municipality of Cocanada as to render them liable to the payment of profession tax under section 53 of the Madras District Municipalities Act, 1884:

Held, that the Clan Line, being a shipping company which earned profits by the carriage of goods by sea, and in the course of its business traded with, but not necessarily within, port towns in various parts of the world, one of these being Cocanada, could not be said to exercise a trade at that port so as to make the company liable for the payment of profession tax. **M** MUNICIPAL COUNCIL OF COCANADA *v.* CLAN LINE STEAMERS, LD., 36 M. L. J. 226; 42 M. 455; 10 L. W. 15; 25 M. L. T. 192 **692**

Madras Estates Land Act (I of 1908), s. 3 (16)—*'Tank-bed,' meaning of—Ejectment from tank-bed, suit for—Jurisdiction of Civil Courts*

Land which is a tank-bed, *i. e*, which has been continuously used for the storage of water is not *ryoti* land and a suit to eject a tenant from such land is cognizable by the Civil Court.

Where, however, its user for that purpose has been abandoned and the land has lost its character as tank-bed at the date of the suit, the suit is not cognizable by the Civil Court.

Section 3 (16) of the Madras Estates Land Act suggests its application to land which had not lost its character as tank-bed when the Act came into force. **M** GOPISETTI NARAYANASWAMI *v.* CHODAVARAPU KAMANNA **318**

——— ss. 7 (2) (d), 8, 153, 189—Inam, *grant of—Grant, whether of land revenue or of land—Estate.*

There is no presumption of law that an *inam* grant of a village is *prima facie* a grant of the land revenue only as distinguished from the land itself. Each case must be considered by itself and the determining factors are the terms of the particular grant and the whole circumstances connected therewith **P C** UPADRASHTA VENKATA SASTRULU *v.* DIVI SEETHARAMUDU, 17 A. L. J. 725; 37 M. L. J. 42; 21 BOM. L. R. 9[illegible]; 2 M. L. T. 175 **304**

——— s. 40 (2), (3), *scope of—Rent, commutation of, principles governing*—Maramat *charges, whether 'rent in kind or otherwise'*

The 'commutation' of rent referred to in section 40 of the Madras Estates Land Act is not commutation in its narrowest sense It was intended to cover something more than a mere arithmetical calculation of averages or application of a market price to commute grain into money

In determining the rent to be paid, the Collector cannot exclude from consideration the question whether the rents actually collected during the decennial period before suit were in excess of what was legally due to the landlord.

Maramat charges are not 'rent in kind or otherwise' within the purview of section 40 of the Act and they lie outside the scope of the Collector's determination **M** PYDI APPALA SURYANARAYANA KURMADASU NAILU *v.* INUGANTI RAJAGOPALA RAO, 35 M. L. J. 547 **131**

Madras Land Encroachment Act (III Mad. of 1905), s. 14—*'Levied' in s. 14, meaning of—Penal assessment, imposition of Suit for declaration that land not liable to assessment—Cause of action—Limitation, starting point of.*

The word 'levied' in section 14 of the Madras Land Encroachment Act means 'collected' and the period of limitation in section 14 of the Act runs from the date when the assessment or penalty is actually collected, and not when it is merely imposed. **M** AIYALAM KESAYA CHETTY *v.* SECRETARY OF STATE FOR INDIA, 36 M. L. J. 223; 42 M. 451 **46**

Mahabrahman, office of, whether can be attached and sold in execution of decree **539**

Maintenance of child, arrears of, suit to recover—limitation **953**

Malabar Law—*Landlord and tenant—Lease of several items of property—Ejectment, partial, right to—Compensation, payment of, for other items—Assignee of reversion in part of [demised] premises,*

right of, to evict tenant from such part—Malabar Compensation for Tenants' Improvements Act (Mad. I of 1900), ss. 5, 6, 7, 8.

Held, by the Full Bench, (*Seshagiri Aiyar, J.*, dissenting).—Where several items of property are comprised in a lease, the lessor is not entitled to eject the tenant from a part only of the holding, but the assignee of the reversion in part of the demised premises is entitled to eject for due cause from such part on payment of the value of the improvements to that part, and this applies to tenancies in Malabar.

Per Seshagiri Aiyar, J.—Under the Malabar Compensation for Tenants' Improvements Act there can be no partial eviction until payment of compensation in respect of the holding as a whole.

The Legislature, in providing for compensation on eviction in the Malabar Compensation for Tenants' Improvements Act, understood that the parties were in *status quo ante* and that there had been no break-up of the lease interest. **M** PUTHIAPURAYIL KANYAN BADUVAN *v* CHENAYANTEAKATH PUTHIAPURAYIL ALIKUTTI, 37 M. L. J. 47; 10 L. W. 55; (1919) M. W. N. 401; 42 M. 603 **286**

——— *Male member leaving* tarwad *house to live in wife's* tarwad, *right of, to separate maintenance or* menchilavu—*Sufficient cause for leaving* tarwad—*Burden of proof.*

A male member of a Malabar *tarwad* leaving the *tarwad* house solely for the purpose of living with his wife is entitled to separate maintenance and *menchilavu.*

Per Seshagiri Aiyar, J.—The Customary Law of Malabar, as enunciated in the decisions of the High Court, is that ordinarily every member of a *tarwad* house should be maintained by the *karanvan.* The onus of proving that his departure from the *tarwad* is for proper cause is on the member leaving the *tarwad* house and it is not for the *karnavan* to show that it was improper.

Menchilavu is part of maintenance and does not stand on a higher footing. **M** GOVINDAN NAIR *v.* KUNJA NAYAR, 38 M. L. J. 565; (1919) M. W. N. 304; 26 M. L. T. 169 **326**

——— Melcharth, *grant of* Kanom, *renewal of, before expiry of term, validity of—Duty of* karnavan *—Necessity or benefit to* tarwad, *proof of—Lessee, duty of, to make enquiry, extent of—Renewal on surrender of term of* kanom *period, effect of.*

The granting of a *melcharth* before the expiry of the term of the *kanom* is invalid, save where the *melcharth*-holder proves necessity or benefit to the *tarwad*

The surrender of a term of a *kanom* and its renewal as from the date of the surrender does not affect the principle.

The *melcharth*-holder should, in such a case, show that there was necessity for the *melcharth* and that he satisfied himself by reasonable enquiries as to the existence of such a necessity. Ordinarily, it is enough if he satisfies himself that there is a pre-existing debt and he is not bound to pursue his enquiries and find out if there was a necessity for that debt. It is not enough, however, that he enquired of the *karnavan* granting the *melcharth* and rested content with the statements made by him. Where a member of the *tarwad* has already noticed that the impending alienation is improper it is his duty to make enquiries of such member. **M** VATAVATTA RAMAN NAIR *v.* KENATH PUTHEN VITTAL KUPPASSAN MENON, 36 M. L. J. 630 **740**

——— *Partition* per stirpes *or by* tavazhies, *validity of—Minor members, right of, to impeach partition on attaining majority.*

Under Malabar Law a partition can only be effected by and with the consent of all the adult members of the *tarwad.*

It is competent to the adult members of a Malabar *tarwad* to make a partition *per stirpes* or by *tavazhies* and their act in effecting such a partition cannot be questioned by the minor members on their attaining majority. **M** NANI KUTTI *v.* ACHUTHAN KUTTI NAIR, 25 M. L. T. 83; 36 M. L. J. 529; 42 M. 293 **10**

Master and servant—Liability of master for tort committed by servant—Test—Burden of proof **753**

Merger—*Superior and subordinate interests, union of, effect of—Proprietor, whether can become* ryot.

Under the law as it stood before the passing of the Transfer of Property Act and the Bengal Tenancy Act, the union of a superior and a subordinate interest did not, by operation of law, necessarily merge the subordinate in the superior interest. It could be shown by the conduct of the party concerned that he did not intend to keep the two interests alive as mutually distinct rights.

A proprietor in occupation of land within his own estate cannot acquire the status of a *ryot.* **C** RAMBISHEN DUTT *v* HARIPADA MUKERJEE, 29 C. L. J. 427; 23 C. W. N. 850 **389**

Mesne profits, *assessment of, mode of—Trespasser—Cost of cultivation, whether can be allowed*

In assessing the amount payable by a trespasser on account of mesne profit, the costs of cultivation and reaping should be allowed to him **Pat** BALDEO RAI *v.* RAM EKBAL SINGH, 4 P. L. J. 301 **747**

Minor, *contract of exchange of land by—Ratification after attaining majority, effect of*

A contract of exchange of land made by a minor is void and as such cannot possibly be ratified in law **C** BHANA *v* BELA SINGH, 35 C. L. J. 399 **410**

——— *represented by guardian, decree against, whether binding on minor*

A minor is bound by a decree in a suit in which he is represented by a guardian *ad litem*, except where the latter acts fraudulently, or where his interests are adverse to that of the minor **M** RAMADH BIBI AMMAL *v* KANDASAMI PILLAI, (1918) M. W. N. 85; 23 M. L. T. 164; 7 L. W. 43 **724**

Misjoinder of causes of action and parties—Multifariousness, test of **509**

——— of parties—Pre-emption, suit for—Plaintiff joining with him persons having different rights *inter se*, effect of **153**

Mistake Compromise entered into under mistake, whether can be set aside **955**

Mortgage—*Agreement between mortgagor and mortgagee as to redemption of earlier mortgages, unregistered—Agreement acted upon—Registration, objection to, whether can be taken subsequently.*

Mortgage—contd.

The manager of the plaintiff's family entered into an agreement with the defendants-mortgagees that the latter should redeem certain earlier mortgages whereupon they would become owners of the redeemed property except a 4-pie share which was to be made over, unencumbered, to the plaintiff's father. The agreement was not registered, but it was acted upon by the parties to it, in that the plaintiff's father obtained a decree for the 4-pie share, and, subsequently, partition proceedings were taken on the basis of defendants being the owners, and not merely mortgagees, of the property. Plaintiff now sued the original mortgagees for redemption:

Held, that the suit was not maintainable, and the fact that the agreement was not registered, as it should have been, did not affect the validity of the redemption by the defendants, the second parties to the agreement. **A** LALMAN PANDE *v* SHEO NARAIN PANDE, 17 A. L. J. 737; 1 U. P. L. R. (H. C.) 124 **865**

——— of ancestral property by father—Antecedent debt Mortgagee, rights of, during father's lifetime **28**

——— *bond, construction of--Stipulation for payment of interest by instalments and of principal on a specified date and for payment of whole amount due with compound interest on default when creditor requires—Creditor, failure of, to exercise option—Prayer for compound interest in plaint—Cause of action, accrual of—Limitation Act (IX of 1908), Sch. I, Arts.* 75, 132.

A mortgage-bond provided for payment of interest accruing due once in every six months and for payment of the principal amount on a specified date, *viz*, 15th May 1900. The document proceeded: "In default, we shall pay, whenever you require, the interest accruing due for the days overdue at the aforesaid rate and the principal amount In case of default in the payment of interest according to the due dates, you may recover, whenever you require and without reference to the due date fixed for payment of the said principal amount, the aggregate principal and interest amount found due on adding to the principal the interest due every six months together with the interest due at the aforesaid rate on such aggregate amount" The mortgagee did not exercise his option of suing for the entire amount on the first default, but brought his suit within 12 years of the date fixed for payment of the principal asking for compound interest according to the stipulation in the bond:

Held, (1) that the mortgagee was not bound to exercise his option of calling in the whole amount on the first default;

(2) that as the mortgagee did not exercise his option as aforesaid, the suit was within time under Article 3 of Schedule I to the Limitation Act;

(3) that the demand for compound interest at the time of instituting the suit did not constitute such an overt act as to have a retrospective effect on the accrual of the cause of action, the clause for the recovery of the principal being independent from the stipulation for compound interest

The words 'whenever you require' are not equivalent to 'forthwith' or 'immediately. **M** TAMADH BIBI AMMAL *v.* KANDASAMI PILLAI, (1919) M. W. N. 82; 25

Mortgage—contd.

M. L. T. 154; 9 L. W. 479 **724 963**

——— and charge, distinction between

——— *by way of conditional sale—Improvements effected by mortgagee after date fixed for redemption—Redemption—Mortgagor, whether liable to pay costs of improvements.*

In the case of a mortgage by way of conditional sale, the mortgagee has a reasonable ground to entertain a *bona fide* belief, after expiry of the period stipulated for redemption, that there is no intention on the part of the mortgagor to redeem and that he is, therefore, the owner of the property. If the mortgagee improves the property subsequent to the date fixed for redemption, it is equitable that the mortgagor, while retaining the benefit of the improvement, should pay its cost at the time of redemption. **P** RAM KAUR *v.* PARTAB SINGH, 58 P. R. 1919 **689**

——— decree passed by Court having no territorial jurisdiction over hypotheca—Execution, application for, whether can be presented to Court having jurisdiction without transfer of decree from Court which passed it **102**

——— *decree—Sale directed in certain order—Sale-proceeds of one property sufficient to satisfy mortgage-debt—Contribution, liability for.*

Where in a mortgage suit involving several mortgages by various mortgagors, the Court decides that the properties should be sold in a certain order, the decision does not mean that in the event of the decretal amount being satisfied by the sale of one property only the remaining mortgagors are released from all liability to contribute to the mortgagor whose property alone has been sold. Before it can be held that the properties have been so released, there must at least be in the previous proceedings an indication of an intention in the mind of the Court to release them from such liability. **Pat** BHEKDHARI SINGH *v.* BAIJNATH GOENKA **49**

——— Foreclosure—Title of mortgagee, when becomes absolute Notice, defective service of, effect of—Proof of service of notice—Burden of proof **73**

——— *in favour of two persons—Usufructuary mortgage in favour of one—Discharge by usufructuary mortgagee, effect of.*

One of two mortgagees, each having a half share in two mortgages, took a usufructuary mortgage of the whole of the property mortgaged from the mortgagors, the consideration being the amount of the two simple mortgages, and gave a discharge for both mortgages:

Held, that the discharge operated only in respect of the share of the usufructuary mortgagee, and that the other mortgagee was entitled to recover his share. **A** JAUHARI SINGH *v.* GANGA SAHAI, 17 A. L. J. 731; 1 U. P. L. R. (H. C.) 71 **107**

——— Insolvency of mortgagor—Mortgagee, position of—Interest, whether payable up to date of payment **192**

——— *Interest, high rate of—Mortgagee, whether entitled to contractual rate of interest*

Where it is not shown that there was any undue influence or coercion, interest on a mortgage must be calculated and allowed at the rate provided for by the contract between the parties in the mortgage-deed, even though the interest would run up to a

Mortgage—contd.

large sum. **C** AMULLYA CHARAN DAWN *v.* ASKARI KAZI **554**

——— Interest, high rate of—Necessity—Burden of proof **52**

——— Interest subsequent to date fixed for redemption, whether payable on principal, interest and costs—Rate of interest—Contract Act (IX of 1872), s. 74—Stipulation for enhanced interest on default of payment on specified day—Mortgage money, application of, to debts bearing higher interest—Penalty **67**

——— Lekha mukhi *mortgage, meaning of—Redemption, suit for—Limitation Act (IX of 1908), Sch. I, Art. 148—Starting point of limitation—Burden of proof*

A *lekha mukhi* mortgage is a usufructuary mortgage by which the land is made over to the mortgagee who has to look to its produce for the payment of the mortgage-debt, the mortgagor undertaking no personal liability and the mortgagee not being entitled to sue for the debt.

The starting point for limitation in respect of a suit for redemption of a *lekha mukhi* mortgage is the same as in the case of ordinary usufructuary mortgages.

A suit for redemption of such a mortgage is governed by Article 148 of Schedule I to the Limitation Act and, therefore, the period for limitation is 60 years from the date of the mortgage. **L** KHANDU LAL *v.* FAZAL **956**

——— *Merger of mortgage in decree, effect of—Decree-holder taking fresh mortgage—Priority—Prior mortgage paid off—Mortgagee, position of.*

Where a mortgage merges in a decree in favour of the mortgagee, his remedy is no longer that of a mortgagee, but is that of a person who holds a decree under which he is entitled to bring certain property to sale, and if he wishes to retain this position he should execute the decree, and not take a fresh mortgage the consideration for which is the decree.

A prior mortgagee who obtains a decree upon his mortgage and after that decree is made absolute takes a fresh mortgage a part consideration of which is the decretal amount, it being distinctly stated that the decree is discharged - cannot claim priority over intermediate mortgagees

A person who pays off a prior incumbrance without taking a deed of transfer is in no higher position than the prior incumbrancer.

Where a decree is obtained upon a mortgage, the decree, upon the making of an order absolute, extinguishes the mortgage security as well as the defendant's right to redeem, by substituting for that security a right to sell conferred by the decree, and thenceforward the mortgagee's remedy is under the decree **A** CHHAGGAN LAL *v.* MUHAMMAD HUSSAIN KHAN, 1 U. P. L. R. (H. C.) 1; 17 A. L. J. 741 **133**

——— Mortgage-deed giving several options to mortgagee—Default made by mortgagor—Mortgagee, remedy of—Limitation, commencement of **985**

——— Mortgagee paying money for protection of property—Possession, order for delivery of—Subsequent mortgagee paying money before actually obtaining possession—Prior mortgagee, payment to—Prior mortgagee, suit by—Puisne mortgagee not made party, effect of—Redemption—Money paid to prior mortgagee, whether must be discharged before puisne mortgagee can be dispossessed—Prior mortgage unenforceable for lapse of time, effect of—Limitation—Interest on money paid in redeeming prior mortgage, whether can be claimed by puisne mortgagee **549**

——— *Mortgagee purchasing equity of redemption—Lien, whether subsists.*

Where a mortgagee purchases the interest of the mortgagor, the presumption is that his mortgage lien would continue to subsist for his benefit. **Pat** SIVA NARAYAN RAM MARWARI *v.* HARI NARAYAN **758**

——— Mortgagor, duty of, to pay public charges—Failure to perform duty—Sale of mortgaged property—Re-transfer to mortgagor—Mortgagee, position of. **574**

——— Mortgagor responsible for repairs—Mortgagee, whether can carry out repairs—Charge **979**

———by Muhammadan—Death of mortgagor—Sale of equity of redemption by widow—Redemption, suit for, by son and daughters—Limitation **79**

——— *Pardanashin* ladies executing mortgage—Independent advice, necessity of—Interest with provision for compound interest, whether penal **556**

——— *Prior and subsequent mortgages—Foreclosure suit by subsequent mortgagee—Purchase of equity of redemption by prior mortgagee—Prior and subsequent mortgagees, rights of—Redemption.*

P. held two unregistered mortgages dated 25th December 1897 executed by *D.*, the original owner of the property. In 1909 *D.* executed a registered mortgage in favour of *H*, who in 1913 instituted a suit for foreclosure without making *P.* a party to the suit and obtained a final decree on 9th May 1914. While this suit was pending, *D.* on 6th January 1914 sold by registered sale-deed the mortgaged property to *P.* who instituted the present suit for possession. The trial Court held that the sale having been made *pendente lite* was inoperative and allowed *P.* to redeem the mortgage of 1909 in favour of *H.* The first Appellate Court, however, dismissed the suit on the ground that as *P.* could not enforce his mortgage at the date of the foreclosure suit, all his rights were extinguished. *P.* appealed to the High Court and *H.* claimed for the first time to redeem *P*'s mortgage:

Held, that *P.* had a right to redeem *H.*'s mortgage of 1909, but *H.* as representative of the mortgagor had a better equity to redeem *P.* **N** KARNIRAM-NATHURAM *v* HARDEO JAGANNATH **374**

——— *Property, whether can be sold for arrears of interest.*

Apart from special stipulation, mortgaged lands cannot be sold for payment of interest in arrear and a mortgagee has no right to demand such a sale. **P C** SETRUCHERLA *v* MAHARAJA OF JEYPORE, 17 A. L. J. 694. 37 M. L. J. 11; (1919) M. W. N. 502; 26 M. L. T. 127; 24 BOM L. R. 914; 30 C. L. J. 209; 23 C. W. N. 1043; 10 L. W. 362. **185**

——— *Redemption before certain period, stipulation as to, effect of Term fixed for payment—Fallow season, redemption in, provision as to—Suit, maintainability of.*

In cases where there is no stipulation restraining redemption, but only a period is fixed for payment, the term fixed for payment can only be regarded as a protection for the debtor till the contrary intention is shown.

Where a mortgage-deed in respect of houses or groves provides for redemption in the fallow season, such embargo has no significance, and it is not necessary that a suit for redemption of such mortgage should be filed in the fallow season. **O** ANANT RAM v KALAW **830**

——— *Redemption—Integrity of mortgage broken with consent of mortgagee—Redemption of remainder.*

Where the integrity of a mortgage is broken up with the consent of the mortgagee and a moiety is redeemed, neither he nor those who claim through him can afterwards invoke in their aid the rule which prohibits the breaking up of a mortgage so as to entitle a mortgagor to redeem any portion thereof which he feels disposed to redeem. **A** SARDANAND RAI v. SOHAWAN KHAN **815**

——— Redemption, suit for—Decree for redemption—Application for extension of time for payment of money—Limitation **924**

——— *Redemption, suit for—Plaint—Acknowledgments saving limitation, whether to be specially pleaded—Limitation—Date of mortgage—Burden of proof.*

In a suit to redeem a mortgage it was alleged that the mortgage was executed within sixty years before suit. The trial Court dismissed the suit on the ground that the plaintiff had failed to prove the allegation and declined to consider certain acknowledgments on which the plaintiff relied, on the ground that they had not been specially pleaded in the plaint:

Held, (1) that the plaintiff having pleaded that the mortgage was within limitation, it was not necessary for him to plead that the acknowledgments saved the operation of limitation;

(2) that the mortgagee was the person in whose possession the mortgage deed would naturally be, and that the evidence as to the exact date of the mortgage was, therefore, a matter within his peculiar knowledge, so that the burden of proving that the acknowledgments were not given within sixty years of the mortgage lay upon him. **A** KAMLA DEVI v. GUR DAYAL, 7 A L J. 350 **233**

——— *Redemption by trespasser, effect of—Mortgagor position of*

If a mortgagee allows a mere trespasser, who has not perfected his title by adverse possession, to redeem the mortgage, the true owner is entitled to treat the transaction as a nullity

The fact that a trespasser acquires by adverse possession the interest of a mortgagor, cannot validate a redemption effected by him before he acquired that interest. **O** JASAVANT SINGH v. RAMPAL SINGH 6 O. L J. 248; 1 U. P L R. (J C.) 45 **735**

——— Sale of mortgagor's property in execution of decree obtained by some other creditor—Rateable distribution—Mortgagee, position of **530**

——— Subrogation—Purchaser in good faith redeeming mortgage—Vendor's title defective—Purchaser, position of **57**

——— suit—Declaration that property was not subject to certain lien, prayer for—Court-fee payable **786**

——— by tenant—Rent decree in favour of landlord—Mortgage decree in favour of mortgagee—Purchasers, contest between—Priority **746**

——— *usufructuary—Mortgagee, dispossession of, from portion of mortgaged property—Acquiescence—Transfer of Property Act (IV of 1882), s. 68.*

A usufructuary mortgage stipulated that, in the event of dispossession of the mortgagee, he would be entitled to damages or to interest at a specified rate. In 1898 the mortgagee entered into possession, but in April 1902 he was dispossessed of half the property. Later on, the mortgagor sold the equity of redemption in the remaining half, and in April 1915 the purchaser forcibly dispossessed the mortgagee therefrom. In May 1915 the mortgagee brought the present suit to recover the principal sum advanced, together with interest at the stipulated rate on half that sum for the period between April 1902 and April 1915:

Held, that the plaintiff, having been dispossessed for 12 years and not having done anything during that time either to obtain compensation from the mortgagor, or to realise from the mortgagor or from the property his mortgage-debt, or to claim additional security, or to enforce payment of interest, must be deemed to have acquiesced in the changed state of affairs and was consequently estopped from claiming interest **Pat** UCHIT MANDAR v. GOSAI SINGH **816**

Muhammadan Law -Claim of heirs entitled to definite shares, whether joint cause of action **748**

——— *Decree against some of several heirs of deceased—Sale in execution of decree—Heirs not made parties to suit, whether bound by sale—Representation.*

A money decree was obtained against the estate of a deceased Muhammadan in a suit by a creditor in which the widow and the step-mother of the deceased were impleaded as defendants. The daughter of the deceased who was his principal heir was not made a party to the suit In execution of the decree the right, title and interest of the deceased in a house belonging to him was sold:

Held, that the daughter of the deceased not having been made a party to the suit, her interest in the house was not affected by the decree and did not pass under the sale.

Per *Heaton, J*—There cannot be a valid sale under a decree unless the property sold can properly be sold under the decree **B** MIRKHA MAMKHA v. BHAGIRATHI MAHADEV ABHYANKAR, 21 BOM. L. R. 329; 43 B. 412 **18**

——— *Dower—Widow in possession of estate in lieu of dower, whether liable to account for profits.*

A Muhammadan widow in possession of her deceased husband's estate in lieu of the dower-debt due to her is not liable to account for the profits of the estate in her hands, if the income of the estate does not exceed the amount growing due for interest on the arrears of dower. **C** ALIJAN BIBI v. SAFIA BIBI **623**

——— *Dower—Widow, right of, to possess estate of husband in lieu of unsatisfied dower—Widow, whether can alienate estate.*

Where a Muhammadan widow obtains possession of her husband's estate lawfully, *i. e*, without force

or fraud, she is entitled as against the other heirs to retain possession of the entire estate till her claim for dower is satisfied, subject to an obligation to account for profits, and the co-heirs cannot eject her without payment of that portion of the dower debt which is chargeable to their share of the estate. In this sense and to this extent the right of the widow is analogous to that of a usufructuary mortgagee. She, however, cannot set up any such right of possession against creditors claiming to have the debts owing to them from the husband satisfied out of the estate She is not a secured creditor, her claim for dower debt ranks equally with the claims of other creditors of her husband.

The heirs of a Muhammadan brought a suit against his widow to recover his estate which the widow was holding in lieu of unsatisfied dower; the amount of the dower was ascertained, an account of the profits received by the widow was taken and the plaintiffs were given a decree for possession of their share of the estate on payment, within a specified time, by them of their share of the dower debt, failing which the suit was to stand dismissed. The plaintiffs failed to pay, whereupon the widow made a gift of the entire estate to the sons and daughter of her sister's son, and the heirs then sued for possession of their share after her death:

Held, (1) that the suit was maintainable and was not barred by the rule of *res judicata*;

(2) that a Muhammadan widow in possession of her husband's estate in lieu of unsatisfied dower cannot, under the Muhammadan Law, alienate the estate, though she may transfer her dower debt or her right to retain possession of the estate **A** MAINA BIBI *v.* WASI AHMAD, 17 A. L. J. 629; 1 U. P. L. R. (H. C.) 166 **242**

——— Maraz-ul-maut, *what is—Gift in favour of heir during* maraz-ul-maut *validity of—Applicability of doctrine to sales and* wakfs

Where a man, who had been suffering from consumption for more than a year, made a gift of certain property in favour of his mother, and it was found that there had been a rapid increase in the disease about the time when the gift was made and that the deceased was under apprehension of the near approach of death:

Held, that the rule of *maraz-ul-maut* applied to the transaction and that the gift, being in favour of an heir of the deceased, was altogether void.

The doctrine of *maraz-ul-maut* is founded on the Koran, which ordains that the heirs must inherit. It does not apply to a sale.

A *wakf* created during *maraz-ul-maut* is valid only to the extent of one-third of the entire estate of the deceased

A gift made during *maraz-ul-maut* in favour of one of the heirs of the deceased is altogether void **A** FAZAL AHMAD *v.* RAHIM BIBI, 16 A. L. J. 158; 40 A. 238 **638**

——— *Marriage, essentials of—Vakil of wife, minority of, effect of—Contract Act IX of 1872, s. 184*

For a Muhammadan marriage all that is necessary is a *proposal* and *acceptance* in the presence of witnesses The fact that the Vakil who acted for the girl at the marriage was a minor would not affect the validity of the marriage, inasmuch as section 184 of the Contract Act permits a minor to act as agent between the principal and a third person. **C** ERFANUDDIN MOLLA *v.* BADAN SHEIKH **583**

——— *Marriage, proof of—Cohabitation, long—Presumption—Dancing girl, position of.*

Where a person in the position of a dancing girl of questionable antecedents, whose connection with her employee was illegitimate from its inception, sets up a valid marriage at a particular time and place, such marriage cannot be inferred from mere circumstantial evidence, nor from evidence of long-continued and exclusive cohabitation on the ostensible footing of a lawful wife. **A** SHABBAN BIBI *v.* KHALIQ SHAH, 16 A. L. J. 754 **624**

——— *Minor—Mother, whether guardian—Alienation by mother of minor's property, validity of*

A Muhammadan mother is not the guardian of her minor daughter, either *de jure* or *de facto*, and has no authority, either express or qualified, to convey property belonging to her minor daughter in favour of any person. **Pat** QAMRUDDIN *v.* FAKHRUDDIN **756**

——— *Pre-emption—Joint estate—Joint liability when ceases—Talab-i-istishhad, how to be made.*

Where the liability to pay Government revenue is joint, the joint liability, for purposes of pre-emption, does not cease in the case of any co-sharer until his particular share has been partitioned by the Revenue Authorities.

Under the Muhammadan law not only is it necessary that the *talab-i-istishhad* should be made in the presence of witnesses, but that they should be asked to bear testimony that the demand has been duly made. **Pat** SARJUG SINGH *v.* JAGMOHAN SINGH **40**

——— *Religious endowment—Trustee, power of, to create leases—Lease in perpetuity, whether valid.*

According to Muhammadan Law, the trustee of a religious endowment cannot grant a lease in perpetuity, nor can he create a lease of agricultural land for a period exceeding three years and of other property for a period exceeding one year. **P** ZAFAR ALI *v.* KISHEN CHAND **795**

——— Waqf—*Alienation of* waqf *property—Suit to set aside alienation and for possession, whether maintainable.*

Any person interested in a *waqf* can sue to protect *waqf* property against strangers

When, therefore, *waqf* property is mortgaged by the manager, any person interested in the *waqf* can sue to have the alienation set aside and the property restored to the trust **L** AFIMAM *v.* HAMID-UD-DIN HUSAIN **799**

——— *Woman, competency of, to officiate as head mujavar of an astana—Right of females to hold religious offices, doctrine of, limitations of*

Under Muhammadan Law it is not incompetent for a woman to be a head *mujavar* of an *astana*.

Per *Abdur Rahim, J.*—Excepting for local usages and customs to the contrary, there is no general provision of Muhammadan Law against a woman specializing in any form of religious teaching and propagating any doctrines of Muhammadan religion, either of orthodox Muhammadan religion or of Sufiism. The disability of women to hold a religious office arises from certain local usages and customs and not by any absolute injunction of Muhammadan Law. **33**

Muhammadan Law—concld.

A religious office can be held by a woman unless there are duties of a religious nature which she cannot perform in person or by deputy, the burden of establishing which is on those who plead the exclusion, and, in the absence of anything in the rules by the founder, the usage of the institution governs the case.

Per *Seshagiri Aiyar, J.*—Except in cases of grants given for the express purpose of performing religious duties which are dependent on personal or sex capacity, there is no reason why a female, whether Hindu or Muhammadan, should be disentitled to perform those duties. Wherever there are profits which are payable to an heir in the discharge of duties appertaining to a religious office, it must be taken as a general rule, subject to some exceptions, that women are competent to inherit these offices and to perform the duties appertaining to them. **M** MUNNAVARU BEGAM *v.* MIR MAHAPALLI, 41 M. 1033 **489**

Municipality, *suit against—Parties, proper.*

Where in a suit the claim of the plaintiff is directed against a Municipality as such, the only proper defendant to the suit is the Chairman in whose name alone the Municipality can properly be sued. **C** TARAPADA MAZUMDAR *v.* SATISH CHANDRA SAHA, 23 C. W. N. 611; 46 C. 784 **993**

Murder—*Guilty, plea of, when should be accepted.*

Before a plea of guilty is accepted in a case in which the accused is charged with murder, the record should clearly show that the person who is charged understands and admits such facts as would bring the offence within the definition of murder and that he does not plead any of the exceptions set out in the Penal Code. **U B** NGA HAN *v.* EMPEROR, 3 U. B. R. (1919) 137; 20 CR. L. J 540 **780**

Negotiable instrument—Holder in due course—Transaction, suspicious—Person taking instrument without enquiry, position of **537**

——— Hundi *payable after one month, inadmissible in evidence—Suit for recovery of original consideration, maintainability of—Limitation, commencement of.*

A suit based upon two *hundis* payable in 30 days from the date of execution was brought more than three years from the date of the *hundis* but within three years from the expiry of the month within which the *hundis* were payable. The *hundis* were not properly stamped and were, therefore, inadmissible in evidence:

Held, that, assuming the plaintiff could maintain the suit for the original consideration, the suit, not having been brought within three years from the date of payment of the original consideration, must be held to be barred by limitation.

The circumstances under which a creditor may sue on the original consideration when the bill or note given by the debtor to the creditor for the payment of the money at a future time becomes inadmissible in evidence considered. **C** GOBINDA KUMAR *v.* RAM CHANDRA, 29 C. L J, 508 **945**

——— Hundi *written on more papers than one, validity of—Stamp duty.*

A *hundi* may be written on more papers than one, provided the aggregate value of the stamp papers used represents the correct value of the stamp to which such *hundi* is liable. **C** BISWANATH

Negotiable Instrument—concld.

BHATTACHARJEE *v.* GOVINDA CHANDRA DAS, 29 C. L. J. 305: 23 C. W. N. 534 **88**

——— *Pro-note, whether discharged by fresh pro-note—Liability on basis of previous pro-note; whether extinguished.*

A promissory-note may be discharged by a fresh note or by a cash payment, and when once discharged, the original note ceases to be in force against a signatory who did not execute the fresh note.

A, B, C and *D* executed a pro-note in favour of *K*. Later on *K*. accepted a fresh note from *A, B* and *C* in renewal of the original note. *K* obtained a decree on this note against *A, B* and *C* and brought a suit against *D* on the first note:

Held, that the suit was not maintainable as the execution of the second note operated to discharge the liability of all the executants of the former note. **L B** PERIANAN CHETTY *v.* KUDUPOODY MALLAYA 10 L. B. R. 4; 12 BUR. L. T. 65 **577**

Negotiable Instruments Act (XXVI of 1881), ss. 1, 7, 48—Hundi—*Acceptance, whether must be in writing—Usage, local—Transfer of instrument—Assignment, oral, validity of—Endorsement and assignment, distinction between.*

The definition of the word "acceptor", as contained in section 7 of the Negotiable Instruments Act, leaves no doubt that an acceptance must be in writing, but, having regard to the provisions of section 1 of the Act, so far as regards instruments in an oriental language, a mercantile usage may be proved which makes an acceptance by word of mouth as effectual against the drawee as an acceptance in writing

An endorsement is not the only mode by which a negotiable instrument may be transferred. It may be assigned otherwise, and the assignee can sue in his own name the only difference being that an assignee has only the right, title and interest of the assignor, while an endorsee has all the rights of a holder in due course.

An assignment need not necessarily be in writing and may be oral.

Where it was found that the plaintiff was the real beneficiary under a *hundi* to whom the money was to be ultimately paid, that he was the holder of the *hundi* and that the nominal endorsee did not claim any interest adverse to him:

Held, that it must be presumed that there was an oral assignment of the *hundi* in favour of the plaintiff and that he had a right to sue upon it. **P** PANNA LAL-LACHHMAN DAS *v.* HARGOPAL-KHUBI RAM, 29 P. R. 1919 **250**

——— **s. 5**—*Bill of Exchange, whether includes* hundi.

A Bill of Exchange may include a *hundi*, but it does not follow that a *hundi* includes a Bill of Exchange **C** BISWANATH BHATTACHARJEE *v.* GOVINDA CHANDRA DAS, 29 C. L. J. 305; 23 C. W. N. 534 **88**

——— **s. 9**—*Holder in due course—Transaction, suspicious—Person taking instrument without enquiry, position of*

A person who takes an instrument evidencing a transaction which excites the suspicion that there is something wrong in the transaction, does not act in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without

Negotiable Instruments Act—contd.

further inquiry and is, therefore, not a holder in due course. **L B** GREEN *v.* BA LON, 12 BUR. L. T. 16 **537**

——— **s. 23**—*Promissory note, execution of, by agent*—*Nattukkotta Chetty firms, practice of*—*Vilasam of firm prefixed by execution to his signature, effect of*—*Principal debited with amount in body of note*—*Liability of agent.*

Second defendant, who was the agent of a Nattukkcttai Chetty, executed a pro-note in favour of the plaintiff to which he put his signature prefixing his principal's *vilasam* thereto. The amount was expressly debited to the principal, the 1st defendant, in the body of the note:

Held, that section 23 of the Negotiable Instruments Act did not apply as the executant expressly excluded his personal liability, and that the 2nd defendant was not, therefore, liable. **M** NATESA AIYAR *v.* SATTAYA PILLAI, 8 L. W. 622 **386**

——— **ss. 37, 64, 66**—Hundi, *suit on*—*Presentment, failure to make*—*Liability of drawer, whether ceases.*

Plaintiff sued upon a *hundi* drawn by the defendant on himself and payable in 181 days. Defendant pleaded that there had been no presentment of the *hundi*. It was found that the *hundi* was not presented and the plaintiff's suit was dismissed on the ground that, under section 64 of the Negotiable Instruments Act, the defendant was not liable to the holder:

Held, that there was no necessity in this case for the bill to be presented for acceptance at all, the defendant, as drawer, being liable under section 37 of the Negotiable Instruments Act as principal debtor and there being no separate drawee.

The non-presentment for payment at maturity of a *hundi*, or bill of exchange, the presentment of which is required by section 65 of the Negotiable Instruments Act, has not the effect of relieving the drawer from liability.

Under the general law it is for the debtor to seek out the creditor for the purposes of performance.

Presentment of a negotiable instrument is not necessary in the case of a maker of the note, in order to render the acceptor liable, unless the note is, in the body of it, made payable at a particular place. **N** LACHMAN PRASAD *v.* RAM CHANDRA RAO, 13 N. L. R. 128 **859**

——— **ss. 64, 66** **859**

——— **s. 80**—*Interest*—*Agreement to pay interest, absence of, effect of*—*Liability under s. 80, whether excluded*—*Interest, when chargeable.*

The statutory liability imposed by section 80 of the Negotiable Instruments Act upon the executant of a promissory note to pay interest is not excluded by the absence of an agreement to pay interest.

Under section 80 of the Negotiable Instruments Act, interest at six per cent. per annum is to be calculated from the date on which the consideration under the instrument ought to have been paid by the party charged, until tender or realization.

In the absence of proof of a demand before suit, the plaintiff is entitled to interest at six per cent. per annum from the date of the suit. **N** LAXMIBAI *v.* BHAGWANT SITARAM **106**

Negotiable Instruments Act—concld.

Northern India Canal and Drainage Act (VIII of 1873), s. 70—*Interfering with banks of canal*—*Offence*—*Penal Code (Act XLV of 1860), s. 430*—*Mischef*—*Evidence necessary for conviction.*

Where a person interfered with the banks of a canal and the prosecution could not prove by the evidence of respectable persons that the act had caused or must have been known to be likely to cause a diminution of the supply of water for agricultural purposes:

Held, that a conviction under section 430 of the Penal Code was improper and that a conviction under section 70 of the Northern India Canals and Drainage Act was more appropriate. **A** HAR NARAIN *v.* EMPEROR, 17 A. L. J. 686; 20 CR. L. J. 425 **201**

N. W. P. Rent Act (XII of 1881), s. 9, *scope of*—*Occupancy holding*—*Will, transfer by, validity of.*

The provisions of section 9 of the N. W. P. Rent Act, XII of 1881, rendered void the terms of any Will in existence on the date on which that Act was passed, if those terms contravened the prohibition against the transfer by Will of a right of occupancy which was thereby enacted. **A** MAHADEO MISIR *v.* DIRGPAL PANDE, 17 A. L. J. 381; 41 A. 356 **146**

Nuisance—Acts of several persons constituting nuisance—Liability of all concerned—Calling of *azan*, whether nuisance—Inherent right **728**

Opium Act (I of 1878), ss. 5, 9, 10—*Rules framed by Punjab Government under s. 5, r. 49 (3) (f)*—*Retail vendor, whether bound to keep accounts*—*Illegal possession of opium*—*Offence.*

Under rule 49 (3) (*f*) of the rules framed by the Punjab Government under section 5 of the Opium Act, the holder of a retail license for the sale of opium is bound to keep correct accounts of his daily sales.

By virtue of the provisions of section 10 of the Opium Act, in prosecutions under section 9 of the Act it must be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily is opium in respect of which he has committed an offence under the Act.

The accused, a licensed vendor of opium, falsified his sale accounts by showing sales in excess of the actual amount sold and was thus enabled to accumulate a certain amount of opium:

Held, that the accused was guilty of an offence under section 9 (*c*) of the Opium Act. **P** EMPEROR *v.* MUNSHI RAM, 9 P. R. 1919 CR.; 20 CR. L. J. 357 **195**

Orissa Tenancy Act (II of 1913), s. 31 (4)—*Occupancy holding, sale of, in execution of money decree*—*Objection that rights are not transferable, whether tenable.*

It is open to an occupancy *raiyat* to object to the sale of his holding in execution of a decree for money, upon the ground that his rights are not transferable without the consent of the landlord. **Pat** MADHU PADHAN *v.* JEGU JENA, 4 P. L. J. 294 **139**

Orissa Tenancy Act—concld.

——— **ss. 193, 210**—*"Court having jurisdiction to determine suit for the possession of land," whether includes Civil Court—Jurisdiction of Civil and Revenue Courts—Civil Court, whether can determine rent.*

The provisions of section 210 of the Orissa Tenancy Act are general in their application and the words "the Court having jurisdiction to determine a suit for the possession of land" in the section mean any Court which has that jurisdiction, unless it can be shown that that jurisdiction is taken away by some provision in the Act itself.

Therefore, a Civil Court has jurisdiction to determine the rent payable by a tenant under section 210 (1) (*d*) of the Orissa Tenancy Act. **R** BANAMALI SATNATH *v.* AKTARAN MAHAPATRA, 4 P. L. J. 72 **222**

Paper Currency Act (II of 1910), ss. 26, prov.—*Negotiable Instruments Act (XXVI of 1881), ss. 120, 122*—Hundi *payable to bearer—Creditor and debtor mentioned at top of* hundi—Hundi *drawn on banker—Intended deposit of money to cover draft—Validity of* hundi—*Endorsement by payee, effect of, on right to dispute validity of* hundi—*Estoppel—Evidence Act (I of 1872), s. 115.*

First defendant drew a *hundi* on a Rangoon firm in which at the top he was described as the debtor and the 3rd defendant as the creditor. The material portion of the *hundi* was as follows: "the money with Rangoon current rate of interest should be paid on demand to the person who brings this by the Rangoon firm." The 1st defendant had no money with the firm when he drew the *hundi*, but intended to make a deposit before presentation:

Held, that the *hundi* was covered by the proviso to section 26 of the Paper Currency Act and that the plaintiff was entitled to recover on the basis of it.

Where a *hundi* is drawn on a banker, an intended deposit before presentation would save the *hundi* under the proviso to section 26 of the Paper Currency Act.

Per *Seshagiri Aiyar, J.*—The policy of the proviso to section 26 of the Paper Currency Act is to enable *bona fide* customers to operate on actual or intended deposits. There is nothing against public policy in so doing and a *hundi* can be drawn on a bank against an intended deposit.

The endorser of a negotiable instrument is estopped as against the endorsee from disputing the validity of the instrument. **M** ARUNACHALAM CHETTIAR *v.* NARAYANAN CHETTIAR, 36 M. L. J. 301; (1919) M. W. N. 188; 9 L. W. 438; 42 M. 470 **300**

Pardanashin *ladies executing mortgage—Independent advice, necessity of.*

In order to make *pardanashin* ladies liable under a mortgage executed by them, the mortgagee must take the elementary precaution of seeing that the ladies have independent advice with regard to the transaction. **C** KAILASH CHANDRA *v.* LATIFANNESSA KHATUN **556**

Partition, *partial, whether permissible.*

Ordinarily, there cannot be a partial partition, but the rule is elastic and has in several cases been departed from. If there is no inconvenience, there can be a partition of a joint dwelling house without partition of other joint properties.

Partition—concld.

A testator cannot legally restrain the partition of a *catcharibari* and thus create a perpetuity. **C** KALI CHARAN *v.* KIRANBALA DEBI, 29 C. L. J. 494 **948**

——— suit—Preliminary decree, omitting directions for future mesne profits—Enquiry at time of passing final decree, whether permissible **140**

Penal Code (Act XLV of 1860), ss. 75, 379, 457, 511—*Previous convict—Theft, attempt to commit—Enhanced sentence, legality of.*

A previous convict entered an open thorned enclosure in which goats and sheep were kept, but on the owner being disturbed, he fled and was arrested near by. He was convicted under sections 457/75 of the Penal Code and sentenced to transportation for life:

Held, on appeal, that the only offence of which he could be convicted was one of attempted theft under sections 379/511 of the Penal Code and that as section 75 did not apply to attempted offences, an enhanced sentence could not be inflicted upon him. **P** GHASITA *v.* EMPEROR, 13 P. R. 1919 Cr; 20 Cr. L. J. 492 **476**

——— **s. 109**—Abetment, what amounts to **449**

——— **ss. 149, 304A, 325**—*Causing death by rash or negligent act—Grievous hurt—Sentences, separate, legality of.*

Accused, members of an unlawful assembly, were convicted under section 304A of the Penal Code for causing death by a rash and negligent act in the following circumstances: Armed with *lathis* they attacked the complainants; in the course of the affray a little girl, who was near by, received a couple of blows on the head, from the effects of which she died shortly after. The accused were also convicted under sections 147 and 325 of the Penal Code, and for the two offences were awarded separate sentences to run consecutively:

Held, that the conviction under section 304A could not be maintained and that the conviction should have been under section 325 read with section 149 of the Penal Code.

As a rule it is unsound to pass cumulative sentences under section 147 and some other section of the Penal Code, where the latter of the two sections can only be applied by the aid of the provisions of section 149. **A** KURE *v.* EMPEROR, 16 A. L. J. 615; 20 Cr. L. J. 617 **677**

——— **s. 183**—Disobedience to order promulgated by public servant—Magistrate, whether can try offence for disobedience of his own order **845**

——— **s. 193** *Giving false evidence—Prosecution, duty of, to prove particular statement as false*

In a case under section 193, Penal Code, it must be proved beyond all reasonable doubt that some particular portion of the statement alleged to have been made by the accused is false. **P** EMPEROR *v.* AMOLAK RAM, 20 Cr. L. J. 519 **679**

——— **ss. 235, 243**—*Counterfeit coins, possession of—Hindu joint family—Coins found in verandah of joint house—Presumption—Possession of manager.*

In order that coins may be counterfeit, it is not essential that they should exactly resemble genuine

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coins, or that they should be of silver and not of some other inferior metal. It is sufficient if they are of the same size as the King's coins and bear the imitation of the Crown and surrounding decorations as are found in a genuine coin.

Some counterfeit coins and a mould for counterfeiting were found buried under the floor of the verandah of a house occupied by a Hindu joint family and the father as the head and managing member of the family was convicted of being in possession of the articles found. It appeared that the verandah was used by the son of the accused as a shop, while the father looked after cultivation, and, excepting the discovery of the articles, there was no evidence to account for their presence, or of the accused having been seen in possession of counterfeit coins or instruments for coining, or that he had ever used the verandah or carried on business in the shop:

Held, that, in the circumstances, the presumption that the managing member of a Hindu family must be held to be in possession of articles found in the family dwelling-house could not be used against the accused, because (*a*) although as head of the family he was supposed to have control over the house, it was impossible for him to know of tiny things placed by a junior member of the family in a place which was not shown to have been under his direct control, and (*b*) the evidence did not exclude the possibility of the articles having been surreptitiously introduced by a stranger **Pat** AMRIT SONAR *v.* EMPEROR, (1919) PAT 220; 20 CR. L. J. 439; 4 P. L. J. 525 **223**

——— **s. 296**—*Causing a disturbance, what amounts to—Spreading false rumour, whether offence.*

The essential ingredient of an offence under section 296 of the Penal Code is the doing of an act which causes a disturbance. The mere spreading of false rumours, although they might result in most serious consequences, cannot be described as "causing a disturbance" **A** MOHAMMAD HUSAIN *v.* EMPEROR, 20 CR. L. J. 421; 17 A. L. J. 820 **197**

——— **ss. 299, 300**—*Hanging person supposed to be dead after inflicting grievous hurt—Death resulting from asphyxiation—Culpable homicide—Murder—"Causing death," meaning of.*

The accused struck his wife a blow on the head with a ploughshare, which rendered her senseless. He believed her to be dead and in order to lay the foundation for a false defence of suicide by hanging, which he afterwards set up, proceeded to hang her from a beam by a rope, which resulted in her death by asphyxiation:

Held, that the accused could not be convicted of culpable homicide or of murder, though he was guilty of causing grievous hurt.

The expression "causing death" in section 299, Indian Penal Code, means putting an end to a human life, and all the three intentions mentioned in the section must be directed either deliberately to putting an end to a human life or to some act which, to the knowledge of the accused, is likely to eventuate in the putting an end to a human life. The knowledge must have reference to the particular circumstances in which an accused is placed. The intention of the accused must be judged, not in the light of actual circumstances, but in the light of what he supposed to be the circumstances. A man is not guilty of culpable homicide if his intention was directed to what he supposed to be a lifeless body. **M** PALANI GOUNDAN, *In re*, 20 CR. L. J. 404; 37 M. L. J. 17: (1919) M. W. N. 340, 42 M. 547; 10 L. W 45: 26 M L T. 68 **164**

——— **ss. 302, 326, 328**—*Dhatura* administered with intention to facilitate commission of robbery—Death caused by *dhatura*—Offence **670**

——— **s. 302**—*Murder—Guilty, plea of, when should be accepted - Sentence, measure of.*

Accused was placed upon his trial for the murder of his child and stated to the Committing Magistrate that he thought he was the cause of the child's death, he was drunk and did not know what he did The plea of drunkenness was repeated to the Sessions Judge, who convicted him of murder and sentenced him to death:

Held, that the sentence was, in the circumstances, most undesirable, without any evidence to ascertain whether there was or was not anything to justify a conviction for a lesser offence or for passing a sentence of transportation for life upon a conviction of murder. **U B** NGA BAN *v.* EMPEROR, 3 U. B R. 137; 20 CR L. J. 540 **780**

——— **ss. 304, 325, 149**—Causing death by rash or negligent act—Grievous hurt—Sentences, separate, legality of **677**

——— **ss. 326, 328, 302**—Dhatura *administered with intention to facilitate commission of robbery—Death caused by* dhatura *Offence*

Where *dhatura* is administered to a person with fatal results with intent to facilitate the commission of robbery, no hard and fast rule can be laid down as to the section of the Penal Code under which the person administering the *dhatura* should be convicted: the circumstances of each particular case must be taken into consideration. **P** SADHU *v.* EMPEROR, 9 P R. 919 CR.; 20 CR. L. J. 510 **670**

——— **s. 339**—*Wrongful restraint—Landlord and tenant—Tenant holding over, position of—Landlord preventing tenant from entering premises—Offence—Specific Relief Act (I of 1877), s. 9.*

A tenant holding over has a position recognised by the law and has a right to retain possession of the premises he occupies even against the landlord himself until di-possessed in due course of law.

Therefore, where a landlord blocked up the entrance to a tenant's rooms who was holding over and thus prevented him from entering the rooms:

Held, that the landlord was guilty of wrongful restraint. **B** GHULAM MAHOMED *v.* EMPEROR, 21 BOM. L. R. 261; 20 CR L. J. 417: 43 B. 531 **193**

——— **ss. 363, 365, 366, 368**—Kidnapping, trial and acquittal on charge of—Trial, subsequent, for offences under ss 36, 368, legality of—Criminal Procedure Code (Act V of 898), ss 403, 435, 436 **686**

——— **ss. 396, 411**—*Dacoity, proceeds of, possession of, whether evidence of guilt of dacoity—Receiving stolen goods.*

The mere fact that property stolen in a dacoity is found with a person is, in the absence of evidence connecting him with the dacoity, no ground for holding him guilty of dacoity or for imputing to

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him knowledge that the property was stolen by dacoity. Such a person is, however, guilty of the offence of dishonestly receiving or retaining stolen property punishable under section 411 of the Penal Code. **C** ARSHED MOLLA *v.* EMPEROR, 29 C. L. J. 325; 20 CR. L. J. 525 **685**

——— **s. 406** **173**

——— **ss. 408, 420**—*Criminal breach of trust by servant—Cheating—Person making purchases on another's behalf and remunerated by commission, whether servant.*

A person who works for a firm in making purchases and is remunerated for his services by a commission on purchases made by him is, for the purpose of section 408 of the Penal Code, a servant of the firm.

The accused was employed by a firm to purchase paddy and was entrusted with a large sum of money for the purpose, and his remuneration was a fixed commission on the paddy purchased by him. Instead of purchasing the paddy the accused diverted the greater portion of the money to his own use. He was tried and convicted of cheating and dishonestly inducing the firm to deliver him the money, under section 420 of the Penal Code, and of criminal breach of trust as a servant, under section 408 in respect of the same sum of money. The accused's case was that he was a trader and not merely a buyer for the firm, and that the money was advanced to him by way of a loan for a specific purpose:

Held, that the accused acted as the agent of the firm on whose behalf he held the money and the property in it did not vest in him; that it was not a loan to him but a trust; that he had been rightly convicted under section 408 of the Penal Code, but that the conviction of cheating with respect to the same sum of money could not be maintained. **L B** PYO GYI *v.* EMPEROR, 12 BUR. L. T. 58; 20 CR L. J. 513; 10 L B. R 31 **673**

——— **ss. 411, 396**—Dacoity, proceeds of, possession of, whether evidence of crime of dacoity —Receiving stolen goods **685**

——— **ss. 420, 406**—*Cheating—Deception, proof of, whether necessary—Property obtained for one purpose used for another—Offence.*

To justify a conviction under section 420 of the Penal Code, deception must be proved. Where in the absence of deception a person obtains property for one purpose and uses it for another, he is guilty of an offence under section 406, and not under section 420, of the Code. **A** RAGHUBIR KURMI *v.* EMPEROR, 20 CR. L. J. 413; 1 U. P L. R. (H. C.) 69 **173**

——— **ss. 420, 408**—Criminal breach of trust by servant—Cheating—Person making purchases on another's behalf and remunerated by commission, whether servant. **673**

——— **s. 430**—Mischief—Evidence necessary for conviction—Northern India Canal and Drainage Act (VIII of 1873), s. 70—Interfering with banks of canal—Offence **201**

——— **s. 447**—*Criminal trespass—Warrant for delivery of land by Civil Court—Refusal of Amin to inspect documents showing rights in derogation of delivery warrant—Offence.*

An Amin of a Civil Court cannot be charged with criminal trespass for delivering property to a person covered by a delivery warrant of Court, although a portion of the property is claimed by a different person whose documents of title the Amin refuses to inspect or act upon. It is not for the Amin to determine whether his superior officer might not have committed a mistake in issuing the warrant.

A person assisting an Amin in doing his duty cannot be held guilty of criminal trespass. **M** NALLAYA NAICK *v.* EMPEROR, 10 L. W. 12; 20 CR. L. J. 559 **847**

——— **s. 448**—*House-trespass—Building not in possession of complainant—Intention to annoy or insult, absence of.*

Complainant started a school in a building erected by public subscription. On another school being started his pupils all left him and he closed down and went away. In his absence the accused took possession of the building on behalf of the rival school and started to hold certain classes in it:

Held, (1) that the complainant was not the owner of the building nor had it been entrusted to him and that it was impossible to say that the accused intended to insult or annoy him;

(2) that, therefore, the accused were not guilty of an offence under section 448 of the Penal Code. **A** NARAIN DAS *v.* EMPEROR, 17 A. L. J. 334; 20 CR. L. J. 463 **351**

——— **ss. 465, 467**—*Forgery—Proof—Similarity of handwriting, whether sufficient proof of offence.*

To convict an accused person as the forger of a document, the mere similarity of the handwriting of the forged document with the writing of the accused, without other evidence of complicity, is insufficient. Where a signature purports to have been forged, the strong similarity between the genuine and the forged signature is suggestive merely of a conspiracy that the genuine signature was obtained by a fraud upon the person whose signature was forged. In neither case can a conviction for forgery be maintained. **Pat** MOHAMMAD KABIRUDDIN *v.* EMPEROR, 20 CR. L. J. 534 **774**

——— **s. 504,** conviction under—Order requiring security to keep peace, legality of **783**

Penalty. *See* CONTRACT ACT, s. 74

Plaint, amendment of, by striking out certain claims—Suit, whether maintainable in respect of such claims **376**

Pleadings—*Facts admitted whether need be proved.*

A fact admitted in the pleadings need not be proved. **C** GOBINDA KUMAR *v.* RAM CHANDRA, 29 C. L. J. 508 **945**

———, *issue not raised in—Court, power of, to frame issue*

A Court is not justified in framing an issue on a question about which no dispute arises on the pleadings. **Pat** RAGHUNATH KURMI *v.* DEO NARAIN RAI, (1919) PAT. 393 **981**

Police Act (V of 1861), s. 34 (VII)—*Ingredients of offence—Obstruction, etc. proof of.*

Unless it is proved that an act complained of was to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers, there cannot be a conviction under section 34 of the Police Act. **Pat** RAM CHARITAR *v.* EMPEROR, 20 CR. L. J. 452 **340**

Possession, *suit for—Evidence insufficient—Title—Presumption—Adverse possession.*

Where in a suit for possession no evidence as to possession is given by either side, or the evidence adduced is so unsatisfactory or insufficient as to leave the Court unable to arrive at a clear conclusion as to which party is in possession, the presumption is that possession follows title. **Pat** BHIKHAD BHUNJAN NARAIN TEWARI v. UPENDRA NATH ROY, (1919) PAT. 298; 4 P. L. J. 463 **801**

Pre-emption—Sale-deed, price mentioned in, whether pre-emption price—Presumption **731**

———, *suit for—Plaintiff joining with him persons having different rights* inter se, *effect of.*

In a suit for pre-emption against a stranger vendee the plaintiff does not lose his right by joining with him persons who have different rights *inter se* but whose rights are superior to those of the vendee. **A** SHEORAJ SINGH *v.* NAIK SAHAI, 17 A. L. J. 391; 41 A. 423 **153**

Presidency Small Cause Courts Act (XV of 1882), s. 41—*Ejectment from part of house, suit for—Rent of portion sued for not exceeding Rs.* 1,000—*Jurisdiction of Small Cause Court—Question of title, decision of—Revision—High Court, interference by.*

A suit to eject a tenant of a portion of a house, the rent of which is less than Rs. 1,000 per annum, is cognizable by a Presidency Small Cause Court, though the annual rent of the whole building exceeds Rs. 1,000.

In such a suit, where the Court goes into the question of title to enable it to exercise jurisdiction, its order cannot be set aside by the High Court as being without jurisdiction. **M** VENKATRARAMA CHETTY, *In re*, 7 L. W. 610 **512**

Presidency Towns Insolvency Act (III of 1909), s. 36—*Order directing person to deliver property belonging to insolvent—Procedure—Official Assignee, remedies of—Costs of unsuccessful motion how to be met.*

Where the Official Assignee applies to the Court under section 36 of the Presidency Towns Insolvency Act for an order against a person to deliver up property in his possession belonging to the insolvent, the only course open to him is to take by itself the examination of that person and ask the Court for an order that is justified by the admissions made or evidence given by that person and without looking to any further evidence at all.

Where the Official Assignee desires to proceed against a third person to recover from him property belonging to the insolvent, there are two courses open to him. The one is to start an action against that person and the other is to proceed against him in insolvency. In the latter case, the Court has a discretion to refuse to deal with the matter by motion and to direct that it be dealt with by an action. The presenting of petitions and obtaining orders in bankruptcy makes procedure more complex. As a general principle, the costs of an unsuccessful motion brought by the Official Assignee, however, careful he may have been, must be borne by himself but he may obtain an indemnity from those in whose interests the motion is made before he starts proceedings **C** SURESH CHUNDER GOOYEE, *Re*, 23 C. W. N. 431 **654**

——— s. 56—*Fraudulent preference—Intention—Burden of proof.*

Presidency Towns Insolvency Act—concld.

If a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving preference to that creditor over his other creditors. Where, however, it is found on the evidence that the dominant motive was not to give preference, but to save his stock in trade from attachment and sale, the transaction cannot be annulled under section 56 of the Presidency Towns Insolvency Act as a fraudulent preference.

The burden of proving the intention of the debtor lies upon the Official Receiver who contests the payment, even if the debtor was insolvent at the time when he made the payment **L B** OFFICIAL ASSIGNEE *v.* M. C. BHAM, 10 L. B. R 8; 12 BUR. L. T. 85 **591**

Principal and agent—*Broker employed to negotiate sale of property at certain price—Principal failing to convey—Damages for loss of brokerage, suit for, by broker, maintainability of.*

Where a broker is employed to negotiate the sale of a house and he finds a purchaser at the stipulated price, and arranges for his brokerage to be paid by him but the transaction is not completed owing to the owner failing to convey, the broker is entitled to damages on the basis of the brokerage which he would have received had the sale been completed. **L B** GUR LUM HPAW *v.* CAMILLO CAMILATOS, 10 L. B. R. 15; 12 BUR. L. T 68 **582**

Probate and Administration Act (V of 1881), s. 50—*Letters of Administration, revocation of—Applicant, right of, to share in estate, barred, effect of.*

Where in an administration suit it is found that the plaintiff's claim against the administrator for a share in the estate is barred by limitation, the determination of that issue is *res judicata* as regards an application by the same plaintiff for a revocation of the grant of administration.

If an applicant has no right to claim his share of an estate from the administrator, he has no interest which would support an application for the revocation of the grant of Letters of Administration. **L B** ABDUL RAHMAN *v.* MAUNG MIN, 9 L. B. R. 273 **355**

——— s. 50—*Letters of Administration with Will annexed—Revocation, application for—Delay, long, effect of—Burden of proof.*

Where Letters of Administration with the Will annexed have been granted to the widow of a deceased person, an application, made more than thirty years afterwards, to call in the Letters and prove the Will in solemn form ought not to be entertained, especially where the object of the application is to prevent the terms of the Will, standing for so many years, from being carried into effect as in the case of an intestacy. In any case, it is for the applicant to establish why the Letters should be called in and the Will proved, having allowed an undue length of time to elapse. **C** PRAFULLANANDA *v.* BROJENDRA NANDAN **593**

——— ss. 50, 78—*Probate—Probate Court, power of, to call for fresh security from executors—Revocation on failure to furnish fresh security—"Just cause," meaning of.*

Probate and Administration Act —contd.

A Probate Court is competent to require a new bond or additional security from the executors where the interest of the estate requires it, and especially where some new situation arises such as an unforeseen increase of assets or the unexpected breakdown of the original surety or sureties. If the order of the Court calling upon the executor to furnish fresh security is not complied with, the Probate may be revoked

Section 50 of the Probate and Administration Act is exhaustive and the explanation of the expression "just cause" is not merely illustrative

The fourth clause of section 50 is not confined to cases where the circumstances which have made the grant useless and inoperative were in existence at the date of the grant though unknown to the Court and to the parties concerned. The phraseology of the clause is sufficiently general to make it applicable to cases where the circumstances contemplated have arisen since the date of the grant.

The real object which the Probate Court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto. **C** SURENDRA NATH *v.* AMRITA LAL PAL, 29 C. L. J. 496; 23 C. W. N. 763 **936**

——— **s. 50**—*Revocation of Letters of Administration—Sufficient cause—Failure to file inventory, whether sufficient cause.*

Where an application is made years after the grant of Letters of Administration to revoke the Letters, cause must be shown why this should be done. The mere fact that the inventory required to be filed within six months of the grant has not been filed is not a sufficient cause, unless it can be shown that the inventory was withheld wilfully and unreasonably. **C** HEMLATA DEBI *v.* RADHARAMAN BANERJEE **561**

——— **s. 50**—*Revocation of Probate—Notice, absence of, whether "just cause."*

Where in an application for revocation of Probate on the ground of absence of notice, it appeared that the applicant, though not cited, had parted with her interest by sale and was represented in the Probate proceedings by her vendee:

Held, that, apart from the fact that by reason of the sale the applicant had parted with her interest in the estate, the mere absence of notice was not "just cause" within the meaning of section 50 of the Probate and Administration Act for holding that the Probate proceedings were defective in substance and liable to be set aside. **N** MANGLA GOURI *v* SAMSON SHALOM **24**

——— **s. 64**—*Letters of Administration, whether can be granted to person who was member of joint Hindu family with deceased—Hindu Law - Joint family Survivorship.*

A member of a joint Hindu family with a deceased person is not competent to apply for Letters of Administration to that person's estate In such a case the estate passes by survivorship and there is nothing left to administer **P** UTTAM DEVI *v* DINA NATH, 56 P. R. 1919 **651**

——— **s. 78**—*Probate Court, whether bound to take security from executors and administrators.*

Probate and Administration Act —concld.

Under the provisions of section 78 of the Probate and Administration Act the Probate Court is bound to take a bond in the case of administrators, but has a discretion in the case of executors. **C** SURENDRA NATH *v.* AMRITA LAL PAL, 29 C. L. J. 496; 23 C. W. N. 763 **936**

——— **s. 86**- Order passed by High Court upon appeal under s. 86- Appeal to Privy Council, whether permissible **596**

——— **s. 90**—Sanction for sale obtained by fraudulent misrepresentation—Sale, validity of **884**

——— **s. 90**—*Will restricting power of executors to mortgage property—Mortgage in excess of powers, validity of.*

Where a Will directs the executors on the death of the testator, to sell his property to pay debts, that is a restriction on the power of the executors to mortgage the property for the payment of the debts. If the property is mortgaged by them, the mortgage is voidable under section 90(4), Probate and Administration Act, at the instance of any other person interested in the property, that is, voidable at the instance of any one interested in the estate **L B** ZAINAB BIBI *v.* M. A. L. CHETTY FIRM, 10 L. B. R. 1; 12 BUR. L. T. 109 **568**

Probate proceedings- *Will, proof of—Will made on deathbed in favour of spiritual guide—Undue influence—Court, duty of.*

Where it is sought to propound the Will of a deceased person made one day before his death in which the testator's spiritual guide is named as the universal legatee, it is incumbent upon the Court to see that spiritual influence was not exercised improperly by terrifying the dying man or by holding out hopes of benefiting his soul

In proceedings upon an application for Probate of a Will, it appeared that the Will had 12 witnesses and that the testator did not sign his own name, but his name was written by his uncle. When the first witness for the petitioner was giving evidence, he named five witnesses and proceeded to prove their signatures on the document The trial Judge, however, suggested that it was not necessary for him to prove more:

Held, that this was a defect in procedure the Will required to be carefully scrutinised and it was necessary to place before the Court all the available evidence so that the Judge could form a right conclusion having a free mind. **C** BASINI DASI *v.* KRISHNA LAL **1007**

Procedure—*Evidence led on all issues—Judgment on preliminary point, expediency of.*

The practice of trying a case till it is ready for judgment and then disposing of it on a preliminary point, condemned as tending to cause needless delay and unnecessary expense. **A** ARBINDAKER RAI *v.* JAGESHAR RAI, 7 A. L. J. 763 **829**

——— Waiver by parties, effect of **881**

Profits, account of, suit for, against *lambardar* by proprietors—Limitation, commencement of **733**

Promissory note. *See* NEGOTIABLE INSTRUMENT

Proprietor, whether can acquire status of *ryot* **389**

Provincial Insolvency Act (III of 1907), s. 22—*Trespass on property of stranger —Remedy—Order of Insolvency Court on application under s. 22, finality of.*

Where in proceedings in insolvency a trespass is committed, whether by the Official Receiver or by anybody else, upon the property of a stranger to the proceedings, he has the ordinary right to seek redress in the ordinary Civil Court, and is not bound to apply to the Insolvency Court. If, however, he does so apply under section 22 of the Provincial Insolvency Act, he must comply with the terms of that section, and if he obtains a decision upon the merits the decision is final **A** BHAIRO PROSAD *v.* MR. S. P. C. DASS, 17 A. L. J. 787; 1 U. P. L. R. 18 (H. C.) **113**

——— **s. 24**—*Jurisdiction of Insolvency Court to correct errors.*

An Insolvency Court has the same jurisdiction that the ordinary Courts of law possess under the Civil Procedure Code to correct any mistake either of a clerk or of the parties themselves upon a question of fact, when a mistake is established.

Where a creditor in insolvency proceedings has exhausted all the remedies open to him for rectifying an error, the Insolvency Court becomes *functus officio* and has no jurisdiction to entertain an application under section 24 of the Provincial Insolvency Act. **A** RAM CHANDER SARUP *v* MAZHAR HUSSAIN, 1 U. P. L. R. (H. C.) 69 **55**

——— **ss. 31, 32**—*Insolvency — Mortgagee, position of—Interest, whether payable up to date of payment.*

A mortgagee of the property of an insolvent is not a person proving in the bankrupt's estate; he is a secured creditor and is entitled to receive out of the sale of the mortgaged property his principal and interest at the contractual rate up to date of payment and costs. **A** JUGAL KISHORE *v.* BANKIM CHANDRA, 17 A. L. J. 480 **192**

——— **ss. 36, 37**—*Alienation by insolvent, annulment of—Alienee, whether can prove just antecedent debts.*

Where an alienation effected by an insolvent is annulled under sections 36 and 37 of the Provincial Insolvency Act by the Insolvency Court, the alienee may prove as an unsecured creditor just antecedent debts which existed before the fraudulent transfer but were included in the consideration therefor. **P** DEVI DIAL *v.* SUNDAR DAS, 65 P. R. 1919 **720**

——— **s. 46**—*Appeal against order confirming sale—Auction-purchasers, whether necessary parties —Leave to appeal refused by District Judge—High Court, power of, to grant leave.*

Where property is sold in insolvency proceedings and the sale is confirmed, the auction-purchasers are not necessary parties to an appeal against the order confirming the sale.

Where, under section 46 (3) of the Provincial Insolvency Act, the District Judge refuses to grant leave to appeal, the High Court is competent to grant such leave. **P** JUGAL KISHORE *v.* ISHAR DAS, 63 P. R. 1919 **695**

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8—*Murtafa, suit for recovery of, whether cognizable by Small Cause Court—Jurisdiction.*

Provincial Small Cause Courts Act—concld.

A suit to recover *murtafa* (a tax or rent leviable in the nature of house-rent for the occupation of houses is cognizable by a Small Cause Court. **Pat** MILNE *v.* JAGMOHAN **961**

——— **Art. 29 (c)**—*Suit for recovery of money put into partnership business together with approximate profits, whether cognizable by Small Cause Court—Appeal, second, whether lies —Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint, when can be allowed.*

The plaintiff brought a suit for the recovery of Rs 40 advanced by him for the purposes of a partnership business which had since ceased to exist and also for Rs. 9 as appoximate profits arising out of the dealings with the money put into the business. The lower Appellate Court dismissed the suit, holding that it was not maintainable The plaintiff then preferred a second appeal to the High Court:

Held, (1) that no second appeal lay, as the value of the suit was under Rs 500 and the suit, not being one for the balance of partnership accounts, did not come within the description of suits given in clause (c) of Article 29 of Schedule II of the Provincial Small Cause Courts Act;

(2) that leave to amend the plaint, to the effect that the plaintiff might be given a decree for such sum as might be found due to him after taking accounts, could not be given, as such amendment would involve the alteration of the entire nature of the suit. **C** NARAIN PROSAD *v.* RAMESWAR ADYA **435**

Public nuisance—*Injunction to restrain public nuisance, suit for—Special damage, proof of —Inability to commit nuisance, whether special damage.*

Plaintiff brought a suit for a declaration that a certain passage closed by the defendant was a public passage and for an injunction restraining the defendant from obstructing the passage, alleging that by reason of the obstruction caused by the defendant he could not enter or pass over the passage and that he had also suffered special damage by being unable to erect scaffolding on the passage for the repair of his house:

Held, (1) that the suit was not maintainable in the absence of proof of special damage beyond that suffered by the rest of the public who used the way and that the fact that the plaintiff could not enter on or pass over the land was not sufficient proof of such damage;

(2) that if the passage was a public highway, the plaintiff was not entitled to erect a scaffolding on it and that he could not sue in respect of a nuisance when the special damage he asserted was his own inability to commit a nuisance. **C** SHYAM LAL DEY *v.* MANMATHA NATH SARKAR **324**

Public policy. *See* CONTRACT ACT, s. 23.

——— Sale of religious office, validity of **979**

Punjab Land Revenue Act (XVII of 1887), s. 158 (2) (xvii)—*Jurisdiction Civil and Revenue Courts Partition, suit for, by tenant for fixed term, whether cognisable by Civil Court.*

Punjab Land Revenue Act—contd.

Under section 158 (2) (*xvii*) of the Punjab Land Revenue Act a Civil Court has no jurisdiction to entertain a suit for partition of agricultural land brought by a tenant holding for a fixed term. Such a claim must be made in a Revenue Court. **P** BHAN SINGH *v.* JAGAT SINGH, 55 P. R. 1919 **645**

Punjab Municipal Act (III of 1911), s. 47—*Contract with Committee not duly signed—Suit, whether maintainable.*

A contract entered into with a Municipal Committee which is not signed by the President, nor by the Vice-President nor by any member of the Committee, as required by section 47 of the Punjab Municipal Act, is not binding on the Committee. **P** KISHEN CHAND *v.* MUNICIPAL COMMITTEE OF AMRITSAR, 59 P. R. 1919 **391**

——— **s. 172,** *scope of—Notice by Municipal Committee requiring demolition of bridge constructed with permission, validity of—Injunction.*

Section 172 of the Punjab Municipal Act does not contemplate that a permission once given by the Municipal Committee should be withdrawn after a term of years.

Plaintiff obtained permission from the Municipality of Ludhiana to build a bridge across a drain in front of his house, on executing an agreement to the effect that he would, at the end of ten years, either apply for fresh permission to maintain the bridge or permit its demolition. The ten years having elapsed and the plaintiff not having applied for fresh permission, the Municipality issued a notice under section 172 of the Punjab Municipal Act calling upon the plaintiff to demolish his bridge or obtain fresh permission to maintain it. Thereupon the plaintiff instituted a suit for the issue of a perpetual injunction against the Municipality restraining it from demolishing the bridge:

Held, (1) that the notice issued by the Municipality was *ultra vires*;

(2) that the circumstances did not fall within the purview of section 172 of the Punjab Municipal Act, and as the Municipality was exceeding its statutory powers, it could be restrained by an injunction. **L** MUNICIPAL COMMITTEE, LUDHIANA *v.* AHAD SHAH **831**

——— **s. 173**—*Depositing goods on street without permission—Site let out to third person—Offence.*

The essence of an offence under section 173 of the Punjab Municipal Act is the placing of goods on a street without the permission of the Municipal Committee, but where such permission is not necessary, the Committee having farmed out its rights to a third person, no offence under the section can be committed. **P** SANT RAM *v* EMPEROR, 22 P. R. 1919 CR.; 20 CR L. J. 516 **676**

——— **ss. 195, 225**—*Injunction to restrain Municipal Committee from certain action, suit for, maintainability of—Appeal to Commissioner, failure to prefer, effect of.*

The mere fact that a person prefers not to appeal against the orders of a Municipal Committee to the Commissioner under section 225 of the Punjab Municipal Act, does not deprive him of the right to bring a suit for an injunction restraining the Committee from taking certain action. **P** BASANTA MAL *v.* MUNICIPAL COMMITTEE, HOSHIARPUR, 62 P. R. 1919 **708**

Punjab Municipal Act—concld.

——— **ss. 225, 195**—Injunction to restrain Municipal Committee from certain action, suit for, maintainability of—Appeal to Commissioner, failure to prefer, effect of **708**

Punjab Pre-emption Act (I of 1913), s. 15 (c), secondly—Rupar, *whether divided into sub-divisions.*

Rupar is divided into well-recognised *pattis* which are "sub-divisions" within the meaning of section 15 (*c*) *secondly* of the Punjab Pre-emption Act. **P** SHIB RAM *v.* MAQSUM ALI KHAN, 40 P. R. 1919 **394**

Punjab Tenancy Act (XVI of 1887), s. 8—*Occupancy rights, acquisition of—Agreement not to eject, proof of—Long occupation—Presumption*—Basiku opahus, *position of.*

One of the cases in which occupancy rights may be decreed under section 8 of the Punjab Tenancy Act is where there has been a promise by the landlord never to eject the tenant. A promise of this character need not necessarily be explicit. It may be implied, and may be established by evidence of the intention of the parties as shown by their actions.

A promise not to eject, however, does not mean a promise not to eject under all circumstances whatsoever, but a promise not to eject *'ta qasur,'* that is, till commission of a fault against the tenure.

Where certain tenants and their predecessors had occupied certain land as *basiku opahus* for 100 years and for three full generations and had built houses on the land occupied by them:

Held, that under all the circumstances it must be inferred that there was an implied promise on behalf of the owners of the land not to eject the tenants *ta qasur*. **P** PARMAN *v.* GHANTHU, 50 P. R. 1919 **484**

——— **s. 77 (3) (d)**—*Occupancy rights, suit to establish, by ejected tenant—Jurisdiction of Civil and Revenue Courts.*

A suit by a person, other than a tenant, to establish his claim to a right of occupancy is not one under section 77, sub-section (3), clause (*d*) of the Punjab Tenancy Act, and is, therefore, not excluded from the jurisdiction of the Civil Courts.

Therefore a person, who has been dispossessed from his tenancy in accordance with a notice issued under section 43 of the Punjab Tenancy Act, and after having instituted a suit to contest his liability to ejectment, can sue in the Civil Court for possession of the land from which he had been ejected on the ground that he has a right of occupancy therein.

Per *Martineau, J.*—The proviso to sub-section (3) of section 77 of the Punjab Tenancy Act applies where in a suit cognizable by and instituted in a Civil Court it becomes necessary to decide any matter in respect of which any suit falling within one of the groups of the sub-section might be instituted. **P** PARMAN *v.* LHASSU, 49 P. R. 1919 **443**

Putni Regulation (VIII of 1819), s. 14—*"On any other ground," meaning of—Sale of* putni *in proceeding taken against wrong person, validity of—Sale, whether can be set aside.*

Putni Regulation—concld.

Proceedings under the Putni Regulation taken for the realisation of arrears of *putni* rent are taken against the tenure and not against the persons, but the tenure cannot be sold by taking proceedings against wrong persons.

The sale of a *putni* by taking proceedings against wrong persons is not absolutely void Such a sale, unless set aside by proper proceedings under the Regulation, confers good title upon the purcha er.

The words "on any other ground" in the second part of section 14 of the Putni Regulation are wide enough to cover the case of proceedings taken against wrong persons

A *putni* sold under the Putni Regulation was purchased by *K. K.* did not take any steps whatever for registration of his name at the *zemindar's sherista* nor did he furnish security. The *zemindar* again sold the *putni* under the Regulation by taking proceedings against the old *putnidar*:

Held, that the title of the purchaser could not be attacked. unless a suit was brought under the provisions of section 14 of the Putni Regulation for setting aside the sale. **C** GOLAM SATTAR *v.* PRODYAT KUMAR TAGORE, 29 C. L. J. 481 **933**

Railways Act (IX of 1890), s. 72—*Contract Act (IX of 18 '), s 15*—*"Goods delivered to be carried", loss of - Liability of Railway Company, extent of—Destruction of goods by fire—Suit for damages—Railway Company, liability of*

According to section 72 of the Railways Act, the liability of a Railway Company in respect of goods delivered to be carried is that of a bailee under section 151 of the Contract Act, and that liability can only be limited by agreement with the consignor provided that such agreement has been approved by the Governor-General in Council.

The expression "goods delivered to be carried" in section 7. of the Railways Act must be read literally and according to its natural meaning.

A person sent certain goods through his agent to the Sholapur Railway Station for carriage. A consignment note was prepared and the goods were taken into the goods yard, and after they had been registered, weighed and marked they were taken into the goods forwarding shed by an official of the railway, who also took charge of the consignment note therefor:

Held, that the goods were "delivered to be carried" as soon as they were taken into the goods forwarding shed and that the delivery was the delivery of the consignor, and his intention was to be considered.

Where goods "delivered to be carried" were destroyed by fire and it was proved that the Railway Company had not taken all measures necessary for the protection of the goods against fire:

Held, that the Railway Company was negligent and was liable in a suit for damages for the destruction of such goods **S** NARASINGGIRJI MANUFACTURING Co *v.* GREAT INDIAN PENINSULA RAILWAY. 21 BOM L R. 406 **309**

Receiver, *appointment of, effect of—Possession of Receiver, whether can be disturbed without leave of Court—Execution of decree—Sale of property in custody of Receiver, validity of.*

Receiver—concld.

The rule that the possession of a Receiver may not be disturbed without leave of the Court appointing him does not apply so far as third persons are concerned, until the Receiver has been actually appointed and is in possession. It is not enough that an order has been made directing the appointment of a Receiver Until the appointment has been perfected and the Receiver is actually in possession, a creditor is not debarred from proceeding to execution against properties in respect of which the Receiver has been appointed.

When property is in the custody of a Receiver appointed by a Court, a sale of that property under an execution issued by another Court is not necessarily void but may be avoided by an appropriate process. **C** KANAILAL JALAN *v.* MANOO BIBI, 29 C. L. J. 424; 23 C. W. N. 952 **394**

———, *appointment of—Sale of property—Auction-purchaser, payments made by—Sale set aside—Auction-purchaser, whether can recover amount spent by him from Receiver.*

In a mortgage suit the High Court, at the instance of the mortgagee plaintiff, appointed a Receiver to take charge and possession of the mortgaged properties and to hold them for the benefit of the parties The mortgaged properties were subsequently sold but the Receiver was not discharged. The auction-purchaser, considering himself the full proprietor and owner, continued to pay the revenue; the Receiver at the same time also paid the revenue on behalf of the judgment-debtor. Four years afterwards, the sale was set aside and the auction-purchaser applied to the Collector for refund of the amounts paid by him as revenue, and was met with the reply that the amounts were not available for refund he then applied to the High Court for an order on the Receiver to re imburse him for the amounts which were paid for the benefit of the estate, and on behalf of the Receiver it was contended that he was not subject to the orders of the High Court but that he was an officer subject to the orders of the trial Court:

Held, (1) that the Receiver, having been appointed by the High Court to which he had submitted his accounts, must be regarded as an officer subject to the orders of that Court;

(2) that so far as the auction-purchaser was concerned, he was justified in considering that he was the person liable to pay the Government revenue that became due during his auction-purchase, on the principle that he became the proprietor from the date of the sale and the duty of paying the revenue devolved upon him from that moment;

(3) that under the circumstances the proper order was to give the auction-purchaser leave to sue the Receiver in respect of his claim **F** at GURUMAHADEV ASRAM PRASAD *v.* RAM SEKHAR PRASAD SINGH **706**

———, suit by, or against, without leave of Court **486**

Record of Rights, *entry in, value of - Presumption—Burden of proof—Suit for joint possession of* khudkasht *land—Defendant alleging occupation by tenants—Land entered as* khudkasht *in Record of Rights, effect of*

In a suit instituted by the plaintiffs asking for a declaration of their right to joint possession with the defendants second party, of some lands on the

Record of Rights—concld.

allegation that the same formed part of the *khudkasht* lands of the *maliks*, the defendants second party, who alone contested the suit, denied that the lands in suit were *khudkasht* and alleged that the same were held by tenants. The *mouzah* within which the lands in suit were situate belonged to the plaintiffs and the defendants second party in equal shares, and the defendants second party held a lease of the share of the plaintiffs and were in possession of the whole of the *mouzah*. The Record of Rights published in 1898 showed that these lands were *khudkahst* lands:

Held, that the onus was upon the defendants second party to show that the entry in the Record of Rights was wrong **C** GAJADHAR PRASAD SINGH v. SHEO NANDAN PROSAD SINGH, 23 C. W. N. 804 **115**

——— *Presumption of correctness—Both parties repudiating entry, effect of*

Where both the plaintiff and the defendant in a suit repudiate an entry in the Record of Rights, the presumption arising from the Record of Rights may be held to have been rebutted. **C** MURALI DHAR ADITYA *v* THAKUR DAS MONDAL **50**

Registration Act (XVI of 1908), s. 17—*Compromise relating to property not in suit, whether requires registration.*

So far as a compromise relates to property extraneous to the suit, it requires registration and if unregistered, is inadmissible in evidence. **P** KARTAR SINGH *v* INDAR SINGH, 31 P. R. 1919 **273**

——— **s. 17**—*Document renouncing title—Registration, whether necessary.*

A document which contains a declaration by a person that he holds no title in immoveable property of Rs 100 in value requires registration, and, if it is unregistered, it cannot be received as evidence of any transaction affecting such property **P** KISHEN CHAND *v.* MUNICIPAL COMMITTEE OF AMRITSAR, 39 P. R. 919 **391**

——— **s. 17**—Partition of self-acquired property between sons—Registration, whether necessary **93**

——— **s. 32**—*Presentation of document for registration by* am-mukhtar, *validity of.*

The presentation of a document for registration by a person holding an *am-mukhtarnama* empowering him to do all acts relating to the executant's estate in various Courts and offices, among others "in the District Registration Office", etc., is a presentation by a person duly authorised **C** BISWANATH BHATTACHARJEE *v.* GOVINDA CHANDRA DAS, 29 C. L. J. 305; 23 C. W. N. 534 **88**

——— **s. 49**—*Unregistered document affecting moveable and immoveable property—Admissibility in respect of moveable property.*

The fact that a document relating to immoveable and moveable property is not registered, would not prevent the party entitled from suing on that document in respect of the moveable property. **B** HANMANT APPARAO *v.* RAMABAI HANMANT, 21 BOM. L. R. 716 **954**

——— **s. 87**—*Registration, defect in, effect of.*

Improper registration of a document, or an error on the part of the Registrar, does not affect the validity of the document. **C** BISWANATH BHATTACHARJEE *v.* GOVINDA CHANDRA DAS, 29 C. L. J. 305; 23 C. W. N. 534 **88**

Regulation XVII of 1806—*Mortgage—Foreclosure Title of mortgagee, when becomes absolute—Notice, defective service of, effect of—Proof of service of notice Burden of proof.*

If, upon an application for foreclosure, proceedings are held in accordance with the provisions of Regulation XVII of 1806, the title of the mortgagee becomes absolute upon the expiry of the year of grace, although no suit is brought by the mortgagee for a declaration of his right as absolute owner of the mortgaged property.

Where, upon an application for foreclosure, notices were issued to *R* and *S* and four others, the mortgagors, and an endorsement on the notices on behalf of those on whom they purported to be served showed that three notices and a copy of the petition were received by *R* for himself and two others and the remaining three notices were received by *S* for himself and two others:

Held, 1 that due service of the notice had not been effected upon all the mortgagors, and that, therefore the mortgage had no been foreclosed, nor had the mortgagee acquired the absolute ownership of the property:

2 that it lay upon the mortgagee to prove that notice of foreclosure had been duly served upon the mortgagors. **A** JAGDIP NARAIN RAI *v.* RAM SARUP KHAN, 1 U. P. L. R. (H. C.) 59; 17 A. L. J. 631 **73**

Religious Office, sale of, validity of **979**

Res judicata—*See* CIVIL PROCEDURE CODE, s. 11.

——— *Decree expressed in general terms—Judgment, whether can be looked at.*

Where a decree is expressed in general terms, it is permissible to look to the judgment to ascertain what the real issues were in order to see how far the decree operates as *res judicata* **at** RAGHUNATH KURMI *v.* DEO NARAIN RAI, (1919) PAT. 293 **981**

——— *in execution proceedings—Question decided at one stage, whether can be re-agitated.*

A decree directed that if possession of the property in dispute was delivered by the defendants to the plaintiffs within one month from the date thereof, the defendants would not be held liable for mesne profits but that if possession was not so delivered, the defendants would be liable for mesne profits for the period antecedent to and during the pendency of the suit The decree also contained a direction that in the event of ascertainment of mesne profits the shares of the parties would be first determined and possession would be delivered according to the shares so calculated The decree-holders applied for execution of their decree, asking for delivery of possession and stating that an application for ascertainment of mesne profits would be made separately. In answer to this application the judgment-debtors objected that possession had already been delivered by them to the decree-holders. The Court investigated the question in controversy and came to the conclusion that possession had not been delivered. The extent of the shares of the parties was determined and possession was delivered accordingly Subsequently, the plaintiffs applied for ascertainment of mesne profits, whereupon the judgment-debtors objected that mesne profits could not be claimed as possession had been delivered within one month from the date of the decree:

Res judicata—concld.

Held, that the question whether or not possession had been delivered was directly and substantially in issue between the parties in the previous application for execution, and that the decision thereon must be deemed to be conclusive between them at all subsequent stages of the execution proceedings. **C** MAKUND SINGH *v.* SARASWATI BIBI, 29 C. L. J. 245 **98**

——— Landlord and tenant—Rent suit—Rate of rent, whether *res judicata* **56**

Restitution—Auction-sale—Decree-holder purchaser Decree set aside — Judgment-debtor, whether entitled to restitution **959**

Restitution of conjugal rights, *suit for Decree, form of Relief awardable.*

In a suit by the plaintiff for a declaration that the defendant No was his wife and for possession of her as well as for any other proper relief, the defence was that the suit was not maintainable, that the defendant No. 1, who was a minor, was not properly represented in the suit, and that the marriage between the plaintiff and the defendant No was not valid, because the Vakil who acted for the wife at the marriage was a minor and the ceremonies necessary for a valid marriage had not been performed The lower Courts gave the declaration asked for and directed the other defendants not to put any obstruction in the way of the wife coming to the plaintiff, and added that the plaintiff would get the defendant No. as his wife:

Held, that the suit was in substance one for restitution of conjugal rights and the Court could, in such a suit, give the plaintiff a declaration that the defendant was his wife and direct the other defendants not to obstruct her in returning to her husband, but that it was not open to the Court to decree the husband possession of the wife and the decree should have merely directed the wife to return to her husband. **C** ERFANUDDIN MOLLA *v.* BADAN SHEIKH **583**

Revision *See* CIVIL PROCEDURE CODE, S. 115, CRIMINAL PROCEDURE CODE SS 3[illegible], 150.

Riparian owners, *rights of - Right to use water of natural streamlet for irrigation, extent of.*

The right of a riparian owner to use the water of a streamlet either for the purpose of irrigation or for the purpose of manufacture is an extraordinary use of the water and is subject to the condition that the use shall not interfere with the lawful use of the water by other proprietors. **Pat** MAHABIR SAHU *v.* RAM SARAN SAHU **949**

Rules and Orders of the Original Side of the Calcutta High Court, Ch. XXXVIII, r. 67, *application under—Limitation—Procedure—Discretion of Court—Limitation Act (IX of 1908), Sch. I, Arts 74, 181*

An application under rule 67 of Chapter XXXVIII of the Rules and Orders of the Original Side of the Calcutta High Court is, as to limitation, not governed by Article 81 of Schedule I to the Limitation Act, but the period within which such application must be made is not unlimited The granting of such an application is discretionary, and as the rule provides an alternative relief by suit which must be instituted within the time given by Article 84 of Schedule I to the Act in exercising the discretion when a question of lapse of time is raised it must be considered whether the time allowed by that Article ought not to cover the application.

As such an application can only be acceded to in a summary procedure where there is no contest or doubt that the parties applying are capable of giving a full discharge for the amount claimed, the applicants should be referred to a suit if there is any contest between the parties which involves an inquiry. **C** LAKHIMONI DASSI *v.* DWIJENDRA NATH, 23 C N. 473; 46 C. 249 **941**

Ryot, whether proprietor can acquire status of **389**

Security bond, execution of, for debt due on promissory note Forbearance to sue for period not specified, whether good consideration **963**

Shamilat. *See* CUSTOM

——— Co-sharer cultivating portion of *shamilat*—Remedy of other co-sharers **567**

———, share of, whether passes on sale of land **378**

Small Cause suit tried as ordinary suit—Appeal, whether lies **967**

Specific performance—Contract for purchase of claim unconnected with immoveable property—Suit on breach of contract—Claim agreed to be purchased barred at date of suit—Compensation, absence of prayer for Power of Court to award compensation **908**

——— Delay in bringing suit, effect of—Discretion of Court **704**

——— *Tender of greater amount asking for execution of contract different from original agreement validity of.*

The plaintiff entered into a contract with the defendant under which the defendant undertook to convey to the plaintiff one-sixteenth share of a Zemindari on the tender by the plaintiff of one-sixteenth of a certain sum The plaintiff tendered one-eighth part of that sum and wanted a conveyance of one-eighth part of the Zemindari:

Held, that although a tender of a greater amount includes a smaller amount, yet as the plaintiff who made the tender called upon the defendant to perform a contract different from the real agreement between them, the defendant was not bound to accept the tender **C** BAIKUNTH NATH DE *v.* BENODE BEHARI DE, 9 C. L. J. 56 **13**

Specific Relief Act (I of 1877), s. 9 **193**

——— **ss. 19, 21 (a)**—*Contract for purchase of claim unconnected with immoveable property Suit on breach of contract Claim agreed to be purchased barred at date of suit—Compensation, absence of prayer for—Power of Court to award compensation.*

In a case where the claim falls under section 21 (*a*) of the Specific Relief Act and cannot be specifically enforced, the plaintiff is entitled to claim compensation in the alternative under section 19, and under the Explanation to that section, the Court is not precluded from granting it by the circumstances that the contract has become incapable of specific performance and that there is no prayer for such relief in the plaint

Defendants agreed to purchase from the plaintiffs a money-claim which the latter had against a third person The defendants having made default, the plaintiffs sued on the contract but their plaint did not

Specific Relief Act—contd.

contains a prayer for compensation. At the date of suit the claim which the defendants had agreed to purchase had become barred:

Held, that, as the contract was not specifically enforceable under section 21 (a) of the Specific Relief Act it was competent to the Court to grant compensation under section 9 even though it was not asked for in the plaint. **M** OOKERJEE COWASJEE *v.* SABHAPATHY MUDALIAR, 9 L. W. 471 **908**

——— **s. 21**—Arbitration—Agreement to refer dispute—Suit by party to agreement, maintainability of—Stay of suit—Procedure **80**

——— **s. 22**—*Specific performance—Delay in bringing suit, effect of—Discretion of Court.*

Where a person allows a period of more than three years to elapse from the failure of the defendant to complete a contract of sale before bringing a suit for specific performance of the contract, the inordinate delay, apart from any other act of the plaintiff which would amount to a waiver of his right to sue for specific performance, is sufficient to disentitle him to any relief, and the case is not one in which the discretion given by section 22 of the Specific Relief Act should be exercised in favour of the plaintiff. **P** LACHHMAN DAS *v.* KHARAK SINGH, 57 P. R. 1919 **704**

——— **s. 25,** *applicability of.*

Section 25 of the Specific Relief Act is inapplicable to a case where an award has been in part performed **C** TWEEDIE *v.* JOGESH CHANDRA ROY **999**

——— **ss. 39, 41** **57**

——— **s. 42, proviso**—*Declaration, suit for—Consequential relief, prayer for, when necessary—Temple trustee, conditional suspension of—Trustees holding properties in rotation—Suit to declare suspension invalid, for injunction and for emoluments Plaintiff not entitled to possession at date of suit—Joint possession of temple properties, absence of prayer for, effect of—Dismissal of suit—Procedure.*

A suit for a declaratory decree ought not to be dismissed on the ground that it is barred by the proviso to section 42 of the Specific Relief Act, unless it is quite clear that the plaintiff ought to seek further relief which he has failed to claim

The further relief which the section speaks of is such relief as flows directly from the declaration sought for and such as the plaintiff would be able to claim in an ordinary suit by virtue of the title sought to be declared

The plaintiff, one of twenty trustees of a temple, was suspended conditionally from the trusteeship until he paid a certain fine and delivered a plot of land to the remaining trustees. Plaintiff sued for a declaration that the order of suspension was invalid, for an injunction restraining future interference with his performance of the duties of the office and for damages for loss of emoluments caused by the defendant's obstruction. According to the usage of the temple, the trustees held possession of its properties by rotation and plaintiff was not entitled to possession at the date of suit. The District Judge directed the plaint to be amended by adding a prayer for joint possession

Specific Relief Act—contd.

of the properties with the other trustees and ordered additional Court-fees to be paid on their value. As plaintiff failed to comply with the order, the suit was dismissed:

Held, (1) that the only consequential relief incidental to and flowing out of the declaration had been asked for by the plaintiff, *viz.*, injunction and damages, and that no further relief was necessary;

(2) that as the plaintiff was not entitled to possession of the properties at the date of suit, and the setting aside of the suspension order would in no way affect the possession of the temple and its properties, the plaintiff was not bound to ask for either joint or symbolical possession. **M** SIVARAMALINGA *v.* SABHARATNA, 9 L. W. 357; (1919) M. W. N 216; 25 M. L. T. 361; 36 M. L J. 624 **822**

——— **s. 55**—*Injunction Noise, whether sufficient cause for issue of injunction Nuisance—Acts of several persons constituting nuisance—Liability of all concerned—Calling of* azan, *whether nuisance—Inherent right.*

Mere noise alone, on a proper case of nuisance being made out, is a sufficient ground for an injunction.

When a man, who is entitled to a limited right exercises it in excess so as to produce a nuisance and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it altogether within its proper limits.

The acts of two or more persons may, taken together, constitute such a nuisance that the Court will restrain all from doing acts constituting the nuisance, although the annoyance occasioned by the acts of any one of them, if taken alone, would not amount to a nuisance.

Plaintiffs sued for the issue of a perpetual injunction restraining defendants from preventing plaintiffs from calling out the *azan* and praying in their mosque. It appeared that the defendants created noises and disturbances at the time of the calling out of the *azan* and at the time of the subsequent prayers, and the Court found that it was done maliciously with the sole purpose of annoying and obstructing the plaintiffs in their religious observances and ceremonies:

Held, (1) that the defendants did not have an unlimited right to blow conches or beat drums, nor could each of them plead that the little noise created by him personally did not amount to a nuisance

(2) that the plaintiffs had an inherent right to call out the *azan* from the mosque

(3) that the plaintiffs were entitled to obtain an injunction. **L** JAWAND SINGH *v.* MUHAMMAD DIN **728**

——— **s. 56 (h)**—*Trade-mark, infringement of—Injunction, suit for—Delay, effect of.*

In a suit for an injunction to restrain the defendant from using a trade-name and from infringing the plaintiff's trade-mark, it appeared that the plaintiff had taken no action beyond sending a notice to the defendant and that he had stood by for five years before coming forward with a suit:

Specific Relief Act—concld.

Held, that, in the circumstances, the plaintiff was not entitled to the injunction, *vide* section 5 *h*) of the Specific Relief Act. **P** VARCADOS *v* MECLEOD, 45 P. R. 1919 **434**

Stamp Act (II of 1899), Sch. I, Art. 35, cl. (a), sub-cl. (i) —*Lease of a shop—Agreement to pay rent daily—Stamp duty payable*

A tenant agreed to pay Rs. 6 ' per month as rent for a shop and to pay the said rent at Rs. 2 per day:

Held, that the tenancy was a monthly tenancy and that it came within Article 35, clause (*a*), sub-clause (*i*), of Schedule I to the Stamp Act and that, therefore, the proper stamp duty payable thereon was eight annas **C** AMOLIA, A. M. *v.* IBRAHIM ISHAK, 23 C. W. N 398; 46 C 4 **221**

Succession Act (X of 1865), s. 27 —*'Lineal descendant', meaning of*

A 'lineal descendant', within the meaning of that term as used in section 27 of the Succession Act, is the offspring of a lawful marriage, and not the offspring of a union which is not that of husband and wife. **U B** SOPHIA BLIN *v* MARIA DAVID, 12 BUR. L. T 48; 3 U. B R. (9 9 128 **542**

Suit *against dead person, maintainability of—Legal representatives, substitution of.*

If a defendant is dead at the time of the institution of the suit, the plaintiff cannot go on with the suit by applying for the substitution of the heirs f the deceased defendant. **C** KRISTA DAS LAW *v* KUMAR KHIRADA KANTA ROY **160**

Te pie bi th, *suit to recover share of, whether maintainable.*

A suit to recover a definite sum of money alleged to be due to the plaintiff as his share in the offerings of a temple is maintainable **P** GANGA PERSHAD *v.* MEGH RAJ, 26 P. R. 1 9 **236**

——— *Hereditary* archaka, *suspension of, by temple trustees* Interim *suspension pending enquiry—Enquiry not held for long period*—Interim *order treated as punitive till vindication of character in law ourt Validity of order—Right of* archaka *to damages and restoration of office—Liability of temple funds.*

The trustees of a temple have the right to make an *interim* order suspending an hereditary *archaka* pending enquiry into his conduct without previous notice, but such power should not be exercised except in cases of urgency where, from the nature of the misconduct alleged and other ci cumstances, immediate suspension from office becomes a necessity to safeguard the interests of the institution

If, however, the intended enquiry is not held within a reasonable time after the *interim* order is passed, the *interim* order becomes illegal and invalid and the *archaka* has the right to maintain a suit for possession of the office and for damages.

In such a suit it is not the duty of the Court to enquire into and adjudge upon the charges against the person suspended and to confirm the order if the charges are found to be true The plaintiff is entitled to have an order by the trustees after notice to himself and proper enquiry, before he is punished, the Court's order not being an adequate substitution for it.

Where an *interim* order of suspension is afterwards converted into an order to subsist till the suspended *archaka* vindicates his character in a Court of law, it becomes punitive and illegal

The temple funds are liable for the claim for damages where the trustees, in passing such order, acted, in what they conceived to be, for the best interests of the temple. **M** JAGANNATHA CHARIAR *v.* SEENU BHATTACHARIAR, 36 M. L. J. 361; (1919) M. W. N 241; 42 M. 618 **869**

Title by purchase, *proof of.*

A person who sets up a title to property by purchase must prove that his vendor had a title in the property sold **P** GULAB DEVI *v.* MOTI RAM, 38 P. L R 1919 **575**

Tort—*Servant and master—Liability of master for tort committed by servant—Test—Burden of proof.*

Before a plaintiff can succeed in a suit for damages against a master for a wrong done by his tenants and servants, he must show that the act complained of was done in the course of something which was authorised by the master to be done. **Pat** DHAKESHWAR PRASAD *v* MAN A AL **753**

Trade name, *use of—Injunction Company, whether entitled to restrain rival company from using similar name—Principle, whether applicable to charitable societies—Pecuniary loss, whether essential—Malice, whether necessary Failure to take objection at registration, effect of—Suit, whether lies for mere honour or title*

A company is entitled to obtain an injunction to restrain a new company from carrying on the same kind of business as the old company under a name identical with or so similar to the plaintiff company's name as to be calculated to deceive the persons dealing with the plaintiff company.

This principle is independent of the statutory rule found in the Companies Act, 1913, and does not recognise a distinction between business concerns and charitable societies, provided it is shown that the similarity in names would cause pecuniary loss.

The fact that the new company has been registered and that the Registrar took no objection to the registration does not preclude the old company from obtaining an injunction to restrain the new company from carrying on the same kind of business as that of the old company under a name calculated to deceive the public

A suit does not lie for a mere honour or dignity unconnected with any fees, profits or emoluments

Malice is not an essential ingredient of the cause of action in such cases.

The Gurkha Association, a Society registered under Act XXI of 8 0 sued certain persons for an injunction restraining them from using the term 'Gurkha Sabha' to describe the rival charitable institution alleged to have been recently founded by them. It was alleged that the plaintiff Association had been in existence for some time and was also known as the Gurkha Sabha, that persons sending subscriptions described it variously as the Gurkha Association or Gurkha Sabha and that the Society started by the defendants was likely to be mistaken for the plaintiff's and to divert to itself the money intended for the plaintiff:

Held, that the facts as set out in the plaint disclosed a cause of action and that the plaintiff's suit was maintainable. **L** GURKHA ASSOCIATION, SIMLA *v.* MUHAMMAD UMAR **905**

Transfer of Property Act (IV of 1832), s. 6—*Transfer of expectancy, validity of—Compromise of dispute relating to succession, whether binding.*

Section 6 of the Transfer of Property Act does no more than enumerate certain rights which cannot be transferred, and does not impose any statutory prohibition against the formation of contracts relating to certain specified subjects as though they were contrary to public policy and forbidden.

Though an imperfect act of transfer or an act purporting to transfer rights mentioned in section 6 confers no equitable interest on the transferee, an arrangement or contract, supported by good consideration and otherwise binding in equity upon the parties thereto, is not deprived of its binding effect merely because one of the results of it is to put one of the parties in the same position as if he had taken a transfer from the person entitled to an inheritance, if a transfer could be actually effected.

K. died leaving him surviving four sons *P.*, *H.*, *G.* and *N*, who divided his property amongst themselves. *H.* died leaving a widow who married *P* Afterwards *N* died leaving a widow A dispute having arisen, *P.* and *G.* came to an arrangement that, in consideration of *P.* being allowed to retain the property of *H*, he would not claim *N.*'s property on the death of *N*'s widow But when the latter died *P* brought the present suit against *G.*'s son for his share of *N*'s property. *G.*'s son relied on the arrangement between *P* and *G* The District Judge decreed the suit, holding that the arrangement relied upon amounted to an attempt to transfer the chance of an heir-apparent succeeding to an estate and was illegal under section 6 *a* of the Transfer of Property Act. On appeal to the High Court:

Held, that the arrangement made by the plaintiff with defendants, having been made upon a *bona fide* dispute, was good as a contract and binding upon the parties to it and their successors **A** CHABLI *v.* PARMAL, 1 U. P. L. R (H. C.) 91; 17 A. L. J 822 **919**

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——— s. 40

——— s. 51—*Compensation for structures, suit for, whether lies.*

A claim by a tenant for compensation for structures erected by him on the land let out to him cannot lie within the scope of section 51 of the Transfer of Property Act, because a tenant cannot possibly believe in good faith that he is absolutely entitled to the land. **N** BHUNESWAR *v* LAL BAHADUR SINGH **380**

——— ss. 53, 67—*Property hypothecated by security-bond, transfer of, validity of—Transferee taking in good faith—Burden of proof.*

The execution of a security-bond in favour of a Court has not the effect of avoiding all subsequent alienations of the property hypothecated by the security-bond.

Defendant No 2 got an *ex parte* decree in favour of the plaintiffs set aside by executing a security-bond in favour of the Court hypothecating certain properties as security for the payment of any money that might be decreed against him Subsequently, the plaintiffs obtained a decree for money against the defendant No. , and in execution thereof some of the properties included in the security-bond were sold and purchased by the plaintiff. Before the sale, but after the execution

Transfer of Property Act—contd.

of the security-bond, the defendant No. 1 purchased these properties for value from the defendant No. 2. The plaintiffs then brought this suit for a declaration that they by their auction-purchase had acquired a good title to the properties in suit and that the purchase by the defendant No. 1 was collusive:

Held, (1) that on the date of sale the defendant No 2 had no saleable interest left in him, and, therefore, the plaintiffs, who had purchased the right, title and interest of the judgment-debtor, could not claim any title by virtue of their auction-purchase:

(2) that the defendant No. 2 had a right to transfer the properties hypothecated in the security-bond subject to the lien created by the security-bond, but that if the plaintiffs, instead of executing the decree as a simple money-decree, had taken proper steps to enforce the security-bond in favour of the Court, the sale to defendant No. 1 would have been ineffectual as against the lien created by the bond **C** KAMINI KUMAR ROY *v.* HIRA LAL PAL, 23 C. W. N 769 **736**

——— s. 53 *Suit by attaching creditor to set aside fraudulent alienation by judgment-debtor—Suit brought in individual capacity, whether liable to dismissal—Representative suit, whether necessary—Amendment of plaint—Civil Procedure Code (Act V of 1908), O XXI, r 63, App. D, Form 13.*

A suit by an attaching decree-holder to set aside an alienation by the judgment-debtor as infringing section 53 of the Transfer of Property Act is not liable to be dismissed merely on the ground that it is not a representative suit on behalf of the general body of creditors

Obiter Even an ordinary creditor suing to set aside an alienation under section 53 of the Transfer of Property Act is under no obligation to sue in a representative character.

Per Krishnan, J. There is no rule either in the English or in the Indian law justifying the dismissal of a suit under section 53 of the Transfer of Property Act because it is not brought in a representative capacity To avoid the difficulty of a multiplicity of suits, the Trial Court may, of its own motion, and should, if moved by the transferee-defendant, direct that a suit by a single creditor under the section should be amended so as to make it a suit on behalf of all the creditors. The Court should also take care, when passing a decree setting aside a transfer even in a single creditor's suit, to adopt Form No 13 in App D, Civil Procedure Code **M** KOTTARATHIL PUTHIYAPURAYIL POKKER *v* BALATHIL PARKUM CHANDRANKANDI, 25 M L T 47; (1919) M W. N. 39; 9 L. W. 138; 42 M. 143; 36 M. L. J. 231 **714**

——— s. 54—*Sale of immoveable property of less than Rs 100 in value by unregistered deed, validity of—Delivery of possession, effect of.*

Where a transfer is effected of immoveable property of less value than Rs. 100 by an unregistered instrument and possession of the property passes to the vendee, the sale is valid and cannot be questioned. **O** GULAB *v* LALTU SINGH, 22 O. C. 53 **561**

——— s. 55 (4) (b) **721**

——— s. 58 **963**

——— s. 59—*Mortgage—Attestation—Burden of proof—Question of law or fact.*

It is a mixed question of law and fact whether or not the evidence adduced by a mortgagee suing on his mortgage on whom the onus rests is sufficient to show that the terms of section 59 of the Transfer of Property Act have been duly complied with. **Pat** DULHIN SUNDARI CHOUDHURAIN *v.* BEHARI LAL, (1914) PAT 279 **328**

——— s. 65 (c)—*Mortgage—Mortgagor, duty of, to pay public charges—Failure to perform duty—Sale of mortgaged property—Re-transfer to mortgagor—Mortgagee, position of.*

Under section 65 (c) of the Transfer of Property Act a mortgagor is bound to pay the revenue accruing due on the mortgaged property while he continues in possession. The mortgage is not extinguished if he fails to perform that duty and the land is sold for arrears of revenue and the purchaser re-sells the land to the mortgagor. The mortgagor, on his purchase from the auction-purchaser, is not entitled to plead for his own benefit that by reason of his failure to pay the revenue and consequent sale there has been a statutory extinction of the mortgage. **L B** PO DWE *v.* K. M. T T. S. CHETTY, 12 BUR. L. T. 41 **574**

——— s. 67, *applicability of—Severance of interest of mortgagees.*

Where there has been a severance of the interests of the mortgagees, section 67 of the Transfer of Property Act has no application **A** JAUHARI SINGH *v.* GANGA SAHAI, 17 A. L. J. 731; 1 U. P L. R. H. C. 71 **107**

——— s. 67—*Security-bond, manner of enforcement of.*

Where property is given as security for the payment of any money that might be decreed in a suit and the security is sought to be enforced, that should be done by bringing a suit under section 67 of the Transfer of Property Act, and it makes no difference whether the security-bond is in favour of the Court or of a party to the suit.

Under section 53 of the Transfer of Property Act it is not enough to show that a purchase of property given in security was for good consideration It must also be shown that the purchase was in good faith. **C** KAMINI KUMAR ROY *v.* HIRA LAL PAL, 3 C. W. N. 769 **736**

——— s. 68 **16**

——— s. 72, *scope of—Mortgagee paying money for protection of property—Possession, order for delivery of—Subsequent mortgagee paying money before actually obtaining possession—Prior mortgagee, payment to—Prior mortgagee, suit by Puisne mortgagee not made party, effect of—Redemption Money paid to prior mortgagee, whether must be discharged before puisne mortgagee can be dispossessed—Prior mortgage unenforceable for lapse of time, effect of—Limitation—Interest on money paid in redeeming prior mortgage, whether can be claimed by puisne mortgagee.*

The words of section 7[illegible] of the Transfer of Property Act are wide enough to cover the case of a subsequent mortgagee who has obtained in the execution department an order for delivery of possession, and who pays up for the protection of the property the money due to a prior mortgagee after the passing of the order for delivery of possession but before he is actually put in possession under that order.

If a prior mortgagee neglects to make a puisne mortgagee a party to his suit, the rights of the puisne mortgagee cannot be affected by the decree passed in such suit.

A sale which does not affect the interest of the puisne mortgagee is not covered by section 7[illegible] of the Transfer of Property Act.

Where a mortgagee makes a payment of money which is not immediately necessary in order to save his security, the payment cannot be brought within the provisions of section 7[illegible].

A usufructuary mortgagee who redeems a prior mortgagee can use the prior mortgage as a shield against a person who wants to dispossess him by paying off his usufructuary mortgage, and can insist that the money due under both the usufructuary and the prior simple mortgage which he has redeemed must be paid before he can be made to give up possession of the property. The fact that at the date the usufructuary mortgage was being redeemed the prior simple mortgage was unenforceable on account of lapse of time will not affect the matter.

In such a case the usufructuary mortgagee is entitled to claim interest which has accrued due since the date of payment on the money paid by him. **O** GAYA PRASAD *v.* GUR DAYAL, 22 O. C. 32; 6 O. L. J. 270 **549**

——— s. 72, *scope of—Mortgagor responsible for repairs—Mortgagee, whether entitled to carry out repairs—Charge on mortgaged property.*

Section 7[illegible] of the Transfer of Property Act allows the mortgagee, in the absence of a contract to the contrary, to spend such money as is necessary for the preservation of the property and add it to the principal.

Where however, there is a condition in a mortgage-deed that the mortgagor is to be responsible for repairs, the mortgagee is not entitled to do them himself without notice to the mortgagor and make the cost an additional charge on the property. **L** MOTI RAM *v.* SANT RAM **979**

——— s. 73—*Mortgage—Mortgaged property sold in execution of rent decree against mortgagor—Charge on surplus sale-proceeds—Mortgagee, right of, to proceed against property.*

Where property subject to a mortgage is sold in execution of a rent-decree against the mortgagor after the mortgagee has got a decree on his mortgage, the mortgagee has a charge under section 73 of the Transfer of Property Act upon the surplus sale-proceeds that remain in Court after satisfaction of the rent decree, and that charge continues to subsist notwithstanding that the amount is drawn out of Court by the judgment-debtors and others. The mortgagee in the first instance must see how much he can recover from the judgment-debtor and others who have drawn out the surplus money, and that sum and any money which by reasonable diligence he could have obtained out of the surplus proceeds in or towards the satisfaction of the mortgage decree cannot be a charge on the mortgaged property For any sum beyond that the mortgage decree will be capable of being executed in

Transfer of Property Act—contd.

the usual manner against the mortgaged property. **C** PARAMESHWAR DAW *v* ANANTH BANDHU DAW **333**

——— **s. 91**—*Redemption—Reversioner, whether entitled to redeem during lifetime of limited owner.*

During the lifetime of a limited owner the reversioner has no more than a mere *spes successionis* and has not, therefore, a sufficient interest in the property of that owner within the meaning of section 91 of the Transfer of Property Act to enable him to redeem a mortgage on that property effected by the said owner **O** BASANT SINGH *v* RAMPAL SINGH, 6 O. L. J. 248 : U. P. L. R. (J. C.) 45 **95**

——— **s. 100** **963**

——— **s. 101**—Mortgage—Mortgagee purchasing equity of redemption—Lien, whether subsists **758**

——— **ss. 105, 108 (b), (c)**—*Lease, agricultural Failure of lessee to pay premium stipulated—Right of lessor to withhold possession—Right to possession under lease—Implied covenant—Contract Act IX of 1872, s. 9.*

The definition of 'lease' in section 105 of the Transfer of Property Act applies to agricultural leases in India

A lease is not a mere contract but the transfer of an interest in immoveable property and the lessor is not entitled to withhold possession from the lessee merely because the latter has failed to pay the stipulated premium, unless the document provides that the lessee is not to have possession until the fulfilment of a certain condition. **M** KANDASAMI PILLAI *v.* RAMASAMI MANNADI, 36 M. L. J. 316; (1919) M. W. N. 94; 42 M. 93 **507**

——— **s. 106**—*Landlord and tenant—Lease—Rent payable yearly, whether makes lease from year to year—Notice to quit, service of, mode of.*

The mere fact that rent is expressed in a lease as so much a year does not make the lease a lease from year to year.

Where a tenant held certain land on which a dwelling-house was built and the rent was expressed in the lease to be payable yearly:

Held that under section 106 of the Transfer of Property Act a notice to quit served on Bhadon 6th requiring the tenant to quit the land in the following month of Aswin was adequate.

A Civil Court peon went to serve a notice under section 106 of the Transfer of Property Act upon two tenants, one of whom was a *purdanashin* lady and the other a minor boy Being told that the lady was indoors and that the boy had gone out to look after cattle, the peon beat a drum, read the notice aloud and affixed a copy of the notice to the wall of the house. It appeared, however, that there were servants present, but that no attempt was made to tender the notice to the servants or to find the boy and tender the notice to him:

Held, that the service of notice was not good, inasmuch as the drum beating and the affixing of the notice to a wall were of no avail unless tender or delivery was not practicable. **C** BISESWAR ROY *v.* PITAMBER NATH **44**

——— **s. 108 (h)**—*Compensasion for improvements*

At Common Law the general rule as to compensation for improvements is that the landlord is entitled to the possession of everything in the

Transfer of Property Act—concld.

nature of real property on the determination of the term of the tenancy. But this rule is controlled by section 108 *h* of the Transfer of Property Act, by which the lessees may remove improvements during the continuance of the lease. **N** BHUNESHWAR *v.* LAL BAHADUR SINGH **380**

——— **s. 108 (j)** **953**

——— **s. 103 (j)** Landlord and tenant—Lands granted for purposes of erecting houses Transfer of *osat raiyati* holding—Landlord, consent of wheather necessary—Custom—Noakhali **953**

——— **s. 109.**

Neither under section 109 of the Transfer of, Property Act nor under the general law of the land is it competent to an assignee of part of the demised premises to eject the tenant from that portion compulsorily during the period of the tenancy. Even if section 109 of the Transfer of Property Act is capable of a different construction, its operation should not be extended to agricultural tenancies in this country **M** PUTHIAPURAYIL KANNYAN BADUVAN *v* CHENNYANTEAKATH PUTHIAPURAYIL ALIKUTTI, 37 M. L. J. 47; 6 L. W. 95; (1919) M. W. N. 401; 42 M. 605 **286**

——— **s. 111 (g)**—Landlord and tenant—Lease—*Kayim saswatham* lease—Denial of landlord's title, effect of—Forfeiture—Derivative title, disclaimer of, effect of—Disclaimer, whether works forfeiture—Lease executed before enactment of Transfer of Property Act—Pre-requisites to forfeiture—Ejectment, suit in **709**

——— **s. 116** **121**

——— **s. 119**—*Exchange—Covenant for return of property exchanged in event of obstruction Suit based on covenant Limitation Act (IX of 908), Sch I, Arts. 113, 43—Vendee from party to exchange, position of.*

Where parties to a deed of exchange covenant specifically that, in the event of obstruction to either party's enjoyment of the property exchanged, each should return to the other what is taken, the covenant is in the nature of a condition subsequent, and a suit based on the covenant is governed by Article 47 and not by Article 113 of Schedule I of the Limitation Act.

The defendant in such a suit cannot avail himself of the plea of a *bona fide* purchase from one of the parties to the exchange, as the transferee cannot get a larger estate than the transferor. **M** SRINIVASA AYYANGAR *v.* KOTTAPPAKKI JOHNSA ROWTHER, 42 M. 681 **939**

Trust, *execution of—Power in nature of trust—Court, duty of*

Per *Scott, C. J.*—A Court will not try to compel the execution of a trust where the terms of the trust are not ascertained or ascertainable, but where a power in the nature of a trust has been executed in professed compliance with the authority given, the onus of proving that the execution was a fraud on the power lies on those who seek by challenging the execution to get possession of the property in the hands of those benefiting by the act of the donee of the power. **B** SHIRINBAI *v.* RATANBAI, 2 BOM L. R. 384 **209**

——— *Grant, construction of—Grant to specific persons, described as servants of mosque, for expenses of lamp oil and for prayers for prosperity of Government—Trust, whether created.*